

RUDO RUCHIYO  
and  
EDDY NYASHA KATSANDE

HIGH COURT OF ZIMBABWE  
FOROMA J  
HARARE, 16, 17 November 2015 & 13 January 2016

### **Trial**

*B C Madanhi*, for the plaintiff  
*S Simango*, for the defendant

FOROMA J: The plaintiff sued the defendant for the delivery of a Mercedes Benz silver in colour identified as bearing engine number 64796130063151 and chassis number WDB2110162A313171 and vehicle registration number ADI 289 alternatively and on failure of full and timeous compliance with the order for delivery of the vehicle that the defendant pay to the plaintiff the sum of US\$50 600.00 with interest at the prescribed rate from date of service of summons to date of full payment and costs of suit at attorney-client scale.

Although in her evidence during trial the plaintiff denied having been in a love relationship with the defendant, it is noted that the plaintiff in the plaintiff's declaration pleaded her case on the basis that in about 2012 the parties had a love relationship and that during the subsistence of the love relationship and in or around February 2012 she bought the vehicle in question through the defendant who assisted in the importation of same. The said vehicle was purchased from the United Kingdom through the defendant's uncle one Tapiwanashe Michael Majome who at the material time was residing in the United Kingdom.

The brief summary of the plaintiff's evidence is that she applied to her employer which supported a loan in question in the sum of \$7 000.00 from Bank ABC for purchase of the vehicle which she had identified as selling in the United Kingdom. Pursuant to an oral agreement between the plaintiff and the defendant the plaintiff caused the loan of \$700.00 by Banc ABC to be deposited into the defendant's company Denfarm Manufacturing P/L's bank account with CBZ. The \$7 000.00 reflected in the defendant's company's bank account on 1

February 2012 and the same amount reflected as having been transferred to Tapiwanashe Majome on 13 February 2012 from Denfarm Manufacturing P/L's CBZ Bank account with the Selous Avenue Branch. The plaintiff testified that she paid the balance of the purchase price for the said vehicle in cash to the defendant who assured her that he forwarded same to Tapiwanashe Majome.

She testified to having given the defendant the sum of \$2 900.00. In order to reassure the plaintiff that the purchase and importation of the vehicle was on course the defendant copied her the e-mail communications with Tapiwanashe Majome. In this regard the plaintiff referred to e-mails appearing on pp 20-24 of the plaintiff's bundle of documents which was produced and marked "A".

The plaintiff also testified that she sent the sum of about \$3 100.00 directly to Tapiwanashe Majome to cover a garage report and service costs as she wanted the vehicle serviced before shipping to take advantage of cheaper spares in the UK.

She further testified that when the defendant informed her that the vehicle had arrived at Walvis Bay she requested the defendant to travel to Walvis Bay to clear the vehicle and drive it to Harare and that she paid the defendant the cost of customs clearance and accommodation and fuel for driving the vehicle to Harare from Walvis Bay and for his food in the sum of \$6 500.00. She also sent him the sum of \$2000.00 by Ecocash whilst the defendant was at the Beit Bridge Border Post.

When the vehicle arrived at Harare the defendant informed her that the customs duty clearance was short and that ZIMRA's Department of Customs required the vehicle to be parked at the Bak's Storage pending settlement of outstanding duty in the sum of \$2 000.00. The plaintiff further indicated that before the defendant took vehicle to park it at Bak Storage the defendant told the plaintiff that there would be need for payment of storage charges at \$250.00 per month. The vehicle was allegedly parked at Bak Storage for the period from March 2012 to May 2013 but before it was parked at Bak Storage she had had it in her possession for more than a week with the defendant's consent. Problems appear to have started when the plaintiff asked the defendant to show her the import documents including the proof of calculation of costs paid to the Department of Customs and Excise.

The plaintiff claims that the defendant then became evasive. The plaintiff also testified that because she could not endlessly pay for storage charges to Bak Storage she asked the defendant for the assessment of the duty by ZIMRA and she was given a document which turned out to be fake when the plaintiff sought to verify it with the Department of

Customs and Excise. The plaintiff then confronted the defendant and asked him as to the whereabouts of the vehicle and the defendant started avoiding her including cutting off mobile calls from her. When she realised that she might lose both the money and the vehicle the plaintiff decided to make a report of car theft to Vehicle Theft Squad (V.T.S.) at Southerton. The plaintiff also engaged private investigators to look for the vehicle as the defendant would not disclose its whereabouts. The vehicle was eventually found parked somewhere in Harare and Vehicle Theft Squad was contacted to come and impound it which they duly did. At the time trial commenced the vehicle was in the custody of Vehicle Theft Squad Southerton Squad. The plaintiff was asked if he could substantiate the claim for the \$50 000.00 plus which she claimed to have paid to the defendant in connection with the purchase and importation and she was unable to give a reliable breakdown as she claimed that out of trust she did not require the defendant to sign for the amounts she paid him in cash as the defendant refused to give her the documents which proved what he had spent the money on.

