TARUVA TARUVA
versus
DEVEN ENGINEERING P/L
and
MOTEC HOLDINGS P/L
and
REGISTERING OFFICER, CENTRAL VEHICLE REGISTRY

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE 20, 21, 22 January and 4 February 2009.

CIVIL TRIAL

Mr H Mucheche for plaintiff.
Adv H Zhou for 1st and 2nd defendants.

MAKARAU JP: The plaintiff joined the first defendant on 1 July 2006. He was employed by the first defendant as its Financial Controller and Company Secretary. It was a specific term of his employment that the plaintiff would be entitled to the use of a motor vehicle and to participate in the group motor vehicle scheme. In due course, a Mazda 3 was procured and allocated to the plaintiff.

On 31 July 2007, the plaintiff left the employment of the first defendant. He took the motor vehicle with him. On 10 august, he was recalled to the offices of the second defendant, the holding company for the first defendant to discuss the issue of the motor vehicle. After discussions, the plaintiff swore to an affidavit in which he deposed that he had sold the motor vehicle to the first defendant. He then surrendered possession of the vehicle to the first defendant but retained the registration book of the motor vehicle and the spare keys to the vehicle.

On 7 September 2007, the plainitff issued summons against the defendants, claiming the following orders:

1. "Declaring that the purported sale of the Mazda 3 Registration Number:AAV 8577 Engine No LF614706, Chasis no JMZBK12F201323749, non-existent, null and void *ab initio;*

2. Declaring that the affidavit issued and authoured by defendants and signed by plaintiff which confirms the purported sale is null and void ab initio because of having been induced by duress and moreso for lack of compliance with lawful and proper laws of authentication and commissioning (notarial practice)'
3. Compelling the 1sta nd2nd defendants to restore possession of the vehicle Mazda 3 registration Number:AAV 8577 Engine No LF614706, Chasis no JMZBK12F201323749 to the plaintiff within 24 hours of this order and in the event that the 1st and 2nd defendant have failed to do so, the Deputy Sheriff is and hereby ordered to effect restoration of possession and ownership of the vehicle to plaintiff from 1st and 2nd defendants by whatever means available to his disposal,

OR ALTERNATIVELY

4. In the event that the 1st and 2nd defendants having changed ownership of the vehicle referred to in paragraph 1, all defendants are hereby ordered to reverse the ownership into the names of the plaintiff within seven days of this order and the event of failure to do so, the Deputy Sheriff is hereby ordered to reverse ownership into the name of the plaintiff."

The suit was defended. In the main, the defendants contended that the plaintiff had compromised any alleged rights that he had to the motor vehicle under the scheme and his contract of employment when he voluntarily agreed to pay for the motor vehicle at its market value before he could claim it as his.

At the trial of the matter, the plaintiff gave the following evidence.

He was employed by the first defendant as Financial Controller and Company Secretary on 1 July 2006. In terms of the contract of employment, he was entitled to the use of a vehicle. A new motor vehicle scheme was then introduced in September 2006. As he was in the requisite grade, he was entitled to participate in the new scheme. In April 2007, he was informed by the Human Resources Executive that the scheme was now operational. A couple of e-mails were exchanged between the parties in this regard. He was given a loan agreement whereby the first defendant was loaning to him a sum equivalent to the cost price of the vehicle. The amount of the loan was agreed in the sum of $5 304 200-00. He duly signed the loan agreement and in due course, the deductions specified in the agreement to offset the loan were made against his salary.

At some stage, he discussed the issue of the change of ownership of the motor vehicle into his name with the first defendant's managing director, who then facilitated such.

In July 2007, he tendered a letter indicting his intention to resign from the first defendant. After discussing the issue with his managing director, he paid up the balance outstanding on the loan. On July 31, he terminated his employment with the first defendant and took the motor vehicle with him.

On 1 August he was invited to a farewell party at which his managing director intimated that the motor vehicle scheme would be varied. This was soon followed by a request that he attends a meeting at the offices of the second defendant. The request and the meeting were on August 10 2007. Present at the meeting were the Group Managing Director Mr B Kumalo, the Group Commercial Director Mr Morris Chinyani. He was advised that the defendants were going to revalue the vehicle. Mr Kumalo then gave him an affidavit to sign. In giving him the affidavit, he said if he did not sign it, he, Kumalo, was going to incarcerate him. At the time he had an aunt who was not feeling well. He intended to travel and attend to her. Kumalo forced him to sign the affidavit, which he did. Had he not been forced to sign the affidavit, he would have prepared it himself and supplied all the details missing from the affidavit.

