

HORNEST VIRIMAYI MUGADZA
versus
NADEEM ENTERPRISES (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
KAMOCHA J
BULAWAYO, 23 October and 16 November 2006

Opposed Application

Mr *J. Sibanda*, for the applicant
Mr *A. Sibanda*, for the respondent

KAMOCHA J: The applicant was seeking an order in the following terms.

“It is hereby ordered:-

- a) That it be and is hereby declared that the agreement of lease between the applicant and the respondent and also the schedule thereto dated 15 January 2003 is null and void and of no effect whatsoever as between the parties;
- b) That the agreement entered into by and between the parties was in fact one for the sale by the respondent to applicant of a Nissan Sunny motor vehicle registration number 789-394L and chassis number FB13-600973;
- c) That it be and is hereby declared that the applicant has effected full payment for such motor vehicle to respondent in terms of the agreement between the parties;
- d) That the respondent be and is hereby ordered to do everything within its power which it is lawfully expected to do to facilitate the registration of such motor vehicle into applicant’s name. In the event that the respondent fails to do so within 7 days of this order the applicant be and is hereby granted leave to take all such lawful steps as are necessary to have the motor vehicle registered in his name without the respondent (*sic*); and
- e) That the respondent pays the costs of this application.”

The facts giving rise to these proceedings were that applicant approached the respondent company with a view to buying a motor vehicle since he knew the respondent as a vehicle dealer. He identified a Nissan Sunny registration number 789-394L - “the motor vehicle”

and made inquiries about it. As he continued making enquiries about the vehicle he was informed about a scheme whereby he could purchase the vehicle on credit. Meaning that he could pay an initial deposit and the balance in monthly equal instalments. He was also told that the balance did not attract any interest. Since the vehicle was going to be sold on credit its price was revised upwards from \$5 000 000-00 to \$6 446 325-00.

In January 2003 applicant and respondent allegedly entered into a verbal agreement in respect of the vehicle. It was agreed that the applicant was going to pay a deposit of \$3 200 000-00 leaving a balance of \$3 246 325-00 to be paid in 36 monthly instalments of \$90 175-69. The respondent company was being represented by its managing director one Mr Kara who recorded in brief the essential terms of the alleged verbal agreement on a small piece of paper with the respondent's letter heads. The note was produced as annexure "A". It contains the vehicle chassis and registration numbers. It gives the price of \$6 446 325; Less deposit of \$3 200 000-00; balance \$3 246 329-00 (sic); 36 months at \$90 175-69. The note was not dated but it was addressed to the applicant as it bears his name.

The applicant asserted that during the course of the discussions with Kara he was assured by Kara that the scheme was similar to the scheme utilized by Scotfin and the Leasing Company of Zimbabwe in respect of the purchase of motor vehicles. The only difference being that this particular scheme did not include interest on the balance.

The applicant paid the deposit and collected the vehicle on the understanding that he had purchased it on credit and ownership of it would be passed to him after 36 months.

About 2 or 3 days latter Kara called the applicant to the respondent's offices in order to sign documents relating to their agreement. He went there and on arrival he was shown documents which did not reflect what they had agreed on. He pointed out to Kara that the contents of the documents did not reflect what they had agreed on. But Kara indicated to him that signing the documents was just a formality to cover himself from the tax man as he feared that

the taxman would demand that he pays the full tax when the applicant had not paid for the vehicle in full. He said the contract was going to cover him in the event that queries were raised by the tax department. He told the applicant not to worry about the contents of the contract documents. He in fact assured the applicant that the written contract was irrelevant in as far as their verbal agreement was concerned because the monthly instalment the applicant was going to pay was not the one written on the contract but the one in the verbal agreement.

The applicant fell for Kara's explanation and signed the written agreement. He even initialed each page of it. The written agreement was produced as annexure "B". The document is entitled "Agreement of Lease". Its schedule gives the details of the said motor vehicle and the rentals for the vehicle.

Its salient points are that it was executed on 15 January 2003. It reads in part -

"Total rental of \$6 446 325-00 including sales tax of \$840 825-00 payable as follows:-

First Rental of \$ Nil is due and payable upon signing this agreement, and further rentals of \$179 064-58 each are payable on the 30th day of each successive month commencing on the 28th day of February 2003 with the final rental due on 31st day of January 2006. Rentals are payable to the Lessor ..."

The applicant proceeded to make payments to the respondent in terms of the verbal agreement i.e. after paying the \$3 200 000-00 he paid \$90 000 per month or in multiples of \$90 000 until the final instalment. There is not even a single month when he paid the \$179 064-58 reflected in the written agreement and the respondent never complained that applicant had failed to pay the amount stipulated in the written agreement.

The applicant pointed out that although he had paid a large amount of \$3 200 000-00 as a deposit the written agreement does not reflect that payment. Yet in annexure "A" which records the verbal agreement that payment is reflected as a deposit. Applicant

contended that if the amount represented rentals it should have borne some resemblance to monthly instalments: For instance it should have represented 2 months or 6 months advance rentals. Further the bunch of receipts which was produced as annexure "C" indicates that the payments made were instalments. None of them reflects the payments as rentals. The respondent must surely know the difference between a payment for rentals and a payment as an instalment. The written lease agreement was signed after annexure "A" yet it states that "Nil is due and payable upon signing of this agreement" which is false because a deposit of \$3 200 000-00 had already been paid.

The applicant finally asserted that the parties at all material times understood the agreement to be one of sale not lease. They understood the lease agreement signed on 15 January 2003 to be a sham and not meant to be a binding legal document.

The respondent strenuously denied the applicant's allegation and contended that the applicant should be bound by the contents of the written agreement. But the respondent conveniently overlooked the fact that the document is very misleading in material respects. It does not mention a large sum of money of \$3 200 000-00 which was paid as a deposit. It gives a monthly rental of \$179 064-58 when in fact the monthly instalment was \$90 175-69 as reflected in annexure "A". It indeed confirms that the binding agreement was the verbal one.

I am inclined to accept that the written agreement of lease was not meant to be binding on the parties which explains why the parties never did anything in terms of it. They in fact acted in terms of the verbal agreement. I am also satisfied that they entered into a verbal sale agreement of the vehicle as reflected in annexure "A".

In the result the application succeeds and I would grant an order in terms of the draft.

*Messrs Job Sibanda & Associates, applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, respondent's legal practitioners.*