

PATRICK CHIFAMBA
vs
CASPER MERINYO

HIGH COURT OF ZIMBABWE
SMITH J
HARARE 24 October, 22 November 2001 and 9 January 2002

Ms *Zengeni*, for the applicant
Mr *Chinyama*, for the defendant

SMITH J: The plaintiff (hereinafter referred to as “Chifamba”) issued summons seeking an order that the defendant (hereinafter referred to as “Merinyo”) return to him a Hyundai Excel motor vehicle (hereinafter referred to as “the Excel”) or alternatively pay him \$500 000, that being the alleged value thereof. Chifamba is a member of the Rixi-Taxi Cooperative Society (hereinafter referred to as “Rixi-Taxi”). As such, he became entitled to the use of a motor vehicle. He alleges that, in June 1997, Rixi-Taxi purchased the Excel by way of a hire-purchase agreement with a finance institution (hereinafter referred to as “Stannic”). Then in September 1997 he entered into a verbal agreement with Merinyo in terms of which he leased his right to use the Excel to the latter, on a monthly basis for an agreed rent. Merinyo failed to pay the rent and so he cancelled the agreement. However Merinyo refuses to return the Excel. Merinyo, on the other hand, alleges that he sought the assistance of Chifamba to enable him to buy the Excel. He paid the monthly rent to Chifamba and Chifamba paid Stannic. However, Chifamba then refused to accept the monthly rent because he believed that he could make more money if he repossessed the Excel.

Chifamba was the first witness. His testimony was as follows. The Excel is owned by Rixi-Taxi but, when he has finished paying the hire-purchase instalments, it will become his. In September 1997 Merinyo brought his car to him for repair. Because Merinyo had to take his children to school. He agreed to lend him the Excel.

At that time they were good friends. Merinyo agreed to pay him \$5 000 a month for the use of the Excel. He paid for the first four months and then stopped. The loan of the Excel was for a short period only. He was surprised when Merinyo refused to return the Excel. Only his children were present when the agreement was entered into, and they are now outside the country.

Chifamba was subjected to a lengthy cross-examination, in the course of which he gave the following responses. He and Merinyo had been friends for a long time prior to 1997. The Excel was purchased by Rixi-Taxi in July 1997 and so it was still very new when he lent it to Merinyo. He had two other vehicles that he had got through Rixi-Taxi. He was paying Rixi-Taxi \$5 000 a month in respect of the Excel and that is what Merinyo agreed to pay him. He had told Rixi-Taxi that he had leased the Excel to Merinyo but he had not advised Stannic because it was of no concern to them. Neither had he advised Stannic of the address where the Excel would be kept by Merinyo. Initially he was paying Rixi-Taxi \$5 000 a month, but after about 6 months the monthly instalment had increased to between \$7 000 and \$8 000. Merinyo had wanted to buy the Excel but he refused to sign any agreement of sale. Rixi-Taxi was the registered owner of the Excel so he could only lease it to Merinyo. The Chairman and the Secretary of Rixi-Taxi were aware that he had leased the Excel to Merinyo. He was not calling them as witnesses because he had enough evidence without them. He had not told Rixi-Taxi that he was having problems with Merinyo over the monthly instalments. That was because he had received a clearance letter from Rixi-Taxi to say that he had duly paid all the instalments and the Excel was now his. He had received the letter in 1999 or 2000, because he had paid off the loan in 3 years. He must have received the letter in June 2000. He had told Stannic that Merinyo had stopped paying him and they referred him to Stannic. Stannic told him that he had to keep paying the instalments. At first he had paid Rixi-Taxi, which then paid Stannic, but in 1999 he started paying Stannic direct. Merinyo had paid him \$5 000 for each of the months of September, October, November and

December 1997. He had taken the Excel from Merinyo in 1999 but Merinyo obtained a spoliation order and he had had to return it (case No. HC 16209/99). He denied that he had been served with any papers in that case or that he had deposed to the opposing affidavit. He had not tried to recover the Excel until 1999 because Merinyo was being evasive. Also, Merinyo was a close friend and he felt sorry for him. In January 1998 the monthly instalments were increased to \$6 000, and then in March 1999 they were increased to \$7 000. He had run a taxi business for many years. In September 1997 he had almost 15 vehicles. He had not given Merinyo any of the older vehicles because they were making money for him. He gave Merinyo the Excel because he was a friend.

