

ACTUAL PROTECTIVE CLOTHING (PVT) LTD
t/a ACTUAL TRANSPORT
versus
BULK COMMODITIES (PVT) LTD
and
AREGRELIA TRADING (PVT) LTD
And
IMRAN SHAZAD

IN THE HIGH COURT OF ZIMBABWE
TAKUVA J
BULAWAYO 11 FEBRUARY AND 1 & 11 JUNE 2015

Opposed Matter

Advocate H. Moyo for the applicant
C. Bhebhe for the respondents

TAKUVA J: This is an opposed court application wherein the applicant prays for the confirmation of a provisional order issued by consent on 29 July 2014.

At the heart of this case is a dispute about ownership of two vehicles namely:

- (a) a MAN Horse diesel truck (white) registration number ACQ 2254 and
- (b) A MAN Horse diesel truck (white) registration number ACQ 2253. Both vehicles are currently registered in the applicant's name. Applicant now seeks a final order declaring applicant as the owner of the trucks and that the trucks be returned to the applicant's possession.

The facts leading to the application and the dispute are detailed in the affidavits filed of record.

In brief the facts are as follows. Applicant had an ongoing business relationship with the respondents in terms of which the respondents would operate the applicant's trucks for mutual benefit. The respondents would be responsible for collection of revenue, crediting the receipts

and debiting the expenses on a regular basis and provide a monthly reconciliation to the applicant. As business developed, it was agreed that applicant should purchase two more trucks from South Africa with the assistance of the respondents.

Applicant then obtained a loan from CABS in the sum of \$38 000,00 to finance the purchase of the two vehicles. Respondents were paid this amount on the 26th of August 2013. The two trucks were then acquired in South Africa at a total cost of US\$46 836,75. It was agreed that the balance of US\$8 836,75 would be paid by applicant to the respondents during the normal course of business between the parties. Both trucks were imported and registered in the name of the applicant.

Sometime in 2013, a misunderstanding arose between the parties which led to a breakdown of their relationship. Respondents then expelled the applicant from the business and withheld the trucks which are the subject of this dispute.

Respondents opposed the confirmation. They admitted the business relationship between the parties but alleged a different set of facts. Respondents alleged that as at 1st August 2013, the applicant was indebted to the respondents in the sum of US\$46 836,75 as a result of the business interactions between the parties. Since the applicant did not have the money to settle its indebtedness to the respondents, the parties hatched a plan in terms of which the applicant was to apply for a loan from the bank on the pretext that the money would be used to purchase two trucks from South Africa to expand applicant's fleet. The money however would be used to settle the applicant's indebtedness to the respondents.

Applicant secured a loan from its bank and two trucks were purchased in South Africa through the assistance of the respondents. The latter alleges that the trucks were registered in the applicant's name in order to "dupe the bank into believing that the applicant had indeed used the loan to purchase the trucks". When the business relationship between the parties broke down the respondents simply expelled the applicant and withheld the trucks.

Respondents further opposed the application on the following grounds:

In limine

1. This is a matter where there are material “disputes of facts and issues” that cannot be resolved on the papers.
2. The applicant is approaching the court with dirt hands in that it seeks to get an order for the release of the cars without “properly accounting to respondent and paying respondent what it owes in respect of the vehicles”.

Ad merits

1. The applicant’s right to ownership is not clear in that respondents paid for those vehicles.
2. The applicant has an alternative remedy in that applicant must lodge a claim against respondents “for whatever reason”.
3. Applicant sold the vehicles in question to the respondents and an agreement of sale was signed by the parties..
4. The transaction involving CABS is not illegal and respondents are not seeking enforcement of this agreement but are “merely bringing out the facts to the court in their defence as to why the applicant is not entitled to the vehicles”.

The long and short of this matter is who owns the trucks. This is the real issue between the parties. There is no material dispute of facts that cannot be resolved on the papers. In my view the purpose of the loan can be established on the papers. It is not a real issue in the sense that even if it is to be accepted as true, it only leads one to the issue of legality which issue is capable of resolution on the papers.

The argument relating to the dirty hands principle is untenable in that it amounts to doing things in the wrong order. How can applicant be said to have approached the court with dirty hands when it alleges that the trucks belong to it?

For these reasons, both points *in limine* are without merit and are hereby dismissed.

