

DISTRIBUTABLE (16)

ZIMBABWE UNITED PASSENGER COMPANY LIMITED
v
PACKHORSE SERVICES (PRIVATE) LIMITED

SUPREME COURT OF ZIMBABWE
GARWE JA, GOWORA JA & MAVANGIRA AJA
HARARE, JUNE 9, 2014 & FEBRUARY 23, 2017

T Magwaliba, for the appellant

E T Matinenga, for the respondent

MAVANGIRA AJA: This is an appeal against a judgment of the High Court which ordered the appellant to pay the sum of US\$763 068.00 to the respondent in respect of 48 buses sold and delivered, together with interest thereon at the rate prevailing from time to time in the United States of America with effect from 22 August 2004 to date of final payment and costs.

BACKGROUND

The background to the dispute between the parties is succinctly captured in the judgment of the court *a quo*. It is to the following effect.

On 7 August 2007, the respondent, as plaintiff, issued summons against the defendant in HC 4215/07 claiming:

- (a) Payment of the sum of US\$763 068.00 being the balance due and payable by the defendant to the plaintiff in respect of buses sold and delivered to the

defendant by the plaintiff at the defendant's special instance and request which, despite demand, the defendant failed to pay to the plaintiff.

- (b) Interest on the sum of US\$763 068.00 at the rate prevailing from time to time in the Supreme Court of the United States of America with effect from 22 August 2014 to date of final payment.
- (c) Payment of collection commission on the above sums calculated in accordance with by-law 70 of the Law Society of Zimbabwe By-Laws, 1982 and costs of suit on a legal practitioner and client scale to the extent that such costs are permitted in proviso (iii) to By-Law 70(2).
- (d) Costs of suit.

It is necessary to set out the pertinent paragraphs of the plaintiff's declaration where its claim is set out as follows:

- “3. The parties entered into an agreement in terms whereof Plaintiff undertook to supply to the Defendant certain goods, namely Scania buses.
- 4. Pursuant to the agreement Plaintiff delivered a total number of 50 Scania buses for a total purchase price of US\$4 877 000.00.
- 5. As security for the due payment of the full purchase price for the 50 Scania buses, Defendant placed at the disposal of the Plaintiff cash cover in the total sum of ZIM\$6 200 000 000.00 in January 2003 and again in May 2003, which amount was to be held by Metropolitan Bank of Zimbabwe Limited pending due performance by the Defendant, that is to say, payment of the full purchase price for the 50 Scania buses.
- 6. Pursuant to the agreement, Defendant paid a total sum of USD4 113 932.00 leaving a balance in the sum of US\$763 068.00 due and payable to Plaintiff.
- 7. In breach of the agreement between the parties, and on or about 21st August 2004, Defendant withdrew and or caused the withdrawal of the cash cover security earlier provided by it to the Plaintiff and the balance of the purchase price immediately became due and payable to Plaintiff.
- 8. Defendant agreed and undertook to pay to the Plaintiff Collection Commission and costs on an Attorney and Client scale in the event of Plaintiff incurring such charges in the recovery of all and any monies due and payable by Defendant to Plaintiff.
- 9. It was at all material times within the contemplation and knowledge of the parties that in the event of Defendant failing to pay the purchase price, Plaintiff would be obliged to pay the purchase price in the currency of the United States Dollar to the manufacturer of the buses, namely Scania South Africa (Pty) Limited.

10. During the period of May 2004 to June 2007 Plaintiff paid the sum of US\$763 068.00 to Scania South Africa (Pty) Limited representing the balance of the agreed purchase price between Plaintiff and Defendant.
11. Accordingly, Defendant is indebted to the Plaintiff in the sum of US\$763 068.00.
12. Despite demand, Defendant has failed to pay the sum of US\$763 068.00”

On 5 October 2007, the appellant, as defendant, pleaded to this declaration as follows:

“2. Ad paragraphs 3 up to 5
These are admitted

3. Ad paragraph 6

The Defendant avers that payments were made by it and by the government of Zimbabwe which assumed the debt. The balance of the debt subject to the Plaintiff’s claim was accordingly assumed by the government of Zimbabwe and if at all no payment was made of that amount, the Plaintiff should look to the government of Zimbabwe for the payment.

