MTOMBENI REGINALD
versus
TAPFUMANEYI MUPFURAREHWE

HIGH COURT OF ZIMBABWE
GOWORA J
HARARE, 3 December 2009

J Zuze, for the applicant
J Koto, for the first respondent
The second and third respondents in default

GOWORA J: The first respondent is the registered owner of a motor vehicle Isuzu KB 250, registration number 524 884 G. The applicant prays for an order that the vehicle be released to him on the basis of an agreement of sale he alleges was concluded in respect of the vehicle on 29 August 2008. The background to the dispute is as follows:

On 29 August 2008, the applicant visited the second respondent's showroom and observed an Isuzu KB 250 on display It was apparently on sale. Since he liked the vehicle he made enquiries regarding the purchase price and othe conditions attaching to the agreement. The applicant avers that he dealt with Harris Kufunga and Shadreck Dzapasi. The applicant avers in the founding affidavit that they are directors of the second respondent. The price was agreed and settled at $112 000-00 which had to be paid by RTGS. The applicant avers further that he was informed by Kufunga that he would have the registration book and the number plates once payment had been effected. An agreement of sale was then concluded The applicant then paid the purchase price and subsequently took delivery of the vehicle.

On 14 November 2008 police officers from the vehicle theft section attended on him and advised him that the vehicle had been reported stolen. He surrendered the vehicle to the police. Thereafter, attempts to follow up the vehicle with the police raised his suspicions as the vehicle was not parked at the police station as would be expected. It was subsequently returned to the police station after the intervention of his legal practitioners. He avers that he is a *bona fide* purchaser and should not be inconvenienced by a dispute between the first and second respondents.

I find that the vehicle was indeed displayed in the second respondent's showroom. The circumstances under which the vehicle came to be displayed in the showroom, viewed from

the explanation by the first respondent raises question marks. The first respondent's explanation is that one Dzapasi had come to his residence on the evening of 29 August 2008 and had begged that the first respondent give him his vehicle as he had a client who required an Isuzu. The first respondent avers that he had been reluctant initially to surrender the vehicle to him, firstly because of the manner in which Dzapasi's uncle Shadreck and Harris had treated him in the past. He did not elaborate on what this treatment related to. Secondly he averred that he had pointed out to Dzapasi that it was night time and it would have been proper if the transaction were conducted during the day. He states that had had relented when Dzapasi gave him an assurance that the client seeking the vehicle was Dzapasi's and further that the second respondent was not going to play a part in the sale. The first respondent had been assured by Dzapasi that if the client was satisfied with the vehicle, then the former would arrange for a meeting to discuss the purchase price. He had therefore retained the registration book and number plates on the understanding that the purchase price and payment arrangements would be negotiated by himself. They had not agreed on a purchase price with Dzapasi.

The first respondent denied that he had authorized Harris or Shadreck to sell his vehicle. He further denied that Dzapasi had authority to sell the vehicle. He stated that if he had authorized the second respondent to sell the vehicle, he would have been given a mandate form to sign signifying the agreement between himself and the company for the disposal of the vehicle. This is the procedure they had adopted when they sold a Toyota Hilux on his behalf. He stated that the second respondent had defrauded him in respect of the sale of the Hilux and he would not have been so naïve as to take another vehicle to the second respondent to sell on his behalf.

Whilst he does not dispute the contention by the applicant that he may have seen the vehicle in the second respondent's showroom he, the first respondent, contends that if the applicant saw the vehicle on 29 August 2009 it must have been after 20:30 hours when he gave the vehicle to Dzapasi. The first respondent states that the vehicle must have been given to the applicant that night because when he visited the second respondent's showroom the following day, the vehicle was not there. He was not unduly worried by its absence because Dzapasi had told him that he would not involve the second respondent or its directors in the deal. He subsequently met Dzapasi and asked about the whereabouts of the vehicle, which is/when

Dzapasi asked if Harris or Shadreck had not phoned him. That is when he heard about the alleged sale.

He reported the matter to the police and as a result charges of theft of motor vehicle were preferred against Harris and Shadreck on 14 November 2008. They persuaded him to drop the charges. When the applicant refused to surrender the vehicle, he then made a report at the vehicle theft in Southerton. He said he used to see the applicant at the showroom when he was following up the issue of his vehicle, but the latter never let on that he had purchased the vehicle until the first respondent had caused the arrest of Harris and Shadreck and it then came to light that the applicant was the purported buyer of the vehicle.

The first respondent denies having sold the vehicle or authorized its sale. The applicant has not filed an answering affidavit.

The first issue that falls for determination is whether or not the first respondent authorized the second respondent to sell the vehicle on his behalf.

