

REPORTABLE ZLR (77)

Judgment No. S.C. 136/99
Civil Appeal No. 95/99

EMMANUEL GWAFWA vs

(1) SMALL ENTERPRISES DEVELOPMENT CORPORATION

(2) BRIAN LAWRENCE COMPANY (PRIVATE) LIMITED T/A
BCL AUCTIONEERS

SUPREME COURT OF ZIMBABWE
McNALLY JA, MUCHECHETERE JA & SANDURA JA
HARARE, OCTOBER 12, 1999

E T Matinenga, for the appellant

L Mazonde, for the first respondent

No appearance for the second respondent

SANDURA JA: This is an appeal against a judgment of the High Court which dismissed with costs the appellant's application for an order directing the first respondent ("Sedco") to deliver a Toyota Hilux motor vehicle, registration number 517-178Z ("the vehicle") to the appellant upon payment by him of the sum of \$80 000.00.

After hearing both counsel, we issued the following order:

- “1. The appeal is allowed with costs.
2. The order of the court *a quo* is set aside and the following is substituted:

- ‘(a) The sale of the Toyota Hilux motor vehicle, registration number 517-178Z, to the applicant is confirmed.
- (b) The first respondent shall deliver the said vehicle to the applicant forthwith, and shall take all steps necessary to facilitate the registration of the vehicle in his name, against payment of the sum of \$80 000.00.
- (c) The first respondent shall pay the applicant’s costs.’”

After making that order, we indicated that our reasons would be handed down in due course. I now set them out.

What happened in this case is set out by the appellant in paras 4-9 of his founding affidavit as follows:

- “4. Through Desired Liaison Auctioneers (Private) Limited the first respondent placed a number of vehicles on tender, among them a Toyota Hilux, registration number 517-178Z. I attach hereto the advert placed by the said Auctioneers marked ‘A’.
- 5. Pursuant to the advertisement, I purchased the tender documents, and of necessity I attach hereto the receipts relating to the tender (documents) I purchased. ... I tendered for all Toyota vehicles.
- 6. I went to inspect the vehicles and was awarded the tender, on the 8th October 1998, of the vehicle referred to above. I met all the required conditions. Desired Liaison Auctioneers (confirmed) to the first respondent that I had won the tender by their letter to it dated the 10th October 1998. I attach a copy of that letter marked ‘C’ and the conditions of the tender marked ‘D’.
- 7. I then ran around to have the vehicle inspected by the Automobile Association of Zimbabwe on the 12th October 1998. When I was satisfied that the vehicle was good I then went to my bankers for

funding and they gave me a bank cheque for \$80 000.00 payable to the first respondent. This is the amount I had tendered for the vehicle.

8. On the 15th October 1998 I approached Messrs Chihambakwe, Mutizwa & Partners to forward payment to the first respondent. They duly did a letter to it attaching the cheque for \$80 000.00. I attach hereto the said letter marked 'E' and the cheque marked 'F'. With the letter, the first respondent had also known that I had been awarded the tender and that I had met all the conditions of the tender.
9. Despite that second assurance, they replied to Messrs Chihambakwe, Mutizwa & Partners saying they wanted to approve the tender themselves. I attach a copy of that letter marked 'G'. Inasfar as I was concerned, the aforesaid Auctioneers were in charge of everything and we only had to make payment to the first respondent. As their agent the Auctioneers bind the first respondent. I verily believe that the tender was complete and it needed no further approval apart from the approval by the Auctioneers."

The conditions of sale referred to by the appellant did not stipulate that Sedco's approval was essential before the sale became binding on it. They are as follows:

- “1. The highest bid will not necessarily win the tender, unless his/her bid is above the valuation report.
2. When there are two (2) bids on tie the first bid to be called out will win the tender. The auctioneer's decision to this effect is final.
3. Payment should be made to SEDCO Head Office, 3rd Floor, Construction House, Harare no later than Thursday 15 October 1998. Failure to do so will result in the tender being awarded to the second winning bid.
4. All vehicles are exposed for examination and are sold without guarantee - *Voetstoots*.
5. After the announcement of the winning tenders on Thursday 8 October 1998, Desired Liaison Auctioneers will not accept responsibility for the safe custody of the vehicles sold.
6. Insurance is available immediately from Auto General Insurance Brokers who are in attendance to assist you. Once you buy a vehicle the insurance lapses and it is a criminal offence to drive a car without insurance.”