4. Ad paragraph 7

The defendant avers that it did not cause the withdrawal of the cash cover from the Metropolitan Bank of Zimbabwe Limited. Alternatively, if it is found that it did, such withdrawal was made after assumption of the debt by the government of Zimbabwe and therefore the Defendant had been released from payment of the debt. Accordingly there was no more cause for the continued retention of the payment by the bank.

5. Ad paragraph 8

The contents of this paragraph are denied in their entirety and the Plaintiff is put to the strict proof thereof.

6. Ad paragraph 9

This is denied and the Plaintiff is put to the strict proof thereof. Alternatively, the Defendant avers that even if the agreement provided for payment denominated in United States Dollars, it is competent for the Defendant to discharge such indebtedness in Zimbabwean dollars. In the event of the Plaintiff therefore succeeding in its claim, the Defendant shall tender performance in the equivalent sum claimed at the official exchange rate applicable in Zimbabwe as at the date of issue of summons.

7. Ad paragraphs 10 & 11

These are denied and the Plaintiff is put to the strict proof thereof.

8. Ad paragraph 12

The Defendant admits having refused to make payment to the Plaintiff given that no payment is due by it to the Plaintiff.”

Sometime in January 2008, the respondent filed a replication to the appellant’s plea. The respondent denied that the debt due to it by the appellant was effectively assigned to the Government of Zimbabwe. It averred that its claim represents the balance of the contract price originally agreed between the parties and for which the appellant remains liable to the Respondent. It further denied that it released the defendant from its obligation to pay the full purchase price and maintained that the appellant is liable for the balance of the purchase price.

On 23 July 2008, the appellant filed an amended plea in terms of which it made a number of pertinent amendments.

First, that the appellant denied that the agreement of sale in respect of the buses was entered into between it and the respondent. It claimed that the agreement of sale was entered into by and between it and Scania South Africa (Pty) Limited (“Scania”), a South African company which in terms of a distributorship agreement nominated the respondent as its local agent. It averred that while it admitted that the respondent was involved in the negotiations for the purchase of the buses, the final agreement was entered into with the respondent’s principal, being Scania.

Second, that the appellant acknowledged the purchase price to be the sum of US\$4 877 000.00 but being for 48 and not 50 buses as averred by the respondent in its declaration.

Third, that the appellant averred that the sum of ZW\$6 200 000 000.00 deposited with the Metropolitan Bank of Zimbabwe was meant to be cash cover to which the

respondent had access in terms of an agreement involving the Metropolitan Bank of Zimbabwe, the appellant itself as well as the respondent as agent for Scania. It averred that the agreement allowed the respondent access to the said amount for the purposes of sourcing foreign currency to pay to the seller, Scania.

Fourth, that both the appellant and the Government of Zimbabwe made payments to Scania and that the balance of the debt the subject of the respondent's claim was assumed by the Government of Zimbabwe. Accordingly, if no payment was made, the respondent should look to the Government of Zimbabwe for such payment. It further averred that at any rate, the agreement between the respondent's principal, Scania and the Government of Zimbabwe provided that the last payment made in the sum of US\$2 900 000.00 was in full and final settlement of Scania's claims against the appellant.

Fifth, that it did not withdraw or cause the withdrawal of the cash cover. It averred that if it was found that it did so, then such withdrawal was made after the assumption of the debt by the Government of Zimbabwe whereby it was released from payment of the debt.

Note is taken at this stage that the authorities establish that the amendment of a pleading procedurally operates retroactively, that is from the time the pleading was originally issued. See *The Civil Practice of the High Courts and the Supreme Court of Appeal of South Africa*, Herbstein and Van Winsen, 5th ed. at p 694.

In its replication to the appellant's amended plea, the respondent denied the contents of the appellant's amended plea. It averred and maintained that the agreement of sale was between it and the appellant although it was known that the supplier of the buses would be Scania in terms of the underlying Distributorship agreement between it and Scania. It further

averred that in terms of that agreement it was to assume ownership and risk of buses and in turn sell them to third parties like the defendant in its own name. The liability to pay Scania thus remained with it, while the appellant remained liable to pay it the agreed purchase price.