The defendants withheld the motor vehicle.

On the same day of the meetong, Kumalo wrote a letter confirming that he would have the vehicle revalued. He followed this on 20 August with another letter, advising the plaintiff the amount that he had to pay. The plaintiff got the impression that Kumalo was now revaluing the loan and sought the advice of his legal practitioners.

He denied that the partied reached any agreement and that he compromised his claim to the vehicle.

Under cross –examination, the plaintiff testified that he was only threatened with incarceration by Kumalo after he had brought the motor vehicle back. In this regard, he testified that two meetings were actually held on the same day even though he would not refer to the second one as a meeting. The threat came after the inspection of the vehicle.

The plaintiff did not impress as a witness. I gained the impression that he was not telling me the truth about the circumstances, nature and the time when he was allegedly threatened and coerced against his will into signing the affidavit. He was clearly inconsistent on this point. Firstly, he testified that he was coerced into signing the affidavit during the course of the meeting. When he was asked why he did not report the extortion to the police when he went to

his house to pick up the motor vehicle, he realized the inadequacy of his testimony and altered it to allege that he was only threatened after he had brought the vehicle to the defendant' premises. He was not detailed or clear as to the nature of the threat and how this may have broken his will and made him do what Kumalo requested of him. His alleged fear of incarceration was most unreasonable in the circumstances where he had not committed any offence and no allegation of criminality was being leveled against him. No police were in attendance at the meeting and no evidence was adduced to the effect that a report had been made against him to the local police. The sick aunt, who later sadly passed on was no mentioned during the meeting and there was no evidence adduced that Kumalo was aware of her and her condition and used this to bend the will of the plaintiff to his purposes. All in all, I find the evidence of the plaintiff on this issue most unreliable especially when I compare it with the evidence of the defendants' witnesses as to what transpired at the all important meeting of 10 August 2007.

In my view, having found the evidence of the plaintiff unreliable on the above issue, this marks the end of the inquiry into the matter as the plaintiff has failed to prove on a balance of probabilities that he was coerced into parting with possession of the motor vehicle and was further coerced into entering into a new arrangement regarding the motor vehicle. I shall however proceed to briefly summarize the evidence that was led on behalf of the defendants.

The defendants called four witnesses. The first to testify was Morris Fortune Nhamo Chinyani. He is the Board Chairman of the first plaintiff and at the time of the meeting of 10 August 2007, he was the Group Commercial Director for the second defendant.

On 10 August 2007, he attended the meeting at which the plaintiff surrendered possession of the motor vehicle to the defendants. He recalls that at the meeting the position of the defendants was put to the plaintiff. This was to the effect that the motor vehicle scheme had been put in place to attract and retain executives and that in the opinion of the defendants, the plaintiff had not earned the vehicle as yet as had only served for ten months after the introduction of the scheme. The plaintiff agreed with the sentiments of the representatives of the defendants present and further agreed to return the vehicle to the first defendant pending its evaluation. It was also agreed in the meeting that the valuation would give him a figure to pay for the vehicle should he wish to purchase it. The meeting was cordial and the plaintiff was not threatened in any manner. He agreed that the first defendant could change back from his name the ownership of the vehicle in the event that he did not pay for the vehicle within a reasonable

time. He then signed an affidavit that would allow the first defendant to effect the necessary changes.

The witness gave his evidence clearly and in measured tones. His understanding of the terms of the loan agreement and of the motor vehicle scheme may not have been legally correct but that in my view, does not detract from his credibility as a witness.

The defendant also called the evidence of Cannan Samkange. He is the Group Human Resources Executive for the holding company. He was in attendance at the meeting of 10 August 2007 when the plaintiff surrendered the motor vehicle to the defendants. At the meeting, he recalls that Kumalo asked the plaintiff whether by leaving the employment of the first defendant when he did, the plaintiff thought that it was fair and right that he takes the motor vehicle with him. After some hesitation, the plaintiff conceded that it was not. Regarding the way forward, the plaintiff asked the executives present to spell out what the defendants wanted. Kumalo advised the plaintiff that he wanted the vehicle returned or for the plaintiff to pay a fair price for it. The plaintiff opted to purchase the vehicle at a fair price.
The plaintiff then signed the affidavit that was prepared for him in the presence of the three executives who attended the meeting. In signing the affidavit, the plaintiff was not threatened at all. After some time, the vehicle was brought back by the driver who had been assigned to accompany the plaintiff to his residence to collect the vehicle. The witness went to inspect it and found all the accessories intact save for the registration book and the spare keys to the vehicle. The plaintiff invited him to pick these up later at his residence as they were locked up in the plaintiff's bedroom.

