VUYA RESOURCES (PVT) LTD
versus
JERIPHANOS MAHACHI
and
NANCY M. CHAVHANGA
and
KATSINA AUTOMOTIVE (PVT) LTD
t/a BEVERLY MOTORS

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 5 & 6 November 2015 & 10 February 2016

Trial Cause

H Nkomo, for plaintiff
FF Hwenhera, for defendant

TSANGA J: "The ideas of a debtor and a creditor as to what constitutes a good time never coincide."[1] It is this parallelism in thought processes regarding when a debt owing was to be repaid that festered the tensions that eventually culminated in this trial.

The plaintiff, Vuya Resources (Pvt) Ltd, sues for the repayment of the sum of $10 276.00 being part of the purchase price for a vehicle it says it purchased from the first defendant, Jeriphanos Mahachi, hereinafter referred to as Mr Mahachi. The quest for the return of the purchase price is on the basis that the vehicle in question was wrongly repossessed by the seller when in fact the parties had agreed to a loose arrangement regarding the time frame for the payment of the balance of the purchase price. It is the plaintiff's argument that the agreement having been cancelled by Mr Mahachi as seller, and the vehicle having been repossessed, the latter has been unjustly enriched and cannot have the car in addition to the deposit paid by the plaintiff.

[1] PG Wodehouse, Among the Chickens

The evidence led

According to the plaintiff's director, one David Gamanya Tapera (hereinafter referred to as Mr Tapera), sometime in November 2010, he entered into an oral agreement with Mr Mahachi, a car dealer, for the purchase of a Bedford 7 tonne lorry, on behalf of plaintiff, a mining company. The lorry was being sold for $20 000.00. A deposit of $10 000.00 was paid into the account of Nancy Moetseka Chavhanga. She is Mr Mahachi's wife and is the second defendant in this matter. An additional amount of $276.00 was also simultaneously sent to Mr Mahachi for the vehicle for what Mr Tapera said was for minor repairs to the vehicle. The lorry was duly delivered to the plaintiff.

One year down line, being sometime in November 2011, Mr Mahachi is said to have repossessed the vehicle without consent, after having learnt that the plaintiff's goods were under attachment. At that time, the balance of the purchase price of $10 000.00 had not been paid.

As said by Mr Tapera, the two became friends over the years, dating back to 2000. The friendship stemmed from the purchase of cars from the car dealership run by Mr Mahachi, Katsina Motors t/a Beverly Motors, which is the third defendant in this matter. As a result of the friendship, he said there was no fixed time frame for the payment of the balance of the purchase price. The overall understanding, as stated by him, was that payment would be liquidity based when plaintiff was in a position to make good its debt. He emphasised that this was in keeping with the parties' ethos of doing business, having at one time assisted Mr Mahachi with fees for his daughter studying in Australia. He said the debt had only been repaid when Mr Mahachi's financial liquidity allowed him to do so.

He further stressed in his evidence that albeit Mr Mahachi had a car dealership business, this particular transaction had not been effected through the car dealership. He said it was a private arrangement as indicated by the fact that the money was paid into a personal account of Nancy Chavhanga at the behest of Mr Mahachi. However, he was clear that apart from paying the money into her account as instructed, she had not been part of the agreement. He disputed the propriety of Mr Mahachi insisting after proceedings had been commenced, to join Katsina Motors t/a Beverly Motors as third defendants to this action given that the agreement at all times was a personal one with Mr Mahachi.

Mr Lionel Thabani Mhlanga also gave evidence on behalf of the plaintiff, as its co-director with Mr Tapera. He was also the director on the ground at the mine. Mr Mahachi's

plea being that the car was released to him with the consent of this particular co-director, his major evidence was that he at no point agreed to the release of the vehicle as claimed. He denied that he had ever called Mr Mahachi to inform him that the plaintiff's goods were under attachment and telling him that he should collect the car. Additionally, he denied that he had also advised Mr Mahachi that the $10 000.00 the plaintiff had paid as an initial deposit could be kept *in lieu* of the usage of the vehicle that had occurred over the year. He insisted that his company having purchased the vehicle on credit, the correct procedure would have been for Mr Mahachi to ask for the balance of the purchase price as opposed to taking the vehicle without a court order. He also explained that it had been possible for Mr Mahachi to remove the car from the premises because mining regulations require all vehicles to be parked with the keys inside.