The appellant also averred that the interventions which were made by Scania did not novate the original agreement between the parties and were merely meant to facilitate exchange control approvals in order to expedite payment. It denied that the debt was assumed by the Government of Zimbabwe or that it released the appellant from the obligation to pay the full purchase price. It maintained that it was the seller in its own right and therefore entitled to claim the balance of the purchase price from the appellant.

The issues that were referred to trial at the pre-trial conference were:

- (a) Whether or not the agreement of sale was between the plaintiff and the defendant.
- (b) Whether or not the defendant was released by the plaintiff from liability to pay the balance of the purchase price.
- (c) In the result, whether or not the defendant is indebted to the plaintiff in the sum of US\$763 068.00.

It is common cause that the appellant purchased the buses. The dispute relates to who the buses were purchased from. The value of the transaction and the balance owing are not in dispute, but the appellant alleges that part of the purchase price was compromised by Scania. The court *a quo* was faced however, with two contrasting explanations regarding the same transaction.

The court *a quo* found that the agreement was between the appellant and the respondent. It found, as a necessary corollary, that the respondent never released the appellant

from its liability to pay the purchase price in full. The court *a quo* therefore found in favour of the respondent as stated earlier herein.

GROUND OF APPEAL

The appellant has appealed to this court on four grounds. The first ground of appeal is that the court *a quo* fundamentally erred in finding that the respondent was the seller of the buses in issue and was therefore entitled to sue the appellant for the balance of the purchase price in terms of the agreement of sale.

The second ground of appeal is that the court *a quo* fundamentally erred in finding that the compromise agreement entered into between the Government of Zimbabwe and Scania South Africa (Pty) Ltd on 23 April 2004 did not have the effect of releasing the appellant from the obligation to pay the balance of the purchase price.

The third ground is that the court *a quo* fundamentally misdirected itself in failing to find that the withdrawal of the cash cover was not in breach of any agreement since it was done pursuant to the agreement of compromise of 23 April 2004 entered into between the representatives of the parties thereto.

The fourth ground of appeal is that the court *a quo* further erred in a material way in finding that the respondent's evidence was credible and was consistent with the documentary evidence produced when in fact such evidence contradicted the exhibits produced or was deficient in the following material ways:

- (a) The agreement of sale itself was never clearly identified

- (b) The respondent's witnesses did not produce the order alleged to have been placed by the appellant with the respondent and the invoice alleged to have been issued by the respondent to the appellant.
- (c) All documents referred to Scania South Africa (Pty) Ltd as the seller opposed to the respondent.
- (d) The respondent's witness Hamish Bryant Wilburn Rudland relied on the cash cover agreements as the agreements of sale. This also contradicted the respondent's pleadings.
- (e) All payments were made to Scania South Africa (Pty) Ltd and not to the respondent.

The appellant contended that the court *a quo* further erred in dismissing the application made by the appellant for absolution from the instance.

THE EVIDENCE ADDUCED BEFORE THE COURT A QUO

(a) Documentary Evidence

The court *a quo* admitted the following documents into evidence.

Exhibit 1 is a "Distributor Agreement" dated 31 July 2001 between the respondent and Scania. In the agreement, the respondent was appointed the sole distributor of Scania's products in Zimbabwe. The respondent would purchase the said products in its own name and sell them in Zimbabwe. The agreement also provided that Scania shall have the right to trade directly with clients and organisations in Zimbabwe. In that event, Scania also undertook to "inform and reserve justifiable compensation" to the respondent.

Exhibit 6 is a Memorandum of a tripartite Agreement by the respondent, the Metropolitan Bank of Zimbabwe and the appellant. The agreement is dated 21 January 2003.

It records that the Metropolitan Bank provided a total sum of ZW\$4 750 000 000.00 to be held by the respondent as a guarantee for the due and faithful performance by the appellant of all its obligations in respect of the purchase of 32 Scania buses during the course of December 2002 from Scania.

The Memorandum of Agreement further states that Scania, through the respondent, and the appellant had entered into an agreement of sale whereby the appellant had bought and taken delivery of the buses specified in Annexure “A” from the respondent for the total price of US\$3 212 000.00. It further states that the Metropolitan Bank, as financier for the appellant, had paid, on behalf of the appellant, the sum of ZW\$4 750 000 000.00 to the respondent, which sum was to be held by the respondent as security for the full payment of the United States dollar price of the buses. A further balance of ZW\$50 million would be paid to the respondent from Metropolitan Bank.

