

Judgment No. S.C. 129/99  
Civil Appeal No. 588/97

Z.M. SKINNER, J.T. SKINNER, W. MOORE AND  
P. NEWTON T/A GOLDEN STAIRS NURSERY vs

- (1) B.K. TRUCKING & USED CARS (PRIVATE) LIMITED  
(2) P.J. VAN NIEKERK

SUPREME COURT OF ZIMBABWE  
McNALLY JA, EBRAHIM JA & MUCHECHETERE JA  
HARARE, OCTOBER 28 & DECEMBER 14, 1999

*A J Dyke*, for the appellant

*H Simpson*, for the respondent

MUCHECHETERE JA: This is an appeal against the decision of the High Court, Harare, on 8 January 1997 in which the plaintiff's claim was dismissed with costs. Although on the notice of appeal it is indicated that the whole judgment is being appealed against, the appellant's heads of argument do not address the learned trial judge's finding on the liability of the first respondent. Mr *Dyke*, who appeared for the appellant, also did not make any submission on the issue during his address. I take this as a concession to what I consider was a proper finding of the learned judge to the effect that no liability attaches to the first respondent because it merely acted as agent of the second respondent.

The appellant purchased a Toyota Cressida motor vehicle from the second respondent for \$165 000,00. The first respondent acted for and was agent of the second respondent in the transaction. The agreement of sale was concluded on 26 October 1994, with the appellant being represent by one Timothy John Skinner (“Mr Skinner”) and the second respondent by Mrs Gillian Schots (“Mrs Schots”).

The appellant alleged that the first respondent’s salesman specifically represented that the mileage reading on the motor vehicle, that is 112 003 kilometres, was the genuine mileage; whilst the mileage recorded in the service record book on 14 July 1993 when Zimoco serviced the motor vehicle, some fifteen months before the sale, was 135 676 kilometres. It was further alleged that the same salesman also represented that the motor vehicle was first used as new in 1991; whilst the registration book indicates that it was first used as new in 1990 and the service record book indicates that it was first used as new in South Africa in October 1989. The appellant contended that the above representations were material and relevant to the purchase price. It therefore averred that if it had known the true age and mileage of the motor vehicle it would not have purchased it at the price of \$165 000,00. It further stated that the fair and reasonable price of the motor vehicle at the time of the sale would have been \$100 000,00. In the circumstances it sought a refund of \$65 000,00.

The second respondent refused to refund the amount demanded but instead offered to refund the whole purchase price upon the return of the motor vehicle, that is, a rescission of the agreement. He stated that he would never have sold the motor vehicle for \$100 000,00. The appellant refused the offer.

The respondents firstly denied that the representations stated above were made. In the alternative, they pleaded that if they were made they denied that they knew or ought reasonably to have known that they were false. They also contended that the appellant acknowledged in writing in the agreement with Fincor that the motor vehicle was first registered in Zimbabwe in 1990 and was therefore estopped from denying such acknowledgement.

On the evidence the learned trial judge found that the appellant established on a balance of probabilities that the first respondent's salesman did make the above-stated representations. He also found that the representations were false, but that they were innocent. I consider that his findings were proper.

The next issue the learned trial judge considered was whether the false misrepresentations induced the appellant to purchase the motor vehicle and whether it was prejudiced in that it paid for it more than it should have. In this connection the learned trial judge found that the representation did not induce the appellant to accept the purchase price of \$165 000,00. In coming to this conclusion the learned trial judge stated the following at pp 4-6 of his judgment (HH-174-96):

“... While I accept that generally speaking a purchaser of a motor vehicle considers the age and the mileage of a vehicle to the purchase price, certain aspects of Mr Skinner's conduct at the time of the sale are inconsistent with his assertion that he considered the mileage and the age of the vehicle as material or induced him to pay the agreed price. For instance the age of a vehicle is to be found in the registration book of the motor vehicle. And yet when Mr Skinner was handed a photocopy of the registration book by Mrs Schots he did not check the age of the vehicle in the registration book. He took the registration book to Fincor who prepared an Hire Purchase Agreement in which the year of first registration is reflected. He did not notice the year of registration as recorded in the Hire Purchase Agreement. Mr Mutumba (the salesman) comparatively speaking is a junior employee of the first defendant. I would have expected Mr Skinner to seek confirmation

of the year of manufacture and mileage from the registration book or Mrs Schots if that was material to his decision to buy the vehicle at a particular price. He chose to rely on representations of the most junior employee of the first defendant. Mr Skinner did not even test drive the vehicle before concluding the agreement of sale. He instead test drove a brand new vehicle, a Nissan Sunny, which was purchased by his mother at the same time. It is common cause that the speedometer of the vehicle was not working. When he noticed this he did not become alarmed that the mileage might not have been genuine. His liking of the vehicle before he even drove it was so obvious that his mother noticed it from afar and offered to buy the vehicle for him. He readily accepted the offer without first checking its age or mileage or performance through a test drive.

... It was only upon discovery of the service record book about a week later and upon realising that the second defendant had sold the vehicle within a short time of buying it himself that alarm bells started ringing and the plaintiff entertained second thoughts about the agreement of sale.”

I agree with the above sentiments. The learned trial judge’s findings are fortified by the fact that the appellant refused to accept a rescission of the agreement of sale. This is in a way an admission that the purchase price he paid was reasonable. Indeed there was also expert evidence to the effect that at about the same time as the sale in question later models than the motor vehicle in question were being sold at between \$200 000,00 and \$250 000,00. And also that at the time Executive Cressidas (like the motor vehicle in question) were in high demand. Further, it took the appellant some five months after his discovery of the misrepresentations to issue summons against the respondents.

I am also in agreement with the learned judge’s reasoning and conclusion on the law applicable in a situation of this nature, that is, when in the case of an innocent misrepresentation a buyer is entitled to a reduction in the purchase price. See pp 7-9 of the learned judge’s judgment.

In the result the appeal is dismissed with costs.

McNALLY JA: I agree.

EBRAHIM JA: I agree.

*Kantor & Immerman*, appellant's legal practitioners

*Wintertons*, respondent's legal practitioners