

AMR CHITOVA EXPRESS (PTY) LTD
versus
BRUNO TAKAWIRA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 26, 27, & 28 March 2018

Civil trial

M Mbuyisa, for the plaintiff
A.A. Debwe, for the defendant

ZHOU J: This is a claim for damages for interference with a lease agreement in the sum of ZAR 2 620 000-00. The basis upon which the claim is founded is that the defendant unlawfully took possession of a bus which was the subject of a lease agreement between the plaintiff and one Norman Gasa thereby depriving the plaintiff of the rentals which would have been paid to it by the said Norman Gasa who was the lessee. In addition, the plaintiff also claims delivery of a bottle jack, a heavy duty wheel spanner and a wheel spanner or payment of the sum of ZAR 5945-98 being the costs of replacing these items. The basis of this claim is that the items in question were inside the bus when the defendant took possession of it but were found to be missing when the bus was returned to the plaintiff.

The defendant contests the claims. His case is that he did not unlawfully take possession of the bus in question but that it was delivered to him as pledged property by Norman Gasa to secure payment of a debt which Gasa owed. In respect of the tools, the defendant denies having taken them.

The plaintiff led evidence from two witnesses. The first witness, Tafadzwa Munyaradzi Jiri stated that at the relevant time he was employed by the plaintiff. Norman Gasa was his boss and friend. The bus in question was being attended to by a mechanic on 22 May 2014. In the evening he was convinced by Sydney Makanda to take the bus for parking at the defendant's premises. The bus had previously been parked there on a number of times. Sydney Makanda in the company of the witness drove the bus to the defendant's premises. The following

morning when he tried to collect the bus he was denied apparently on instructions from the defendant. Norman Gasa advised him to return to his residence while he tried to resolve the dispute with the defendant. The witness is the one who collected the bus from car sales premises when it was released at the end of the June 2015. When he collected the bus he discovered that a bottle jack, a wheel spanner and a wheel spanner extension bar were missing.

The second witness for the plaintiff, Amith Sewpersadhi is the Operations Manager for the plaintiff. His evidence was essentially in relation to the agreement of lease of the bus between the plaintiff and Norman Gasa. He stated that the agreement was that Gasa would pay rent in the sum of ZAR20 000 per return trip. During the peak period the bus was expected to do nine trips between Harare and Johannesburg. On other months it would do eight trips. According to him the plaintiff lost income in the form of the rentals as a result of the taking of the bus by the defendant.

The defendant gave evidence that the bus was given to him as a pledge to secure a debt owed by Norman Gasa. Gasa told him that he mortgaged his property in order to secure financing for the bus. He denied that his possession of the bus was unlawful.

Hardwork Chirinda, the second witness for the defendant testified that the bus was delivered to the defendant's premises by Sydney Makanda who advised that it was being kept at the defendant's premises to secure a debt owed by Norman Gasa to the defendant. This witness stated that Sydney Makanda was a workmate of Norman Gasa. This contradicts the evidence of Tafadzwa Jiri that Sydney Makanda was employed by the defendant.

Tafadzwa Jiri did not explain why Sydney Makanda would drive the bus if he was employed by the defendant. The bus did not belong to the defendant. Tafadzwa Jiri contradicted his summary of evidence that the bus was driven to the defendant's premises by the driver whose name is not stated. The court therefore finds that Sydney Makanda was employed by the plaintiff or worked with Norman Gasa.

Wrongful interference with a contractual relationship is an actionable wrong in our law of delict, see *Lanco Engineering Co v Aris Box Manufacturing (Pvt) Ltd* 1993 (4) SA 378 (D CLD) at 380B-F. This would mean that if a person wrongfully interferes with a contract of lease they would be liable for loss suffered by the lessee or lessor who would have suffered such loss.

The question to be determined first is therefore whether the conduct of the defendant in keeping the bus at his premises would fall within the ambit of the delict of wrongful interference with a contractual relationship. His evidence was that the bus, was surrendered to

him as pledged property by Norman Gasa. The defendant's allegations and evidence were not rebutted by the plaintiff. Norman Gasa was not called to testify. No explanation was given as to why he was not called to testify even though he is listed in the summary of evidence as one of the witness for the plaintiff. The plaintiff sought to rely on an affidavit filed by Norman Gasa in an urgent chamber application. There is nowhere in his affidavit where Norman Gasa states that he did not surrender the bus to the defendant as security. His affidavit merely seeks to argue that the bus owners are not involved in the debt owed to the defendant. Further, the defendant gave evidence and was not challenged, that Norman Gasa explained that he was being unduly pressured to institute the urgent chamber application by persons who were not even the owners of the bus. The defendant's version in that respect is supported by the fact that Norman Gasa was not called to testify as a witness.

Thus from the evidence led there was no wrongfulness in the manner that the defendant received possession of the bus. The fact that Norman Gasa was not the owner of the bus when he pledged it to the defendant is of no relevance because the dispute is not about ownership of the bus. The plaintiff is not basing its claim on loss suffered by denial of its rights of ownership. The cause of action is of wrongful interference with a lease agreement.

Even if the plaintiff had succeeded in establishing the wrongful interference with the lease, which it failed to do, the defendant would be absolved from the instance on the quantum of the loss suffered.

The plaintiff's operations manager who testified did not give any evidence as to how the figure of ZAR2620 000 is arrived at. He hinted that he would have brought the documents to show the income which the plaintiff was earning from the lease if he knew that such information was required. The fact is that such documents were not produced in evidence. Other than just referring to the number of months that the bus was not operating, there was otherwise nothing to prove the figures claimed.

In respect of the claim for the delivery of items which were said to be in the bus at the time that it was parked at the defendant's premises, no evidence was led to show that those items were inside the bus. The witness who accompanied the bus on the day in question did not carry out an inspection to ascertain the presence of the tools. Also, there was no evidence that if the tools were ever there then they were removed by the defendant. In his closing submissions Mr *Mbuyisa* for the plaintiff abandoned the claim for payment of ZAR 5945-98 on account of the absence of evidence to link the value of the tools to that figure. The plaintiff cannot claim delivery of the tools from the defendant in the absence of evidence that he has

possession of them. After all, the evidence on record shows that at some point the bus was attached and removed from the defendant's premises by the Sheriff in the execution of a judgment obtained against Norman Gasa by a company belonging to the defendant's family. The plaintiff has not shown that when the bus was removed from the defendant's premises the equipment had been taken possession of by the defendant.

In all the circumstances, the plaintiff's claim against the defendant cannot succeed.

In the result, IT IS ORDERED THAT:

1. The plaintiff's claim is dismissed with costs.

Mtewa & Nyambirai, plaintiff's legal practitioners
Muzorewa Law Chambers, defendant's legal practitioners