The agreement also states that the payment of the purchase price was to be made by the appellant to Scania, subject to the necessary foreign currency being made available by the Reserve Bank of Zimbabwe. Furthermore, the respondent had the right to liquidate all and any such funds held by it in terms of the agreement to satisfy in full and final settlement the full cost of the buses or any other indebtedness, loss or damage suffered by it as a result of the failure by the appellant to pay US\$3 212 000.00 to Scania by 30 September 2003.

Another pertinent clause of the Agreement is that in the event of the appellant effecting payment of all amounts due, the respondent undertook to pay to the Metropolitan Bank all the money held as security in terms of the agreement or any balance thereof.

Exhibit 5 is a Memorandum of Agreement entered into by and between the respondent and the appellant. It is dated 30 May 2003 and states in the preamble that Scania had, as of 30 May 2003, provided the appellant with 18 more Scania Torino buses for use in its fleet. Clause (a) states:

“PMC (through Scania S.A.) and ZUPCO hereby have entered into an agreement of sale in terms of which ZUPCO has agreed to buy and pending payment taken delivery of the buses specified in the first annexure.

ZUPCO has paid Z\$2 700 000 000.00 to PMC (respondent) which sum is to be held by PMC as security cash cover for the full payment of US\$1 665 000.00 for the buses is made to Scania S.A. in terms of this agreement.” (sic)

Clause (b) thereof provides that payment of the purchase price was to be made by the appellant to Scania in full on or before August 30, 2003. Clause 2 of the agreement makes reference to the appellant’s obligations to Scania. Clause 3 then states:

“In the event of ZUPCO effecting payment of all the amounts in foreign currency and due above to Scania SA, PMC undertakes to pay to ZUPCO all the money held as security hereof or any balance thereof free of any interest.”

Exhibit 2 is a Duty Free Certificate issued by the Ministry of Local Government, Public Works and National Housing. It is dated 7 January 2003 and states:

“Approval is hereby granted to Zimbabwe United Passenger Company (ZUPCO) through its agent Pioneer Motor Company (PMC) to import 150 Scania buses from Scania South Africa, duty free. Any duties payable would be borne by the Government of Zimbabwe.”

Exhibit 3 is a letter dated 23 October 2003 from the State Procurement Board to the appellant’s Chief Executive Officer in which reference is made to 48 buses delivered by the respondent to the appellant.

Exhibit 4 is an agreement dated 23 April 2004 between Scania and the Reserve Bank of Zimbabwe. The preamble is couched in the following terms:

“Whereas Scania (SA) (Pty) Ltd sold 48 buses to Zimbabwe United Passenger Company (ZUPCO)

And whereas an amount of US\$3 663 068.00 is due by ZUPCO to Scania”

It proceeds to state, *inter alia*, that Scania will accept the amount of US\$2 900 000.00 in full and final settlement of the outstanding amount due by ZUPCO to Scania. There is no mention made of the respondent in this agreement.

(b) Oral Evidence

The respondent’s first witness was its Chief Executive Officer, one Mr Rudland. The essence of his evidence was to the effect, amongst other things, that the cash cover agreements, exhibits 5 and 6 were the agreements of the sale of the buses, between the respondent and the appellant. However, his testimony was permeated by uncertainty as to the details of the transactions. He contradicted himself in a material respect. At one point he said that the buses were only delivered after the cash cover agreements, which he claimed were the agreements of sale, were signed. During re-examination he changed and said that the two cash cover agreements were signed after the delivery of the buses.

The respondent’s second witness was Scania’s attorney, a certain Mr de Bruin. This witness conceded that he gave contradicting evidence. Amongst other things, he spoke of a tender document which he said evidenced the awarding of a tender to the respondent to supply buses to the appellant. This document was not discovered or produced or adverted to anywhere else. He also spoke of an acknowledgment of debt allegedly signed by the respondent in Scania’s favour, supposedly showing that the sale of the buses was between the respondent and the appellant. This document was also not placed before the court.

Mr de Bruin also failed to reconcile his evidence that the agreement of sale was between the appellant and the respondent with conflicting documentary evidence showing that

the agreement was between the appellant and Scania. The first is exhibit 6 which was signed for on behalf of the respondent by Mr Rudland and it states that Scania sold the buses to the appellant. The second is the letter of 3 February 2004 to the Governor of the Reserve Bank of Zimbabwe, authored by Mr Henriksson, the executive board member of Scania, and it also stated that Scania sold the buses to the appellant.