On the other hand, Mr Mahachi's evidence was that the agreement was entered into with Beverly Motors.[2] His version was that indeed the agreement was that $10 000.00 would be paid as deposit and the balance of $10 000.00 would be paid after 30 days. He stated that the $276.00 that had been paid atop the deposit, was for fuel and licence fees, and not for repairs as claimed. He further explained that the reason why the money had to be paid in his wife's account was because Beverly Motors did not have a Standard Chartered Bank account which the purchaser had intended to transact through in quest of a quick intra bank transfer to facilitate a quick release of the car. He said that when after 30 days the balance was not paid, efforts had been made to contact Mr Tapera who proved to be very elusive and would not answer his phone. He denied that he could have entered into an open ended payment arrangement given that cash inflow is important for his own company's stocks. He stated that his wife had even gone to Mr Tapera's house seeking to retrieve the balance but had received no joy. Instead she had received a hostile welcome.

As in his plea, he maintained that he had been called by Mr Mhlanga to bring a mechanic and collect the car. He indicated that he was surprised that Mr Mhlanga was now distancing himself from those facts. He said that at the time, Mr Mhlanga had apologised for letting him down and had explicitly indicated that the deposit would setoff usage of the car over the period in question. His evidence was that when he had gone to pick up the car he had spoken to the messenger of court and indicated to him that the car belonged to his company. He said the messenger had called Mr Mhlanga who was away and following telephone

[2] A history was given of the acquisition of the vehicle through another of first defendant's companies. It was in my view not material to the complexion of the core dispute between the parties.

conversations, the car had been released to him. He stated he had thereafter approached Duly's in Gweru to uplift the car and effect repairs as it was by then not working. However, evidence regarding expenditure for repairs was not placed before the court. Having failed to discover his documents in terms of the rules, and in the face of plaintiff's counsel vehement objection to their production at this point, this court ruled against their production at this late stage given that at all times he had been represented by counsel who ought to know the rules.

In support of his assertion that once the vehicle had been repossessed the matter was settled by agreement, Mr Mahachi pointed to the reality that the issue of the balance was thereafter not raised. He stated that in fact the parties had continued to do business as evidenced by the fact that he had even sold a car on behalf of Mr Tapera at the beginning of 2013 through his car dealership. He said that it was only in September 2013, some one year and ten months after he had collected the car, that he had received a visit at his offices from Mr Nkomo, the plaintiff's lawyer, who had initially indicated to him that he owed Mr Tapera some money transferred on his behalf for his daughter's fees in Australia, before shifting the issue to being about the return of the deposit. His explanation as to why the issue was suddenly resurrected was that his wife, Nancy Chavhanga, had denied Mr Tapera permission to park his accident damaged vehicle at the car dealership because she was of the view that he had treated her rudely.

Nancy Chavhanga also gave evidence. She corroborated her husband's evidence regarding the payment of the money into her account and indeed that of Mr Tapera. She also explained that she is co-director of Beverly Motors with her husband. She also confirmed that she had gone to Mr Tapera's house in hot pursuit of the balance after failing to get hold of him. She confirmed that she had not been received well as he had closed his door in her face. She further stated that the reason for the resurrection of the matter was indeed because she had refused Mr Tapera permission to leave his vehicle at Beverly Motors. She denied vehemently the claim by Mr Tapera that he had ever paid their daughter's fees explaining that the arrangement that they had between them occurred during the time when foreign currency was very hard to come by. Her explanation was that Mr Tapera had access to foreign currency and would pay on their behalf in foreign currency whilst they would pay him here in local currency.

As to the preliminary point on who the contracting parties were, I am inclined to hold on the facts that the plaintiff's action against Mr Mahachi in his personal capacity is not justified and to proceed in my analysis on this basis. In my view, there was nothing in

plaintiff's evidence that indicated that Mr Mahachi sold cars from his car dealership in his personal capacity. Previous dealings involved his car dealership. I do believe his wife Nancy Chavhanga that she chased up the balance owing and that since she is director of Beverly Motors, this would indicate that she regarded the sum as owing to the business.

