

WILLEM WESSELS
versus
ZECKS DUBE
and
MANICA ZIMBABWE (PVT) LTD

HIGH COURT OF ZIMBABWE
OMERJEE J:
HARARE, 15 November 2008

Mr *Madya*, for plaintiff
1st defendant in default
Advocate *Colegrave*, for 2nd defendant

OMERJEE J: The plaintiff seeks an order that the defendant's replace his wife a Toyota Emina Minibus, in the alternative plaintiff seeks that he be reimbursed the sum of US\$11, 544-00 as representing the replacement value of the said motor vehicle. The relief sought is opposed by the second defendant. The first defendant has not sought or filed any pleadings in this matter and did not appear at the pre-trial conference, or at the trial. The first defendant is in default having been served with summons. The material and relevant factual background to the determination of this dispute may be summarised as follows:-

Plaintiff bought from the Trust Company of Japan a Toyota Emina Minibus 1997, eight seater. The purchase prize of US\$4,900-00 was provided by plaintiff's mother in law who is resident in New Zealand. In or about September 2006, plaintiff sought the services of a customs clearing company to facilitate the clearance of the motor vehicle into Zimbabwe via the Beit bridge boarder post. Plaintiff's wife resolved to enlist the service of second defendant. She was referred by the Harare Office to the Beitbridge office of second defendant and was put through to one Zecks Dube employed then, as a clerk by second defendant. Plaintiff's wife communicated on various occasions both by means of 'e-mail' and by telephone with Zecks Dube, in regard to the clearance of the motor vehicle into Zimbabwe via Bitbridge. In this regard plaintiff's wife provided various copies of e-mails exchanged with Zecks Dube. See Exhibits 1,5,6 and 7 respectively.

It was not put in issue that plaintiff's wife dealt with Zecks Dube after she had initially made contact with second defendant offices in Harare who in turn referred her to their Beitbridge office. It was common cause that plaintiff's wife exchanged 'e-mails' with Zecks Dube in an open transparent manner. It is not an issue that Zecks Dube furnished plaintiff's

wife with Exhibit 1 a Tax invoice dated 23 September 2006 emanating from the offices of second defendant. That document emanates from the offices of second defendant has a ZIMRA VAT No. 1004215.

The plaintiff's wife also exchanged two e-mails and spoke on the telephone with one Simion Mudiwa, who was Zecks Dube's superior at Beitbridge. The motor vehicle was shipped from Japan to Durban in South Africa. Plaintiff arranged separately for customs clearance of the motor vehicle in South Africa and for purposes of clearance inwards at the port. The motor vehicle arrived at Beitbridge, the clearing agents in S.A.K.Z.N. it is not in issue to the second defendant the documents relating to the motor vehicle to facilitate its inward clearance. The second defendant duly opened a file to its officer in relation to the plaintiff's motor vehicle.

It is not in dispute that the plaintiff having been informed that his motor vehicle was at Beitbridge journeyed to that place by motor vehicle on 18 October 2006 accompanied by his brother. The plaintiff arrived there in the early evening of 16 October 2006. He saw Zecks Dube and sought identification particulars from the latter who obliged. Zecks Dube requested for and was paid Z\$1,701,000 in cash. When the plaintiff asked for a receipt, he was advised that one would be issued later after all customs formalities had been finalised. The plaintiff saw Zecks Dube at the second defendant's officers later that evening and was advised that the motor vehicle would only be cleared the next day. It is not in issue that the following day the plaintiff's motor vehicle was extensively damaged in circumstances that were unclear whilst being driven by one Miyen Zhou, an employee of the second defendant as a "boarder runner". Zhou died two days later. It is further common cause that neither the plaintiff nor his wife had had any prior dealings with, or knew Miyen Zhou.

It was not in dispute that:

- (a) Zecks Dube appeared efficient, knowledgeable and friendly in his dealings with the plaintiff and his wife.
- (b) The plaintiff had no reason to suspect or doubt Zecks Dube authority an employee of the second defendant to facilitate the clearance of the plaintiff motor vehicle.
- (c) The plaintiff in all dealings with Zecks Dube transacted with him, in his capacity as an employee of the second defendant.
- (d) There was no evidence nor was it suggested by the second defendant that the plaintiff knew or should have known that Zecks Dube had exceeded his authority or mandate.

The second defendant called one witness Emmanuel Muzondo – its Regional Manager for all boarder posts based at Beitbridge at the relevant and material. The gist and substance of his testimony was to the effect that:

- (a) The plaintiff had acted at all times in his dealings with Zecks Dube in the latter's capacity or an employee of the second defendant
- (b) He did not impute any impropriety in the plaintiff's dealings with Zecks Dube.
- (c) Muzondo's concern was that Zecks Dube had flouted the second defendant's internal procedures with regard to the importation of motor vehicles and concealed that the second defendant his conduct in this regard.
- (d) Muzondo, significantly did not allege or even suggest that the plaintiff then or would have been aware of his behaviour *vis a vis* the second defendant.
- (e) Muzondo stated that the plaintiff at all times, dealt with the second defendant in regard to the clearance of his motor vehicle through its employee Zecks Dube in the belief that Zecks Dube was so authorised to act.