The witness came across as honest and reliable. He was forthright in his responses to questions put to him under cross-examination and was quite clear as to the policy of the defendants regarding the motor vehicles and why certain decisions were made and implemented. He was also clear on the relationship between the plaintiff and the defendant regarding ownership of the vehicle. He testified that while the plaintiff held the registration book, the vehicle belonged to the first defendant who had a say as to how it was used until ownership in the vehicle was transferred to the plaintiff.

I shall rely on the evidence of this witness.

The defendants also called Richard Nyatsoka. He is Managing Director of the first defendant. He was the plaintiff's immediate boss.

The witness testified as to the terms of the motor vehicle policies that the defendants had and how the plaintiff qualified under the second defendant's policy. He also confirmed that he had authorized the plaintiff to transfer registration of the vehicle into his name. Towards the end of July 2007, he discussed with the plaintiff the imminent departure of the plaintiff and how the defendants would treat the vehicle now that the plaintiff was leaving. At the time the plaintiff left employment, he was under the impression that the plaintiff would leave the vehicle behind. In accordance with proper corporate decorum, he did not repossess the motor vehicle from the plaintiff on the plaintiff's last day of service. He only learnt on 7 August that the plaintiff had failed to surrender the vehicle to the defendants. At this stage, he was on leave. He spoke to the plaintiff about the issue but did not attend the meeting of 10 August when the vehicle was surrendered. He returned from leave on 27 August to learn that the vehicle had been returned and the plaintiff had agreed to pay a fair price for it should he wish to purchase the vehicle.

Generally, the witness gave his evidence well and would make good eye contact, giving the impression that he was telling the truth and had nothing to hide. He was however not present at the all important meeting of 10 August and thus, in my view, his evidence is of marginal value.

Like the first witness, I find that the interpretation given to some of the clauses of the loan agreement and of the motor vehicle scheme by this witness may not be legally sound but again in my view, this cannot detract from his generally favourable demeanor in the witness box.

The last witness to testify for the defendants was Benjamin Nkosentya Kumalo. He is the Group Managing Director of the second defendant. He called for the meeting held on 10 August 2007 to discuss the issue of the motor vehicle with the plaintiff. In attendance at the meeting were the plaintiff, the Group Human Resources Executive and the Group Commercial Director and Chairman of the first defendant.

At the meeting, which the witness chaired, he asked the plaintiff how he had transferred registration of the motor vehicle and how much he had paid for the vehicle for the short period that the scheme had been operating before he terminated his services. He further asked the plaintiff whether in the circumstances, his taking of the motor vehicle did not amount to unjust enrichment. The plaintiff agreed with the sentiments expressed on behalf of the defendants. The parties proceeded to determine a formula by which a fair price for the

vehicle would be established and at which price the plaintiff would purchase the vehicle. The plaintiff requested for a letter from the witness confirming what the parties had agreed to so that he would be protected from any possible reneging by the defendants. The witness wrote a letter confirming that he would commission an evaluation of the motor vehicle and inform the plaintiff about the established value in due course. The meeting was quite amicable and he did not threaten the plaintiff in any manner. The plaintiff agreed to and voluntarily surrendered the motor vehicle. The parties also agreed that the plaintiff signs an affidavit that would assist the first defendant in reregistering the vehicle into its name in the event that the plaintiff did not pay a purchase price equivalent to the market price of the vehicle within a reasonable time. The witnesses commissioned the affidavit as he is an ex officio commissioner of oaths. He was present when the vehicle was brought to the premises although he did not go to inspect it. There was no subsequent meeting after the vehicle was brought to the premises. A few days later, he wrote to the plaintiff advising him of the fair market value of the vehicle.

The witness was impressive in the witness box. He gave his evidence well. He answered all questions put to him under cross –examination with forthright answers. His understanding of the terms of the loan scheme and of the loan agreements was in my view legally sound and he readily accepted that he had commissioned the affidavit by the plaintiff even though he had an interest in the matter as he was unaware that he could not do so.