Earlier I commented that the explanation by the first respondent as to how the vehicle was displayed raised eyebrows. I am fortified in this belief by the contents of a letter attached to the opposing affidavit. The letter was written by the legal practitioners of the first respondent and is dated 29 August 2008 and demand is made for payment in respect of a Toyota Hilux allegedly sold by the second respondent on behalf of the first respondent as far back as May 2008. It is too much of a coincidence that the letter is written on the same day that the applicant alleges he obtained possession of the vehicle. However, he who avers must prove. The applicant has not filed an answering affidavit and the averments in the opposing affidavit, no matter how ridiculous they appear have not been denied by the applicant. They are therefore taken as having been accepted as the truth of the events which transpired between the applicant and the persons who allegedly sold him the vehicle.

The first respondent in opposing the application questioned the lack of a purchase price on the agreement of sale. The authority quoted by the applicant cannot be faulted in terms of the principle as regards the price of an item being sold. What we have here however is that the applicant has cited the first respondent and sought an order for specific performance against the first respondent when he is not alleging an agreement of sale between himself and the first respondent. He is bringing this action as the owner of the vehicle when he did not get a transfer of the rights qua owner form any of the parties he allegedly dealt. Although the first respondent has produced a registration book which shows that the vehicle is registered in the

name of the first respondent the applicant has decided to ignore this factor. It needed an explanation as the applicant does not state that he purchased the vehicle from the first respondent.

The applicant has omitted to cite the persons he purchased the vehicle from as parties to this action. He has instead cited the first respondent and yet he never at any stage dealt with him. He seeks that the agreement of sale of 29 August 2009 be declared valid but has failed to cite the alleged parties to the sale in this application. The agreement is on the letter head of Leo Chris Auto but the seller in the agreement is described as G R Chikoto. Chikoto is not the owner nor has he been cited. In citing the applicant he is therefore no suited as is clearly shown in his affidavit. He never dealt with the first respondent as regards the sale of the vehicle.

In the heads of argument filed on behalf of the applicant it is alleged for the first time that the second respondent was acting as an agent for the first respondent. It is argued in the heads of argument that he entered into the agreement 'on the basis of agency'. I have not been educated on the precise meaning of that cryptic phrase. I assume however that it is meant to convey that the second respondent was the first respondent's agent in the sale of the vehicle. If that was the basis of the claim by the applicant it should have been pleaded from the outset and been averred in the founding affidavit. It is trite that an applicant must make his case in the founding affidavit and not in subsequent pleadings. This averment is not even in an affidavit but in heads of argument. Whether or not the second respondent acted as an agent of the first respondent would be a factual issue which can then be subjected to scrutiny in accordance with established principles. In the instant case no factual basis was laid to allege that there was in existence an agency relationship between the first and second respondents. Thus the contract that the applicant argues that he entered into with the first respondent through the agency of the second respondent has not been established. If the applicant's case had been that he had entered into an agreement with the first respondent, my view is that in the draft order he would have sought a declaration as to the validity and enforceability of the alleged agreement. Instead in the draft order he seeks an order declaring him to be the owner of the vehicle. The allegations of agency contained in the heads of argument appear to be an after thought when it must have dawned on the applicant and his legal practitioners that the only basis upon which an agreement could be alleged against the first respondent was through agency. I am unable to find that there ever was a contract between the applicant and the first respondent.

I turn next to the payment of the purchase price. According to the applicant the price had been agreed at $112 000-00 which had to be paid through a Real Time Gross Settlement system. The applicant averred that he had paid the money on 29 August 2008 and has attached what he states is proof of such payment. An examination of the document in question shows that it is not an extract from a bank. It appears to be a computer generated entry from a company called Laryscope Healt. It bears a date at the top of either 6 November 2008 or 11 June 2008. In addition the payment allegedly made to the second respondent was according to the corresponding entry being referred to by the applicant paid to Broadstars. This is not payment to the second respondent and if it was the applicant has not seen fit to explain how the payment effected to a different entity meant that it was payment to the second respondent. The reality therefore is that even if the applicant was given the benefit of doubt with regards the agreement of sale, he has failed to prove that he paid the purchase price in respect of the alleged sale.

Without alleging and proving an agreement of sale between himself and the first respondent the applicant cannot have any basis for claiming the relief that he seeks from this court. The first respondent cannot be made to surrender the registration book, number plates and spare keys to the vehicle unless the applicant has averred and proved a contract between himself and the first respondent in terms of which the latter would have those obligations. No contract has been alleged or proved on the papers before me and in my view the applicant is non suited.

In the result I find that there is no merit in the application and I therefore dismiss it with costs.

Mtombeni, Mukwesha, Muzawazi & Associates, applicant's legal practitioners
Thondhlanga & Associates, first respondent's legal practitioners