Neither of the respondent's two witnesses was able to explain away material clauses in the cash cover agreement that directly identify Scania and the appellant as the contracting parties to the sale of the buses.

IS THE COURT A QUO'S FINDING THAT THE AGREEMENT FOR THE SALE OF THE BUSES WAS BETWEEN THE RESPONDENT AND THE APPELLANT BORNE OUT BY THE EVIDENCE?

As the parties presented two conflicting or incompatible explanations for the same transaction, it was incumbent upon the respondent to prove the agreement on which it based its claim. The respondent's claim was based on an alleged agreement of sale of buses that it claimed it entered into with the appellant. The appellant on the other hand argued that the agreement for the sale of the said buses was entered into by and between it and Scania, and not the respondent.

The cardinal rule on *onus* is that a person who claims something from another in a Court of law has to satisfy the Court that he is entitled to it. See *Pillay v Krishna*, 1946 AD 946 at 952 – 953. It also settled that he who alleges must prove. See *MB Investments (Pvt) Ltd v Oliver & Partners*, 1974 (3) SA 269 (RA).

The respondent's witness' evidence that the cash cover agreements are in fact the agreements of sale for the buses is not supported by the evidence and does not bear scrutiny. If the buses were delivered before the cash cover agreements were respectively signed, then

the cash cover agreements cannot be the agreements for the sale of the buses. It follows therefore that the cash cover agreements cannot be the basis of the respondent's claim against the appellant. Rudland's evidence that the respondent started delivering the buses after the signing of the agreements runs contrary to the categorical statement in the tripartite agreement, exhibit 6, to the effect that the appellant purchased the buses from Scania in December 2002. The witness purported to explain this discrepancy away by saying it was an "administrative issue." It is clear that the cash cover agreements were not the agreements of sale.

The Duty Free Certificate also helps to shed some light on the issue. It relates to the importation of buses from Scania in South Africa by the appellant "through its agent", the respondent. The question that immediately arises is why the respondent did not import the buses on its own and then sell them to the appellant in terms of the distributorship agreement if it was the seller. The question remains unanswered on the evidence adduced before the court *a quo*. Rather, the description of the appellant as the importer creates or leads to the inescapable conclusion that the appellant purchased the buses from a company beyond the borders. The appellant could not have imported the buses if it was buying them from the respondent.

It is also evident from the evidence adduced before the court *a quo* that the appellant at some point liaised directly with Scania on issues relating to payment. Scania's Executive Board Member, one Henrik Henrikson, in a letter dated 3 February 2004, wrote to the Governor of the Reserve Bank of Zimbabwe stating amongst other things that the appellant was indebted to Scania. Part of the letter reads:

"We address this letter to you in regard to the amount of US\$3 672 068.00 due and owing by the Zimbabwe United Passenger Company Ltd ("ZUPCO") to this company. We would like to record the following:

'1. During 2002, an agreement was entered into in terms whereof this company agreed to supply a fleet of new buses to ZUPCO. We were informed that

ZUPCO is a corporation owned by the Government of Zimbabwe and is responsible for public transport.

2. It was agreed with officials of ZUPCO that payment of the purchase price of the buses would be effected in US dollars to be paid by ZUPCO to this company.””

There is no mention of the respondent at all in the letter. It is clear that for all intents and purposes Scania considered itself as the seller of the buses. There would otherwise have been no direct dealings with the appellant in view of the distributorship agreement in terms of which the respondent could secure buses from Scania and thereafter sell them at a mark-up in Zimbabwe in its own name. Thus Scania would have dealt with the respondent and the respondent would in turn have dealt with the appellant.

In the letter from Scania’s executive board member referred to above, the author clearly sets out when the sale of the buses took place and how it was done. He states that the initial 32 buses were delivered in January 2003 and the last 18 were delivered in May 2003. This differs with the evidence of Rudland who was at pains to explain when the actual agreement for the purchase of the buses took place, in vain.