The defendant defended the plaintiff's claims and in his plea averred that there was no agreement with the plaintiff for him to assist the plaintiff purchase a vehicle from the UK and that he bought the vehicle in his personal capacity for his personal and business use. The defendant accused the plaintiff of having defrauded her employer by using a quotation on the defendant's company's letter head to support an application for a loan to purchase a car. The defendant claimed that he had enough resources to purchase the vehicle contrary to the insinuation by the plaintiff that he had no capacity to pay the said money. The defendant testified that he was able to get the money from the company where he and his mother were co-directors to purchase the said vehicle. Although the defendant admitted having observed a transfer of \$7 000-00 into the company account he claimed to have paid part of it back to the plaintiff at Runhare House in the presence of his co-directors Ms Nancy Majome (his mother) and a manager. He also claimed that part of the money was used to purchase household goods and some of it was spent on holidays with the plaintiff. He claimed that the plaintiff never bought a vehicle from the United Kingdom and that she was being spiteful and wanted to see him suffer and impoverished after he had terminated a co-habitation of 3 years duration with the plaintiff. The defendant also testified that the sum of \$3 100-00 which was reflected in the plaintiff's personal account as transferred to Tapiwanashe Majome was his own money which the plaintiff took from the safe at the parties residence. He also testified that he instructed her to send that amount to T. Majome when he was at Beitbridge.

The defendant also claimed that the plaintiff had made several reports to the police claiming that he had stolen or/defrauded her of the Mercedes Benz E270 and an Audi and that charges in respect of these matters had been withdrawn before plea which plaintiff denied. The defendant insisted that he allowed the plaintiff to look after his monies kept in the safe at their joint residence out of trust as he regarded her as his wife. The defendant also testified that he paid the plaintiff the sum of \$7 000.00 from cash he took from the safe at the company premises at Runhare House. He insisted that he had enough reserves to finance the purchase of the vehicle in question and in this regard sought to rely on the bank statements from Denfarm Manufacturing (Private) Limited's bank account found in the plaintiff's bundle of documents to prove that he had the necessary resources. It is noteworthy that the defendant did not discover any bank accounts or statements. He also claimed that there were other bank accounts for his companies and specifically referred to the one at Agribank which he did not produce neither did he discover. In the summary of the defendant's evidence the defendant claimed that the plaintiff was not to be trusted as she was a liar and a vindictive and spiteful fraudster determined to punish him for ending the love-relationship and that she did not purchase the vehicle in question.

The parties testified in support of their respective cases and closed their cases without calling any witnesses. This was quite surprising as each of them whilst on the witnesses stand claimed they had witnesses to some of the events they testified to. The defendant had in fact indicated at the pre-trial conference that he would be calling three witnesses. Be that as it may the matter falls to be determined on the basis of the evidence each placed before the court.

It is common cause that the vehicle in dispute is an E270 Mercedes Benz silver in colour whose identification details are as indicated herein above. It is also common cause that (i) the vehicle was imported from the United Kingdom with the assistance of Tapiwanashe Majome who is defendant's uncle, (ii) that the plaintiff has not met Tapiwanashe Majome in person and had not been communicating with him, (iii) that at the time trial commenced the vehicle in dispute was in the custody of the Vehicle Theft Squad (VTS) at Southerton and remains so.

Whilst it is also common cause that the plaintiff used an unsigned quotation reflecting that it was issued by Denfarm Motors t/a Denfarm Manufacturing appearing on p 25 of the plaintiff's bundle of documents marked A is in dispute whether the use of the said quotation by the plaintiff was without the defendant's consent. The quotation does not bear a date. The

plaintiff claims that the defendant consented to the use of the quotation in her application for a loan whereas defendant claims it was fraudulently used by the plaintiff without his knowledge. Considering that the loan application was made in January 2012 this court is persuaded that the plaintiff's version is the truthful one. The loan application was made at a time when the parties were still cohabiting and it is the evidence of both of them that they trusted each other at some stage of their relationship. It is not unexpected that defendant would have wanted to please the plaintiff whom he regarded as his wife and at whose residence he was accommodated by supporting her application for a loan. Besides when the defendant found \$7 000.00 in Denfarm Manufacturing (Private) Limited's bank account he would not have been surprised as the plaintiff would have informed him that the loan application had been successful to the extent. The court accordingly rejects the defendant's suggestion that the quotation was fraudulently used to defraud the plaintiff's employer and or the bank.

The plaintiff told the defendant that she wanted to apply for a loan to purchase a car and considering that it would have been cheaper to import the type of vehicle only defendant would have suggested that he would seek the assistance of his uncle Tapiwanashe Majome to help identify the type of vehicle the plaintiff was trying to buy and assist with its acquisition. It must have been for this reason that after securing the loan the parties agreed that the amount be transferred to Tapiwanashe Majome through the defendant as the plaintiff was not known to her.

