

XAVIER P MAKUMBINDE
versus
KUDZAI RUZVIDZO
and
JOEL MAZANHANGA

HIGH COURT OF ZIMBABWE
MAFUSIRE J
HARARE, 28February 2014 and 28 April 2014

Court application

M. Mandevere, for the applicant

1st respondent in default

2nd respondent in person

MAFUSIRE J: The applicant sought an order nullifying the sale of a certain vehicle by the first respondent to the second respondent. At the end of the hearing I granted the order sought in terms of the draft. The order read as follows:

- “1. The agreement of sale by and between the 1st and 2nd Respondents in respect of the motor vehicle Nissan March ACP 3268 be and is hereby declared unlawful.
2. Applicant be and is hereby declared the lawful owner of the Nissan March ACP 3268.
3. Respondents jointly and severally shall pay costs of suit.”

I gave the reasons for my decision *ex tempore*. However, the second respondent has now asked for them in writing. Here they are.

In December 2012 the first respondent purported to sell the vehicle in question (hereafter referred to as “**the sale vehicle**” or “**the vehicle**”) to the second respondent. Apparently it had been a swap deal. For the purchase price the second respondent had surrendered his own vehicle, also a Nissan March, and had topped it up with cash. At the hearing there was a conflict as to how exactly the sale had been arranged and what exactly had been the agreed purchase price. But it was common cause that the sale vehicle had belonged to the applicant.

At the time of the purported sale the applicant had been in Kariba. The sale vehicle had been in Harare. The respondents had also been in Harare. The first respondent had

contacted the applicant by phone that he had found a buyer for the sale vehicle. The applicant had arranged with his sister to make the sale vehicle available for inspection by the potential buyer. The buyer was the second respondent. The next thing was that the first respondent had sold the vehicle to the second respondent. The sale document was a crude agreement in long hand on Kingstons Limited's stationery. It read as follows:

“I RUZVIDZO KUDZAI ID 63 – 1035356 V 24 residing at Glennorah do hereby solemnly and sincerely swear/declare the following:-Sold my Nissan March Reg no. ACP 3268 as an swop and top with a Nissan March Reg ABY 5930 with cash top of USD 800 paid USD 600 Balance of USD 200 to be paid on or before the 15th of December of 2012”

The document was signed by the second respondent as “BUYER”; the first respondent as “SELLER” and by two other persons as witnesses.

The first respondent did not file any opposing papers. The second respondent, through his legal practitioners who later renounced agency, did. However, almost all the averments in the second respondent's opposing affidavit were inadmissible hearsay. He alleged he had been aware that the applicant had been communicating with the first respondent. He referred to a certain phone text message allegedly from the applicant to the first respondent which he said had been shown to the criminal court. Apparently the matter had been to the criminal court at the instance of the applicant. He had reported a case of theft of the sale vehicle against the first respondent. However, it seems the first respondent not been convicted. It also appeared that it was the applicant who had ended up paying a deposit fine to the police for a false report. The applicant claimed he had been coerced to pay the fine. He also claimed that he had filed a complaint against the conduct of the police. However, I found none of these details relevant.

The major ground of opposition by the second respondent to the relief sought had been that the applicant had legitimately sold the vehicle to him through the first respondent as his agent. He claimed it was only because the applicant had been unhappy with the quantum of the cash top up that the second respondent had paid that he was now renegeing on the agreement. Applicant had allegedly wanted US1 000, the second respondent averred. But he had refused to pay such an exorbitant amount. He had agreed to only US800 which he had paid. The second respondent also claimed that the applicant had felt done down by his agent, the first respondent, in that he had demanded an amount of commission which the applicant had felt had been exorbitant and unjustified.

Given what was common cause, namely that the sale vehicle had belonged to the applicant; given that the purported sale agreement had patently been false and therefore a nullity, and given that the transfer of possession of the vehicle to the second respondent had been predicated on such a nullity I considered that the onus to prove a genuine sale of the vehicle had lain on the second respondent. I considered that the second respondent had come nowhere near discharging that onus. The second respondent's affidavit had essentially been hearsay testimony. There had been no opposition from the first respondent who had been central to the whole dispute. It was on that basis that I granted the relief sought.

Kadzere, Hungwe & Mandevere, applicant's legal practitioners