On the one hand Rudland said that the cash cover agreements were meant to secure the due performance of the appellant’s indebtedness to Scania. On the other hand, he changed and said that the cash cover agreements were in fact the agreements of sale. I note that the respondent’s declaration does not detail the sequence of events as clearly as does the author of the letter from Scania. Such failure on the respondent’s part tends to dent the credibility or probability of its version being true. This is particularly so when such failure is viewed in the light of its claim that the appellant’s failure to honour its obligations to it could drive it into liquidation. Put differently, in light of such perceived magnitude and importance of the

transaction, the respondent's witness' failure to give adequate detail further tilts the scale of probabilities against it. It does not lend support to its claim.

The court *a quo* found in part:

“It seems to me that both of the plaintiff's witnesses gave truthful evidence. Their evidence in court is supported and corroborated by the documentary evidence produced by the plaintiff. It is clear to me that the agreement for the sale of the buses was between the plaintiff and the defendant. The facts show that when the defendant and the plaintiff entered into an agreement of sale, a separate cash cover agreement was executed to guarantee due and faithful performance of the defendant's obligations. When the defendant failed to perform, the governor of the Reserve Bank intervened and negotiated directly with the supplier for a settlement of the sums due to the supplier and implicitly the manufacturer of the buses. This sum did not include the mark-up to which the plaintiff was entitled both in terms of its business practice, the distributorship agreement as well as the agreement between it and the defendant.”

The court *a quo*'s finding that there was an agreement of sale as well as separate cash cover agreements is contrary to the evidence of Rudland who said that the agreement of sale was the same as the cash cover agreements.

It is settled that an appellate court will not readily interfere with findings of fact made by a lower court. In *Beckford v Beckford* 2009 (1) ZLR 271 (S) the following was stated:

“It is significant that these findings were not challenged on appeal. In any event, an appellate court would not readily interfere with findings of fact made by a trial Judge ...”

The law is also settled that such findings can be interfered with where the conclusions reached by a court are contrary to the evidence before the court. This was enunciated in *TM Supermarkets v Mangwiro* 2004 (1) ZLR 186 (S) where the following was stated:

“I am also persuaded by the contention that the court *a quo* in this particular respect misinterpreted the evidence placed before it. This Court has held, in *Reserve Bank of Zimbabwe v Corrine Granger supra* that such a circumstance amounts to a misdirection in law. At p6 of that judgment, MUCHECHETERE JA stated as follows: ‘And a misdirection of fact is either a failure to appreciate a fact at all or a finding of fact that is contrary to the evidence actually presented.’

This authority, I find, is apposite in *casu*. The court *a quo* took the view that the responsibility in question entailed simply checking the resets and not recording the reset numbers. The evidence makes it clear this was not so. The misdirection of the court is thus evident,”

In *casu*, the evidence placed before the court *a quo* suggests that the cash cover agreements are not the agreements of sale. The evidence supports the conclusion that the transaction of the sale of the buses was between the appellant and Scania with the respondent only coming into the picture at Scania’s instance, and only for the purpose of safeguarding the due performance of the agreement between the appellant and Scania. As the cash cover agreements are certainly not the agreement of sale of the buses, I conclude that the respondent did not proffer any evidence which substantiates its claim that it transacted with the appellant in respect of the purchase of the buses. It thus did not prove that which it had alleged.

The lack of clarity of the respondent’s claim and the lack of particulars of the transaction in its declaration when juxtaposed with the clarity of the details of the transaction as stated by Scania’s executive board member clearly show that the probabilities do not favour the respondent’s version. The documentary as well as the oral evidence before the court *a quo* point more towards the conclusion that the agreement for the sale of the buses was concluded between the appellant and Scania.

Further credence is lent to this probability by the fact that the documentary evidence placed before the court *a quo* suggests that the appellant’s obligation to pay the purchase price for the buses was to Scania. Furthermore, that the Zimbabwe dollar amounts were held by the respondent so as to ensure the execution of the appellant’s obligations towards Scania. The cash cover agreements record that the Zimbabwe dollar amounts were to be

released upon the appellant's fulfilment of its obligations to Scania. The appellant's version is thus further shown to be the more likely of the two.

