STEPHEN CHIKAMHI
versus
BARNABAS KAMANGIRA

HIGH COURT OF ZIMBABWE
UCHENA, MWAYERAJJ
HARARE, 12 February 2014, 11 March 2015

Civil Appeal

K. Gama, for the appellant
Mrs CC Kanengoni, for the respondents

MWAYERAJ: The appeal was occasioned by the appellant who did not agree with the whole judgment of the court *a quo* which was issued in favour of the respondent. In the court *a quo* the plaintiff (respondent) who had transacted with the defendant (appellant) over sale of a motor vehicle sued for specific performance for the outstanding balance and the trial court acceded to the claim.

The brief background of the matter being that the parties entered into a sale agreement wherein the appellant was to purchase an Isuzu truck for $7 300. The appellant paid US$5 100 leaving a balance of $2 200. The appellant counter claimed to the claim for specific performance raising concern that the vehicle was defective and as such the respondent had to refund the deposit. The court *a quo* ruled in favour of the respondent as it dismissed the appellant's claim in reconvention and upheld the respondent's claim for payment of the balance and interest. Irked by the court *a quo's* decision the appellant lodged the present appeal on the following grounds of appeal:

1. The court erred when it concluded that the respondent did not misrepresent on the condition of the motor vehicle when it was clear that this was so. The respondent clearly did not disclose the material fact that the motor vehicle had an engine overhaul prior to the agreement of sale.

2. The court erred when it fully ignored the undisputed fact that the parties had mutually agreed to terminate the agreement between them. The termination was not completed solely because the respondent was not able to pay restitution in full.
3. The court erred when it failed to realise the fact that the appellant's staying with the motor vehicle for a long time was not of his making.

It was in fact the respondent who was failing to make restitution. It is therefore clear that the appellant could not just give the respondent his car without him giving back the US $5 100 paid to him by the appellant.

The thrust of the appellant's argument was that the vehicle in question had a latent detect warranting redibition or cancellation of the contract. According to the appellant the respondent had failed to disclose a latent defect thus leading the appellant to purchase a defective vehicle. The defect ought to have been disclosed by the respondent who was aware the vehicle had had an incomplete engine over haul because liners were not replaced.

Further the appellant argued that the non-disclosure or misrepresentation led the appellant to purchase the motor vehicle in question which developed serious problems at Zimunya Township Mutare just 6 days after purchase. The vehicle lost compression and could not pull such that it had to be towed back to Mutare. The appellant argued that the court a quo misdirected itself when it relied on that the parties had entered into an agreement yet the real issue was whether or not there was a misrepresentation leading to the sale of a vehicle with latent defects thus creating a situation for redhibition.

The respondent on the other hand presented argument that the respondent disclosed the nature of vehicle he was selling a second hand Isuzu truck. Further, the respondent argued appellant inspected the vehicle and took if for test drive. On p 43 of the record the appellant in his evidence confirmed taking the vehicle for test drive with his mechanic. He said at the test drive "my mechanic stopped the car and indicated there was an unfamiliar sound coming from the engine". It was on that same day that appellant paid a deposit of $4 700-00 and proceeded to Masvingo. Upon his return he paid another $400-00 to top up to $5 100-00. The mechanic according to the appellant was still worried about the sound coming from the engine.

The appellant's mechanic Edward Kwaramba on p 53 of the record stated he further

inspected the truck to see if it was worth buying or not. He said in the second paragraph of evidence in chief stated

> "Defendant returned after 3 – 4 days with my truck. I advised him on the engine performance, to me the engine performance was not up to date. I advised the defendant not to buy the vehicle as the symptoms I saw were consistent with an engine which would need attention".

The appellant despite advice by his own mechanic not to buy the vehicle in question went ahead and purchased the vehicle. He feared that since he was going to a funeral he would end up using the money. As far as the respondent is concerned the appellant acquiesced to the state of the vehicle and purchased. The fact that the vehicle lost compression during test drive was common cause and would not entail a latent but patent defect. The fact that the vehicle was partially over hauled a year before sale would not change the completion of the matter at the time of sale. The engine overhaul does not necessarily mean existence of a latent defect. The general understanding of engine overhaul would entail service of the engine and not hiding defects. It is with these divergent views that we wish to look and analyse the grounds of appeal in relation to the law. For misrepresentation to be a ground for cancellation of a contract. (1) The misrepresentation ought to be material, secondly the misrepresentation ought to have been intended to induce the other part into entering the contract and thirdly the misrepresentation ought to have induced the other part entering into the contract. From the record of proceeding it is apparent the parties freely transacted with the seller offering his second hand vehicle for sale and the buyer appellant accepting to buy the vehicle. The circumstances of sale were such that the buyer had opportunity to test the vehicle and make a decision. Quite apparent from the record, is the fact that the appellant was advised against buying the vehicle by his mechanic but proceeded to buy. Even when the vehicle lost compression the appellant bought the vehicle and kept it. Loss of compression and failure to pull on a vehicle denotes a serious engine problem. This was an apparent defect and common knowledge coupled with the specialist mechanic advice to appellant not to buy, but the appellant was persistent. He bought the vehicle appreciative of defects. There is no evidence of barring the appellant from inspecting the vehicle. The assertion of misrepresentation is just a bald assertion not substantiated. The requirements of a misrepresentation of a material nature having been used to induce appellant into entering contract

are not substantiated and not real.