Muzondo struck this court as a fair, impartial and professional witness. He gave his evidence in a straightforward manner. Significantly, he made important concessions under examination even where such were adverse to the case of the second defendant. When viewed as a whole, it is clear from all the evidence led that the plaintiff has established a balance of probabilities liability on the part of the second defendant. It is significant that on his do given all the evidence led including that of Mr Muzondo, Advocate *Colegrave* in his doing address confined his submissions in the main as to whether, as a matter of Law, the relief sought by plaintiff was competent in law. When invited by the court to clarify, he stated that he had no instructions to make any concession on the aspect of liability but would not make any submissions of substance in this regard is understandable and inevitable given the evidence led, more particularly that of the second defendant's own witness, Mazondo.

In the result it makes it unnecessary for this court to determine the admissibility or the weight if any to be attached to Exhibit 3 the statement from Zecks Dube dated 17 November 2006. The second defendant it is clear from evidence is vicariously liable, for the actions of its employee in this matter.

THE ORDER SOUGHT:

“Plaintiff seeks an order that defendants replace his motor vehicle a Toyota Emine Minibus. This aspect of the claim is contractual in nature. Plaintiff seeks an order of specific performance it is contended on behalf of the second defendant that the order as sought is imprecise in its terms. A claim for specific performance is discretionary in its nature and as such the order sought ought to be refused, due to the alleged imprecision of the form of order sought.

The motor vehicle ordered by plaintiff it is not in dispute is as described at paragraph 7 of plaintiff’s further particulars dated 17 October 2007 as follows ‘1997’.

Plaintiff is unaware of the first date it was used as new. It was in good working order 97,000km. Yes it can be sourced from second hand car dealers in Japan, Singapore or Dubai.

The plaintiff is unaware if the motor vehicle can be obtained in Zimbabwe as he has been unable to find one.

The Registrar of the High Court can appoint an independent party to verify compliance of the order by second defendant”.

In the view of this court the main order sought is incapable of being complied with or being fulfilled. The make, model and condition of the motor vehicle an unknown.

In addition, if a representative of the Motor Vehicle Association is appointed to over see the suitability of the motor vehicle that the plaintiff ought to receive, then the order sought can and ought to be granted. Accordingly, the court is disposed to the grant of the main order as such order is capable of fulfilment.

The determinant alternative claim by plaintiff is founded on the basis of the delictual liability of the second defendant. It was submitted that Zhou was not acting within the course and scope of his duties at the time he drove the motor vehicle but was on a frolic of his own. It was further the submission of Mr *Colegrave*, that damages in this respect which are delictual in nature are based at the time the wrong occurred giving rise to such claim the issue of damages arising from delict has been the subject of consideration in our courts.

In *Leighton v Eagle Ins. Co Ltd & Ors* 2002 (2) ZLR 592 H. it was held that the general measure of damages caused by injury to property is usually the devaluation in its market value. Plaintiff instituted proceedings timeously. However by legislature intervention by the State, the duty payable on imported under vehicles was altered and became payable in

foreign currency. It is self evident that a motor vehicle cannot be imported at present at the price paid by plaintiff in an amount required in foreign currency.

The courts must recognise the change in duty regulations in respect of an imported motor vehicle. For in the view of the court it would be just and equitable that plaintiff be awarded the sum claimed in the alternative as near as possible, such as would restore plaintiff to the position he would have been in, had defendant delivered his motor vehicle to him at the time.

It is not in dispute that to procure the same type of vehicle would require payment in the following amounts.

* CIF price of vehicle (Durban)	US\$4,900
* Duty, VAT and surcharges (115%)	US\$5,635
* Port clearance charges and transport to Beitbridge	<u>US\$1,009</u>
Total	<u>US\$11,544</u>

The amount to be expended by plaintiff is expressed in units of foreign currency. It is also not a disputable fact that in order to replace the motor vehicle plaintiff would require one to pay the Japanese Supplier in United States dollars (US\$) and the current position in Zimbabwe is that duty and surcharges must be paid for in United States dollars (US\$). It is on this basis that the court has determined that an award must be expressed in units of foreign currency. See *Makwine Oil Procurement (Pvt) Ltd v National Oil Company of Zimbabwe* 1988(2) ZLR 482(5) at 492 E-F.

Where a court awards judgment sounding in units of foreign currency the rate interests applicable cannot be that prevailing in Zimbabwe but that applicable in the country where the currency is the home currency. See *Industrial Equity Ltd v Walker* 1996(1) ZLR 269(H!) at 307.

In the result it is accordingly ordered as follows:-

- (1) The defendant jointly and severally are directed to deliver to the plaintiff in Zimbabwe, duly cleared by ZIMRA, a replacement Toyota Emina Minibus, 1997 model, 2,4 petrol engine, 8 seater four doors with a mileage of 92 000 km or as close to that mileage as possible, and in good working order.
- (2) The Registrar of the High Court is directed to approach the Zimbabwe Motor trader Association as an independent party for them to appoint a representative so as to ensure compliance with the terms of this order by the defendants. The

costs thereof are to be borne by the defendant jointly and severally the one paying the other to be absolved.

- (3) This order shall be given effect to expeditiously and in any event, not more than four months from the date hereof.

In the Alternative it is ordered as follows:

- (1) That the first and second defendants are to pay the plaintiff jointly and severally, the one paying the other being absolved the sum of US\$11-544 representing the total replacement value of the plaintiffs' motor vehicle with interest thereon from the date of judgment to the date of payment at the rates prevailing, from time to time, in the United States of America.
- (2) The costs of suit are to be borne by the defendants jointly and severally, the one paying the other to be absolved.

Wintertons, plaintiff's legal practitioners

Coghlan, Welsh & Guest/Stumbles & Rowe, second defendant's legal practitioners