In re-examination Chifamba said that the other vehicles he owned in 1997 were used as taxis whereas he merely used the Excel to go to church. He was not allowed to give any of the other vehicles to Merinyo but he could give him the Excel because he had asked Rixi-Taxi for permission.

The next witness was Danmore Chiweshe who sells and values motor vehicles. He said that a 1997 Hyundai Excel of average mileage and condition would be worth between \$700 000 and \$750 000. He admitted that it was impossible to value a motor vehicle without examining it, and said that he had not seen the Excel and therefore could not value it. He said that the value he gave was for a Hyundai Excel of 1997 vintage, which had averaged 20 000 kilometres a year, was in average condition and had been serviced regularly.

Merinyo then gave evidence. His testimony was as follows. He knew Chifamba well. In 1997 he entered into an agreement with Chifamba in terms of which he bought the Excel for \$250 000, making monthly instalments of \$5 000 with effect from September 1997. He collected the Excel in mid-September. As Chifamba had been paying instalments from June he wanted an additional payment

of \$2 000, which he duly paid. He then paid monthly instalments of \$5 000 until December 1997, when Chifamba told him that the instalments had been increased to \$6 000. Then in March 1999 the instalments were increased to \$7 000, which he duly paid until August. He had problems then and so could not pay the monthly instalments. He told Chifamba about his problems and Chifamba said he should pay when he could afford to do so. He had reduced the agreement of sale to writing but Chifamba refused to sign the document, because the Excel was being bought by Rixi-Taxi on hire-purchase and Stannic would not allow him to sell it until it had been fully paid for. Because he trusted Chifamba, he was not worried when Chifamba refused to sign. Chifamba was his best friend and like a father to him. In October 1999 Chifamba had taken the Excel from him but he had obtained a spoliation order and regained possession. Chifamba had filed an opposing affidavit in that case. In paragraph 5 of his opposing affidavit he admitted that Merinyo had paid him \$2 000 as security. The opposing affidavit had been signed by Chifamba. He was lying when he said in cross-examination that he had not signed it. The Chairman and the Secretary of Rixi-Taxi were well aware that he had bought the Excel from Chifamba. Merinyo was cross-examined but he was not shaken, and repeated what he had said in his examination-in-chief.

Chifamba was a very poor witness. Even his counsel appreciated how bad a witness he was. She conceded that under cross-examination his responses were not clear and that he often did not answer the questions. She tried to explain his performance by saying that he was old and had diabetes and also suffered from high blood pressure which affected him when he was stressed. She submitted that the cross-examination was lengthy and Chifamba had been badgered by Mr *Chinyama* and so became confused. Mr *Chinyama* pointed out the many anomalies in Chifamba's evidence. He submitted that Merinyo had been a good witness and that the probabilities accorded with his testimony. He queried why, if Merinyo had stopped paying in December 1997, Chifamba had taken no steps to recover the Excel for

almost 2 years. If, however, Merinyo was telling the truth, when he said that he paid every instalment until August 1999 when he had problems, that would explain why Chifamba did nothing about retrieving the Excel until September 1999.

Chifamba did not call any witness to corroborate his testimony that he had leased the Excel to Merinyo and not sold it to him, even though he claimed that the Chairman and the Secretary of Rixi-Taxi were aware of the transaction. Nor did he produce any documentary or other evidence to support his testimony. That means that his case rests squarely on his own personal testimony. He was far from satisfactory as a witness. No reliance whatsoever can be placed on his testimony. Merinyo, on the other hand, was a good witness. He gave his evidence well and was not shaken in cross-examination. Moreover, his evidence accords with the probabilities. If Chifamba had about 15 other vehicles, why did he lend, or lease, the latest model to his friend who just wanted it, according to Chifamba, to take his children to school whilst his car was being repaired? Why did Chifamba not demand the return of the Excel when he had repaired and returned Merinyo's vehicle? Furthermore, if Merinyo stopped paying the monthly instalments in December 1997, why did Chifamba continue pay the instalments to Stannic for almost 2 years before he took steps to try to recover the Excel? Why did Chifamba deny signing the opposing affidavit in the proceedings instituted by Merinyo for a spoliation order?

The application is dismissed with costs.

Makarau & Mucharehwa, legal practitioners for the applicant.

Chinyama & Company, legal practitioners for the respondent.