On the merits while it is true that respondents paid for the trucks in South African rands, the applicant refunded the respondents subsequently. It is not in dispute that the applicant has produced documents which show that the trucks were purchased, imported and registered in the name of the applicant. See annexures “A1 – A10” in the supplementary answering affidavit. While the applicant’s claim for ownership of the trucks is clear and straightforward, the same cannot be said of the respondents’ claim. I say so for the following reasons:

- (i) If indeed the trucks belonged to the respondents as they claim, why would they enter into an agreement of sale involving the purchase of property they already owned? Respondents’ answer is that since the trucks were registered in applicant’s name they needed to “process the transfers into their name”. The question still remains why, if this was the reason, respondents entered into an agreement with Maxwell Goremusandu as the “seller” when the trucks are registered in applicant’s name – a fact known to the respondents? Even assuming that Goremusandu is a director of the applicant, in terms of the Companies Act, he could not sell company property without a company resolution authorizing him to dispose of company assets.
- (ii) The said agreements of sale are denied by the applicant. These agreements mention the purchase price of US\$20 000,00 and US\$18 500,00 respectively. Inram Shahzad in his supplementary affidavit avers that “The said agreements of sale are marked annexures “W” and “X”. The attached ledgers marked annexures “G” – “K” will show that the respondent have (*sic*) been making payments to the applicant and the agreement also acknowledges that those payments were made. “Now, why were respondents paying again for their trucks? Why pay anything if the agreements were simply to facilitate change of name”?
- (iii) It is also surprising why Bulk Commodities (Pvt) Ltd, the 1st respondent would pay for trucks belonging to Aregreliia (Pvt) Ltd.
- (iv) The alleged declaration by Goremusandu on page 2 of these agreements is baffling in that he purportedly states that he is the owner of the trucks and that “Actual

Protective Clothing had made part payment of the respective purchase price ... and that “Actual Protective Clothing” is authorized to effect change of ownership of the trucks in his absence. Quite clearly, the authorization should have been the other way round. Why would the applicant pay Goremusandu for the trucks when it was not the purchaser?

For these reasons I entirely agree with applicant’s counsel’s submission that: “throughout this application and with all due respect the respondents have filed a mumbo-jumbo of voluminous and confusing documents hopefully expecting the court to sift through and make sense out of them”. I would add that I have failed to find any real sense or meaning of respondents’ submissions.

As regards the illegality of the contract between applicant and CABS, the respondents’ allegation that the parties agreed to dupe the bank into believing applicant required a loan to purchase trucks when the purpose of such a loan was to enable the applicant to pay its alleged debt to the respondents, leaves one with no doubt that such a contract is illegal or *contra bonos mores*. Surprisingly, respondents want the court to enforce this contract notwithstanding the illegality.

R. Christie *Business Law in Zimbabwe* 2nd edition at p 88 states:

“Misrepresentation, fraud, duress, undue influence and mistake all affect the enforceability of contracts because of defective consent. Illegality, on the other hand has nothing to do with defective consent, but affects the enforceability of contracts because some rule of law has been contravened. The rule may be statutory or it may stem from the common law ...”

See also *City of Gweru v Kombayi* 1991 (1) ZLR 333 (S); *Herbst v Surti* 1990 (2) ZLR 269 (HC); *Waste Management Services v City of Harare* 2000 (1) ZLR 172 (H). Unenforceability means that specific performance will not be granted, nor a claim for payment nor any other claim for enforcement no matter how it is framed.

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In casu, the basis of the illegality is that the parties, going by the respondents' averments intended to defraud the bank. Clearly, such a contract would be unenforceable as the law cannot be expected to lend its aid to the enforcement of a contract which the law itself prohibits.

For these reasons, I find that the applicant has established clear ownership rights in respect of the two trucks. I also find that that the applicant on the evidence has proved all the requirement of a final interdict.

Accordingly, it is ordered that:

1. The temporary interdict operational on 1st, 2nd and 3rd respondents be and is hereby confirmed to be final and perpetual
2. The applicant be and is hereby declared the owner of 2 x MAN Horse trucks registration numbers ACQ 2253 and ACQ 2254.
3. Costs of suit at an attorney and client scale by 1st, 2nd and 3rd respondents jointly and severally liable, the one paying the others to be absolved.

Lazarus & Sarif applicant's legal practitioners
Coghlan & Welsh respondents' legal practitioners