At no stage has it been argued that the appellant's bid was below the valuation report. So there is no question of a breach of condition 1 above.

In his affidavit Mr Dziya, the managing director of Desired Liaison Auctioneers (Private) Limited ("the Auctioneers"), averred that the sale of the vehicle was confirmed by Sedco's official who was present at the sale. He avers as follows in paras 4 and 6 of his affidavit:

- "4. I admit that Desired Liaison was to submit tenders to the first respondent for confirmation. This is what exactly happened in this and all other instances. ...
6. When a tender would have been approved by us we then signed against the awarded tender together with Mr Mahere of (the) first respondent. His signature was confirmation of the award of the tender. Every person who participated in the tender was aware of that and the tender process proceeded in that way ...".

Whether or not Mr Mahere confirmed the sale on behalf of Sedco was not common cause. However, it was common cause that the appellant was not aware that Sedco's approval or confirmation was essential. The conditions of sale did not say so and the Auctioneers did not tell the appellant about it.

The main argument advanced on behalf of the appellant was that Sedco was bound by the agreement concluded by the Auctioneers because the Auctioneers had ostensible authority to conclude the sale.

The principles on which a seller can be bound by the ostensible authority of his agent have been set out in a number of cases which have come before

this Court. In *Stewart v Zagreb Properties (Pvt) Ltd* 1971 (1) RLR 180 (R, AD) at 184 C-F, 1971 (2) SA 346 (R, AD) at 349 F-H, BEADLE CJ said:

“The principles on which a seller or a principal can be bound by the ostensible authority of an agent have been set out recently by this Court in the case of *Reed, N.O. v Sager’s Motors (Pvt) Ltd*, 1970 (1) SA 521 (R, AD). The headnote to that case, which accurately sets out the judgment, is as follows:

‘If a principal employs a servant or agent in a certain capacity, and it is generally recognised that servants or agents employed in this capacity have authority to do certain acts, then any of those acts performed by such servant or agent will bind the principal because they are within the scope of his “apparent” authority. The principal is bound even though he never expressly or impliedly authorised the servant or agent to do these acts, nor had he by any special act (other than the act of appointing him in his capacity) held the servant or agent out as having this authority. The agent’s authority flows from the fact that persons employed in the particular capacity in which he is employed normally have authority to do what he did. Whether an act is or is not within the scope of the apparent authority of an agent is essentially a question of fact.’”

What the learned CHIEF JUSTICE said in the *Stewart* case *supra* was subsequently quoted with approval by DUMBUTSHENA CJ in *Seniors Service (Pvt) Ltd v Nyoni* 1986 (2) ZLR 293 (S) at 298F-299B, 1987 (2) SA 762 (ZS) at 766 A-C.

In the circumstances, the principles enunciated by BEADLE CJ are well established. Those are the principles which I shall apply in the present case to resolve the issues before me. The essential question is whether an auctioneer has ostensible authority to conclude a sale agreement in respect of the property being sold by public auction for other persons. I am satisfied that he has. That is so because it is generally recognised that an auctioneer has the authority to conclude sales of properties which he sells by public auction. In fact, the auctioneer is almost invariably instructed to do just that, and in concluding a sale agreement he acts on behalf of the seller. The sale agreement, therefore, binds the seller.

Applying the principles enunciated by BEADLE CJ to the facts of this case as set out by the appellant in his founding affidavit, which were common cause, there can be no doubt in my mind that when the Auctioneers concluded the sale agreement with the appellant, that agreement bound Sedco because the Auctioneers had ostensible authority to conclude the sale agreement on behalf of Sedco.

That is why we allowed the appeal.

McNALLY JA: I agree.

MUCHECHETERE JA: I agree.

V S Nyangulu & Associates, appellant's legal practitioners

Scanlen & Holderness, first respondent's legal practitioners