What is not in dispute is that this was an instalment sale, with an initial deposit being paid by plaintiff. Essentially, the parties are not in agreement as to when payment of the balance of the purchase price was due. The creditor says payment was to be made within 30 days and the debtor says the agreement was open ended. In the absence of any clear proof however by Mr Mahachi that the payment was within 30 days, the assumption is that the verbal contract did not actually stipulate a time frame. However, looking at the testimony of the parties, I am inclined to believe the second defendant, Nancy Chavhanga that various demands were made regarding the payment of the balance of the purchase price. I also believe her when she says she paid a direct visit to Mr Tapera's house regarding the payment of the balance of the purchase price and that she met with no success. Given that the first and second defendants operate a car dealership, it would appear to me to be most unlikely that the agreement entered into, albeit at face value by the first defendant on account of his friendship with the plaintiff's director, would have been virtually open ended in the payment of the balance.

Legal principles and analysis

The legal position with regard to instalment sales is that the buyer is entitled to immediate possession and to retain possession pending the full payment of the purchase price. In the event of default in payment the innocent party may insist on performance or cancel the agreement.[3]

Where the agreement does not stipulate when payment should be made, Maja, in his book *The Law of contract in Zimbabwe*[4] explains as follows:

> "Whenever the contract does not stipulate when performance should be due, the creditor has an obligation to place the debtor in *mora* by way of a demand or an *interpellation*. An *interpellation* is a demand calling upon a debtor to perform on a particular day failing which the debtor will be *in mora*…"

In seeking the resolution of this dispute the plaintiff relies on the argument that to be *in mora* a debtor must know that they have to perform. A demand must be made whether by way of summons or extra judicially by means of a letter of demand or even orally to be valid.

[3] See R H Christie *Business law in Zimbabwe* (Claremont: Juta) 1998 (2014 edition) at p 155.
[4] Maja I., *The Law of Contract in Zimbabwe* (Harare: The Maja Foundation) 2015 at p117

A reasonable opportunity to perform must be granted and that upon failure to comply the contract can be cancelled by serving notice of rescission in which a second reasonable time limit is stipulated. Mr *Moyo*, plaintiff's counsel, drew on the case of *Dobrock Holdings (Pvt) Ltd* v *Turner and sons and 2 Ors, Turner and Sons (Pvt) Ltd* v *Zambezi Paddle Steamers (Pvt) Ltd and Turner and Sons (Pvt) Ltd*[5] and the dicta therein from the case of *Asharia* v *Patel* [6] for the elucidation of these principles. The gist of his argument was that none of this was done. On the other hand, the nub of Mr *Hwenhera*'s argument, who appeared on behalf of the defendants was that there was a novated agreement.

Significantly, the conceptual grounding of the plaintiff's case and indeed its counsel's thrust in cross examination, was to highlight that the parties, being long term friends, their agreement was fundamentally informed by relational contract theory as opposed to the classical framework of contract law. Relational contract theory, is explained by Hawthorne and Pretorius as follows:

> "Relational contracts are situated at the intersection of law and society, and relational contract theory constitute an important paradigm shift within the law of contract. ….Not individualism, but the interdependence of individuals in social and economic relationships is the guiding principle of relational contract theory…Intricate linkings of habit, custom and rules are found in such relational contracts…..
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> The relational rules may be summarised as follows: the object of contracting is not primarily the allocation of risk, but the commitment to co-operate; obligations in the long term agreements change as circumstances change; in bad times parties are expected to support one another rather than standing on their respective rights; insistence on literal performance will be considered wilful obstructionism; **in the event of unexpected contingencies causing severe losses the parties are to search for equitable ways of dividing the losses**; and finally the sanction for bad behaviour is refusing to contract in the future…..".[7] (My emphasis)

Thus the modern law of contract which is founded on realism puts emphasis on contextualising the facts of a particular case in order to keep law real and achieve substantive as opposed to formal equality.[8] Formalism on the other hand, or the classical approach which the plaintiff now seeks to rely on, is based on strict and logical adherence to legal doctrines and principles and rules.

If, as Mr Mahachi argued, the plaintiff through its co-director consented to the re-possession of the car, then this would signify in my view, the plaintiff's own acceptance of the conclusion of the contract. Also this was not a case where the balance of the purchase

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[5] 2*006 (2) ZLR 326 (S)*
[6] *1991 (2) ZLR 276 at 279G-280C*
[7] Hawthorn L & C. J Pretorius *Contract law Case Book (Cape Town: Juta) 1994 (3rd edition 2010)* at pp 243-244
[8] See Note 7 *at p 4-6*

price was not paid because the car had material defects or where the plaintiff felt that it had been short-changed. The circumstances under which the car came to be repossessed that led to the alleged reformulation of the agreement are important.