Additionally, the respondent's second witness having testified to some material inaccuracies and to the falsity of some of the details recorded in the cash cover agreements, it follows that the cash cover agreements cannot be relied on by the respondent as the basis to establish its version of the transaction. When confronted with the clear contents of the letter authored by the Executive Board member of Scania, this witness persisted in denying that the letter spoke to an agreement between Scania and the appellant. He responded:

“It does not say that there is agreement between Scania and ZUPCO, it says it says it (would) supply buses to ZUPCO.”

The witness thus sought to portray that “supply” and “sale” are different things in the context of the dispute between the parties. The fallacy of this approach can be and is demonstrated by the fact that such a stance would mean that the respondent had no cause of action before the court *a quo* because its declaration speaks to the “supply” and not “sale” of Scania buses to the appellant.

The totality of the evidence adduced before the court *a quo* establishes the following. First, the respondent's first witness was unsure about the important details of the transaction. Second, the respondent's version does not accord with the documentary evidence adduced before the court *a quo*. Third, the respondent's witnesses failed to explain material clauses in the cash cover agreements that directly identified the appellant and Scania as the respective parties to the sale of the buses. Fourth, the respondent did not discover the documents which could have clarified or established its position or version. Fifth, the respondent's second witness said that some of the information in the cash cover agreements is

erroneous. Finally, the respondent did not lead evidence from Scania to clarify issues and disprove the appellant's defence as alleged in its plea.

The *caveat subscriptor* rule sets out that a party is taken to be bound by the ordinary meaning and effect of the words which appear above its signature, for the other party is entitled to assume that he has signified his assent to the contents of the document. See *Mdlongwa v Thembekile Mdlongwa* SC98/05, *Wille's Principles of South African Law* 8th ed at p 426, *Glenburn Hotels (Pvt) Ltd v England* 1972 (2) SA 660 (RAD), *Du Toit v Atkinson's Motors BPK* 1985 (2) SA 893 and *The Principles of the Law of Contract*, *AJ Kerr* 4th ed at pp 86–90. The cash cover agreements signed between the appellant and the respondent point to a substantive relationship between the appellant and Scania, the respondent's relevance only being that of securing the due and faithful performance of the appellant's obligation to pay for the buses to Scania.

There is no explanation given as to why the respondent did not call Mr Henrikson, the Executive Board member of Scania, to clarify the context of his interactions with the appellant and with the Governor of the Reserve Bank of Zimbabwe. Without such an explanation the respondent cannot disprove the appellant's version of events. This is so because from the moment that the appellant amended its plea, it became apparent that the nature of the relations between the appellant and Scania would be in issue. Thus the decision by the respondent not to call Mr Henrikson is fatal to its case.

A plaintiff who relies on a contract bears the *onus* of establishing that it is binding and enforceable and that what he claims is due. In this regard, see *Tuckers Land and Development Corporation (Pty) Ltd v Loots* 1981 (4) SA 260 (T) at 264C-D. Furthermore, the

standard of proof in civil matters is on a balance of probabilities. See *Miller v Minister of Pensions* [1947] 2 All ER 372-374 where the rule was formulated as follows:

“It must carry a reasonable degree of probability but not as high as is required in a criminal case. If the evidence is such that the tribunal can say ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal, it is not,”

In *West Rand Estates Ltd v New Zealand Insurances Co Ltd* 1925 AD 245 at 263 the following was stated:

“It is not mere conjecture or slight probability that will suffice, the probability must be of sufficient force to raise a reasonable presumption in favour of the party who relies on it. It must be of sufficient weight to throw the *onus* on the other side to rebut it.”

On a proper analysis of the evidence adduced before the court *a quo* the respondent did not meet the requirements set out by the authorities. Its case is not compelling. The court *a quo* placed emphasis on the credibility of the respondent’s witnesses but in reality their version does not tally with the evidence on record at all. The finding by the court *a quo* that the agreement of sale was between the appellant and the respondent is thus not supported by the evidence placed before that court.

DISPOSITION

The respondent did not prove that the transaction of the sale of the buses was between it and the appellant. Consequently, the question of whether or not Scania compromised the balance owing does not arise. The appeal has merit and must succeed. Costs will follow the event.

In the result it is ordered as follows:

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

“The Plaintiff’s claim is dismissed with costs”

GARWE JA: I agree

GOWORA JA: I agree

Magwaliba & Kwirira, appellant’s legal practitioners

Kantor & Immerman, respondent’s legal practitioners