The bank statement on p 15 of the plaintiff's bundle 'A' reflects transfer of \$7 000.00 of the plaintiff's loan into the defendant's company bank account at the time the credit balance in the account was the sum of \$584.63. There is no other deposit of an amount in the region of \$7 000.00 between 1 February 2012 and the 13 February 2012 when the sum of \$7 000.00 is taken out of the account with a transaction narration reflecting transfer in favour of Tapiwanashe Majome.

Although the defendant claims that this was his own money transferred to his uncle in the United Kingdom the court rejects this claim for the following reasons (i) the defendant could not prove that the source of this amount \$7 000.00 was other than the transfer by the plaintiff as aforesaid, (ii) the defendant did not discover the bank statements on p 15 – 16 of the plaintiff's bundle "A" despite their relevance and availability. It is irrestable to conclude that the reason for not discovering the bank statements can only be a desire to conceal the

movement of \$7 000.00 especially after deciding to deny that it was transferred to the UK for the purchase of the vehicle.

The plaintiff testified that she gave more money in cash towards purchase of the vehicle and also sent another amount directly to Tapiwanashe in the sum of \$3 116.14 by transfer from her Standard Chartered Bank account towards repair/ service of the vehicle after a garage report as represented by the defendant. It should be remembered that the defendant claimed that which defendant disputed claiming that the \$3 116.14 was his own money which the plaintiff took from the safe at the parties residence on the defendant's instruction that this amount be sent to Tapiwanashe Majome. I reject the defendant's version in preference to that of the plaintiff on this aspect. At no stage did the defendant put it to the plaintiff while the plaintiff on the witness's stand that these amounts were his kept in the safe at their joint residence. The defendant never put it to the plaintiff that the \$3 116.14 was not her money but his. The court considers the defendant's claim that the sum of \$3 116.14 was his own money to be a recent fabrication by the defendant. The defendant did not indicate in his summary of evidence that he kept substantial amounts in safe at home and that used same to pay for the vehicle acquisition.

The defendant sought to portray the plaintiff as a liar and spiteful and not to be trusted as a witness. These comments probably apply with equal if not greater force to the defendant as a witness. He was quite unconvincing and his version does not convince even the unwary. He had no capacity to purchase the said vehicle. Despite being challenged expressly in this regard in the plaintiff's declaration defendant failed to produce evidence to prove otherwise. The plaintiff has proved on a balance of probabilities that she purchased the Mercedes Benz E270 vehicle with the assistance of the defendant and his uncle in the United Kingdom who must have all the time believed that he was assisting the defendant his nephew.

The plaintiff's claim in the alternative was understandably not as easy to prove as the main claim because the defendant refused to disclose the details of the relevant transactions associated with the importation of the vehicle in question. That notwithstanding the court finds that the plaintiff spent the following amounts in connection with the importation of the vehicle in dispute:-

- (i) \$7 000-00 towards purchase price
- (ii) \$6 500-00 towards shipment and duty
- (iii) \$2 900-00 top up
- (iv) \$3 116-14 repairs services of vehicle before shipping

- (v) \$2 000-00 shortfall on penalties remitted via Ecocash
- (vi) \$4 750-00 storage costs purportedly paid to Bark Storage

These figures were not seriously disputed and I find them proved on a balance of probabilities.

When the vehicle arrived in Zimbabwe the defendant had it registered in his name. This court finds it as established that the love relationship between the parties had ended on a sour note. None of the parties can be considered not to have been adversely affected by the termination of this relationship. For this reason both parties would have had a motive not to tell it as it is with a clear motive to fix the other. Despite this apparent motive to deliberately misrepresent the truth this court found from uncontroverted circumstantial evidence that the version of the plaintiff is more probable than that of the defendant.

Although the defendant in his plea under para 5 dealing with paras 7-10 of the plaintiff's declarations pleaded as follows-

“Defendant never received any money from plaintiff for the purchase of a motor vehicle neither did he pay any money that he received from plaintiff to one Tapiwanashe Michael Majome” it is clear that the \$7000.00 deposited into the defendant's company bank account was transferred to Tapiwanashe Majome despite the defendant's denials. Clearly this is a case where once the evidence contradicts the plea such evidence should be disregarded – see *Casper Sibanda v Barnabas Sigola* HB 05/14. Comparatively the defendant's version lacks veracity and the court has no hesitation in rejecting it.

In the result it is ordered:

1. That the defendant deliver to the plaintiff a Mercedes Benz Motor Vehicle silver in colour with engine number 647961 30063151 chassis number WDB 2110162A313171 and Vehicle Registration Number AD1289 within 48 hours of service of this order on the defendant failing which the defendant pay the plaintiff the sum of \$27 266.14 with interest at the prescribed rate with effect from the date of summons on the first defendant.
2. That the defendant pay the plaintiff's costs of suit.