With the plaintiff still owing the balance of the purchase price for the vehicle, its goods were under attachment for other debts it owed to its creditors. Materially, if the vehicle had been removed and sold in execution, this would not have absolved the plaintiff's obligation to pay for the balance of the purchase price. I can therefore see why the plaintiff's Director, Mr Mhlanga, would most likely have sought to avoid their company being saddled with a debt for a car that would no longer be in its possession had it been attached. By surrendering the vehicle, the issue that the parties clearly intended to settle was the payment of the balance of the purchase price. Working within a relational contractual framework, when the plaintiff fell onto hard times, the parties found their own way of accommodating each other. The parties clearly sought an equitable way of dividing their losses. The plaintiff would return the vehicle instead of paying the balance of purchase price. The amount paid as a deposit would defray expenses for using the vehicle. The plaintiff cannot therefore blow hot and cold by now insisting on formalism when clearly the parties' chosen remedy of choice was to renegotiate a balanced outcome to the issue of the remainder of the money that was owing given their history of doing business. Whilst rules often settle disputes in the face of agreements, a rigid approach to rules for the sake of rules may not result in justice within the context of the facts in a particular case. Moreover, as illustrated in the description of the key characteristics of relational contract theory, formalism has not been a changeless essence.

That for one year ten months, in fact almost two years, the plaintiff had absolutely no issue with the removal of the vehicle must be taken into account. No evidence was placed before this court by the plaintiff's directors that at any point soon after the repossession of the vehicle, they had considered the act unlawful. Taking action immediately and not one year ten months later would have been an indicator that the plaintiff regarded the car as having been wrongfully repossessed at the time. If the surrender had been involuntary, there is no reason whatsoever why the plaintiff would have failed to take action immediately upon its repossession to defend its right to keep the vehicle.

Mr Mahachi's version that the car was voluntarily surrendered is more credible than that of plaintiff's directors that they never consented to its removal. His version that there was indeed some dialogue that led to the messenger's consent for the vehicle to be removed is also credible. I am also inclined to believe the defendants that the proceedings were simply

instituted merely to harass. The facts clearly speak to voluntary surrender. There was no breach of peace in obtaining the vehicle. The voluntary surrender was by way of verbal agreement in the same fashion that the parties had entered into the initial agreement.

The plaintiff's attempt at this point, notably after the fact, to return to a set of formalist contractual rules to resuscitate the matter when the facts speak for themselves that the parties had renegotiated otherwise, would not yield a fair and reasonable result. It would also not be in keeping with what the parties intended. As stated in *Boerne* v *Harris:* [9] "One must not introduce into the modern law of contract a formalism that is foreign to its spirit".

The plaintiff's claim for the return of the purchase price lacks merit and is accordingly dismissed. In the face of the plaintiff's claim, the first defendant had also counterclaimed US$5 321.54 for recovery and repairs of the motor vehicle and the payment of $57 600.00 as the daily net hire charge. The plaintiff, (as defendant in reconvention) applied for absolution from the instance at the close of the evidence in chief in the counterclaim. In my view, the counterclaim is intricately linked to a finding in the main claim. The counter claim was largely a reaction to the plaintiff's initial claim. Having found that that the parties agreed to the vehicle being repossessed with the understanding that the amount initially paid as deposit would go towards its usage for the year the vehicle was used, that was the end of the matter. There can be no counter claim based on leasing the truck at AA rates as that was never an aspect of the agreement. In any event the plaintiff in reconvention woefully failed to provide any evidence in support of his claims. There is no basis upon which this court would find for the plaintiff in reconvention on the counter claim.

In the main, I find that the plaintiff bears the responsibility for bringing this matter and must bear the costs of this action.

Accordingly it is ordered that:

The plaintiff's claim in the main be and is hereby dismissed with costs.

Absolution from the instance is granted with respect to defendant's counter with no order as to costs.

Mhishi Legal Practice, plaintiff's legal practitioners
Muringi Kamdefwere Legal Practitioners, defendant's legal practitioners

[9] 1949 (1) SA 793 at p810