The trial court made a finding at p 5 of its judgment that there was an agreement to cancel the contract. I must hasten to point out that such a finding is not supported by evidence on records. Excepts of exchange on p 32 – 33 refers.

Q. You received engine complaint after 2 weeks from sale.
A. Yes
Q. He told you immediately refund US$5 100 and take your car since you had not disclosed and you refused?
A. I told him I would deduct the use my car and that he had damaged car in accident.
Q. You wanted money for two weeks of use.
A. Yes
Q. You had said you had half amount of his money, how much did you have at that moment.
A. US$3 500-00
Q. And he said I will not give you your car until you give me the full amount.
A. He said so and I told him to leave the car.
Q. The position is that you were happy to get car back and you return his money.
A. Yes if car was returned in good condition and accident free.
Q. It was in good condition and it still is.
A. Car isn't in same condition I gave him in.
Q. Agreement failed because you wanted both car and balance from him.
A. We never came to that point, all I asked is why he would want his money back when car was damaged.

The above questions and answers clearly show there was a proposal to return the car and a discussion on payment for use of the car. The proposal and suggestions were never implemented. In fact it is clear from the record there was no meeting of minds on way forward and no meeting of minds on cancellation of the contract. Cancellation of contract just like entering into a contract consists of intention. From evidence on record the parties did not agree to cancel the contract. To

that extend therefore the finding by the trial court that the parties had agreed to cancel the contract is not supported by evidence and therefore cannot stand. The cancellation of contract must be clear and unequivocal. The case of *Zimbabwe Express service Pvt Ltd* v *Munetsi Ranch (Pvt) Ltd* 2009 (1) ZLR 326 is instructive. In circumstances of the case before the court *aquo* the contract remained uncancelled.

The finding of the court *a quo* interestingly was in favour of the respondent on basis of the sale agreement. Which agreement according to the evidence adduced remained intact as there was no repudiation.

The appellant's main trust of argument that the vehicle in question had a latent defect warranting redibition of contract has of necessity to be juxtaposed with the requirements of redibition and misrepresentation already discussed above. Indeed in circumstances were a case of redibition has been established a part so claiming is entitled to cancellation of the contract.
Requirements of *Actio Redibitoria* as alluded in Christie Business Law Zimbabwe 2nd Edition p 163 include:

> "1. That, th*e merx* had a defect at the time of sale regardless of knowledge of otherwise of the seller at the time of sale
> 2. The defect has to be so serious as to render the property unfit for the purpose for which it was sold and bought.
> 3. The buyer must restore the property to the seller".

In the circumstances of this case the first requirement is not an issue. Both the seller and buyer knew of the defect at the material time. It is evident from the record that the defect of the vehicle of not having compression and not pulling was obvious as observed during test drive thereby prompting the mechanic to advise against buying. Given the circumstances of the case the defect cannot be said to have been so serious as to make the vehicle unfit for the purpose for which it was bought given the appellant was appreciative of the nature of the defect on a second hand vehicle. The bottom line is the appellant accepted the vehicle in its state and did not seek to cancel the contract. The intention to cancel only came after the respondent had claimed his balance. Again there was no meeting of minds, on claim for balance, intention to return motor vehicle, refund and payment of balance. These issues remained open till the trial court made a finding in favour of the respondent that the outstanding balance be paid. Given the appellant had not returned the car and that he had full knowledge of the defects in the vehicle at the time of

entering into contract, the requirements of *actio redhibition* were not meet and remain unfulfilled. The appellant with knowledge of the fact that the truck he was buying had no compression and that ever after taking delivery and further testing the defect manifested itself at Zimunya still the appellant did not seek to *redhibit* on grounds of the engine defect. In the circumstance of his case the defect cannot be said to be latent for it manifested during test drive before the conclusion of contract and shortly after conclusion of contract the defect still manifested. The appellant that is the buyer did not restore the motor vehicle in question but kept it. It was only when the balanced was claimed that he claimed foul play and sought to *redhibit,* but still did not restore the vehicle. He aquienced and kept the motor vehicle and put forward an intention to claim for action *quanti minoris* for a reduction of the purchase price. Again this from the facts of his case did not materialise as the parties minds never met. The status quo of the appellant keeping the car prevailed till the respondent claimed payment of the balance. It is trite that a part who seeks to rely on *actio redhibitoria* must meet the requirements for him to succeed. He must restore the property to the seller as aptly illustrated in *Romla Products Ltd* v *Crick* 1973 (1) ZLR 225. In *casu* the appellant held onto the vehicle which was a second hand truck. It, obviously not being new had defects by reason of wear and tear. This ought to be expected. In this case upon running the vehicle and test driving with expert knowledge of the mechanic the vehicle evinced obvious engine defect even to an (ordinary purchaser). The engine was not pulling and had no compression but the appellant was willing to get it as it was. This was not because of a misrepresentation or hidden nature of defect. The defect was quite apparent. To this end again the appellant failed to meet the requirements of *acio redhibitoria.* The apparentness of the lack of compression of the engine does not qualify the defect of the vehicle in question as being latent and thus it does not qualify under *redhibitoria* defect. There is no basis to accord the appellant the remedy in circumstance were the requirements have not been met. The trial court in so far as it ruled that the appellant owed the respondent contractually did not misdirect itself.

We accordingly find no reason why we should interfere with the decision of the court *a quo* on ordering specific performance.

The appeal is accordingly dismissed with cost.

UCHENA J: agrees……

Gonese & Ndlovu, appellants legal practitioners
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