I will rely on the evidence of this witness.

At the pre-trial conference of the matter, five issues were identified as falling due for determination at the trial of the matter. These were framed as follows:

1. Whether there is a valid and enforceable agreement of sale of the motor vehicle in dispute by the plaintiff to the defendant.
2. Whether the affidavit signed by the plaintiff is null and void by reason of duress and improper authentication and commissioning.
3. Whether the plaintiff is entitled to the motor vehicle in dispute in terms of the Motec Vehicle Scheme.
4. Whether the plaintiff is entitled to pay the sum of $4,5b to the 1st defendant and purchase the vehicle in dispute from the 1st defendant.
5. Whether if the first defendant has changed ownership of the vehicle in dispute, such change of ownership could be reversed.

At the hearing of the matter, the plaintiff abandoned his alternative prayer for the payment of the sum of $4,5B, thus leaving four issues for determination.

With respect, in my view, the four issues as settled at the pre-trial conference do not capture the essence of the dispute between the parties.

It is common cause that the plaintiff was entitled to possession of the motor vehicle during the course of his employment with the first defendant. It is further common cause that the plaintiff did not sell the motor vehicle back to the first defendant as captured in the affidavit that he swore to on 10 August 2007. in my view, the dispute between the parties is whether the plaintiff is entitled to ownership of the motor vehicle in terms of his contract of employment and if so, whether he has waived or compromised his entitlements thereto.

The founding document in this dispute in my view is the second defendant's Group Management vehicle Purchase Scheme. It is common cause that this is the scheme under which the plaintiff became entitled to the use of the motor vehicle in question. It is also common cause that this document has to be read together with the loan agreement between the parties. While I accept that the loan was granted on paper, with no money actually changing hands, in my view, the importance of the loan agreement as a document lies in establishing the purchase price of the vehicle. It is in the loan agreement that the amount representing the purchase price of the vehicle is set. The motor vehicle scheme simply makes reference to the loan agreement in respect of the purchase price of each vehicle falling under the scheme.

In my view, the plaintiff, having qualified to participate in the motor vehicle scheme was clearly entitled to the motor vehicle in terms of that scheme during the course of his employment with the first defendant and would have been entitled to the vehicle upon termination of his employment upon satisfying the terms of the scheme and of the loan agreement. Richard Nyatsoka testified that it was a requirement of the loan agreement and of the motor vehicle scheme that the plaintiff had to approach him as Managing Director of the first defendant before he paid up the balance outstanding on the loan. I read no such term in the scheme. It may have been the practice that the defendants wished to obtain on the ground but it was not a specific term of either of the two governing documents. I further do not read into the scheme an implied term that the whole amount of the loan, which incidentally represented the purchase price of the motor vehicle in issue, had to be re-valued on the date of repayment, to take into account the appreciated value of the vehicle. This was the understanding of the defendants' witnesses. It is however not in the letter of the agreement.

I may add here for the benefit of the defendants that if it is their wish to disentitle employees who have not served the organization for the requisite number of years for each model of the qualifying vehicles, then this must be clearly spelt out in the motor vehicle scheme. Similarly, if it is their wish to reserve the right to the defendants to revalue vehicles on the date of disposal to the employee, again this is spelt out in clear language in the motor vehicle scheme. The letter of the scheme as it stands bears little if any bearing to their understanding of what the rights and obligations of the employees are under the scheme.

On the basis of the foregoing, I have no doubt in my mind that having paid for the balance outstanding on the loan agreement before his employment with the first defendant terminated, the plaintiff was entitled to claim ownership of the vehicle under the motor vehicle scheme.

However, as *Advocate Zhou* points out and correctly so in my view, the parties reached another agreement on 10 August 2007, in terms of which the plaintiff surrendered his entitlement under the motor vehicle scheme and agreed that he would pay the market price of the vehicle if he desired to own it. The issue is to determine the nature and effect of this subsequent agreement.

In his pleadings, the plaintiff seeks to avoid this second agreement by pleading that is not binding on the parties as it was induced by duress. I have already found above that I do not believe the plaintiff's testimony that he was threatened at all during the meeting of 10 August to come to a position contrary to his volition. I note that *Mr Mucheche*, in his closing submissions, has not pressed me to find that the plaintiff was compelled by reasonable fear of any imminent evil to his person to agree to surrender the motor vehicle and to be able to acquire ownership of the vehicle by way of a purchase.

The issue that I now have to determine in this matter is whether there was an agreement reached on 10 August 2007 and whether the effect of that agreement was to supersede the obligations and rights that the parties had agreed to prior.

I have no doubt in my mind that the parties were in agreement on 10 August 2007. the essence of that agreement was that the plaintiff would return the vehicle to the first defendant, that the vehicle be re-valued and that if he wished to own the vehicle, the plaintiff had to pay its market value, as established by the evaluation.

I have indicated above that in my view, the plaintiff was entitled to ownership of the vehicle upon the termination of his employment and after having paid off the balance

outstanding in accordance with the provisions of the loan agreement as read with the motor vehicle scheme. The plaintiff may not have been confident of his rights in this regard, or may have been aware that the defendants held a different interpretation on the provisions of the two documents governing the issuance and ownership of motor vehicles between the parties. This is all now speculation on my part and is largely irrelevant in view of the new agreement that the parties concluded on 10 August 2007. I raise the issue simply to buttress my conclusion that by entering into the new arrangement, the plaintiff adversely affected his rights under the prior contract and may have done so ill-advisably. It is my view that the second agreement was ill advised but is nonetheless binding on the parties like any other bad bargain.

Our law of contract has for long recognized that a new agreement that settles a dispute operates as *res judicata* in respect of the old agreement and in itsself becomes a valid and binding contract between the parties. Not only can the original cause of action no longer be relied upon, but a defendant is not entitled to go behind the compromise and raise defences to the original cause of action when sued on the compromise. (See *Road Accident Fund v Ngubane* 2008 (1) SA 432 (SCA); *Lieberman v Santam Ltd* 2000 (4) SA 321 (SCA) paras 11 - 12); *Hamilton v Van Zyl* 1983 (4) SA 379 (E) and *Majora v Kuwirirana Bus Service (Pvt) Ltd* 1990 (1) ZLR 87 (SC)).

This in our law is referred to as a compromise.

The courts in South Africa have even moved on to hold that a compromise need not necessarily however follow upon a disputed contractual claim. Any kind of doubtful right can be the subject of a compromise. A valid compromise may be entered into to avoid even on a clearly spurious claim.

Mr Mucheche submitted that there was no dispute between the parties. With respect, I do not agree. The parties clearly had a dispute regarding the ownership of the motor vehicle. In any event, on the authority of the above authorities, even if the parties were not locked in a dispute, they could still validly conclude a compromise as to the possession and ownership of the vehicle, which in my view, they proceeded to do.

In establishing whether a claim has been compromised, one is concerned simply with the principles of offer and acceptance. (See *E Bop A Lula Manufacturing & Printing CC v Kingtex Marketing (Pty) Ltd* 2008 (2) SA 327 (SCA)

In *casu*, I am satisfied that at the meeting of 10 August 2007, the parties reached a compromise. In my view, at this meeting, the parties achieved consensus on all the

relevant contractual requirements. They unequivocally intended to settle the dispute of the motor vehicle by this new consensus. In terms of this new consensus, I am satisfied that the defendants offered to sell the vehicle to the plaintiff for its market value and the plaintiff in turn accepted the offer. He asked the defendants to reduce the offer to writing, which Kumalo did in his letter of 10 August 2007. Thereafter, the plaintiff did not pay for the motor vehicle in terms of the agreement and is thus not entitled to claim possession and ownership of the vehicle. It is my further view that he showed his acceptance of the offer by surrendering the vehicle and demanding that the offer be put in writing so that the defendants would not backtrack on same.

In my view, the parties before me compromised the dispute of the motor vehicle on 10 August 2007. The effect of the compromise was to discharge the prior agreement embodied in the loan agreement and in the motor vehicle scheme. It established a new contract between the parties that is binding and enforceable. The new contract does not entitle the plaintiff to possess the motor vehicle. It entitled him to purchase the motor vehicle upon certain terms and conditions, which terms and conditions the plaintiff did not comply with.

On the basis of the foregoing, there is thus no basis upon which the plaintiff's claim can succeed. As is clear from the authorities, the plaintiff is not allowed to raise the old agreement to raise a cause of action against the defendants.

In the result, I make the following order:

The plaintiff's claim is dismissed with costs.

Matsikidze & Mucheche, plaintiff's legal practitioners.

Takundwa & Partners, defendant's legal practitioners.