C. of A. (CIV) No. 2 of 1981

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

PIONEER MOTORS(PTY)LTD Appellant

v

ALBERT SEBOKA MOKAKE Respondent

HELD AT MASERU

Coram:

MAISELS, P.
SCHUTZ, J.A.
VAN WINSEN, J.A.

J U D G M E N T

Van Winsen, J.A.

This is an appeal against an order by Cotran C.J. awarding to respondent (plaintiff in the Court a quo) damages in the sum of M10,000 as compensation for the loss of a motor vehicle entrusted by him to appellant (defendant in the Court a quo) for repair and which the latter failed to restore to respondent. For the sake of convenience the parties are referred to as in the Court a quo.

It appears from the evidence that on the 10th of July 1980 plaintiff had delivered to defendant his Toyota truck, registration number L.G. 228, for repair and service. On the 20th of July,1980 when a relative of plaintiff went to defendant's premises to fetch the truck the work on it was not complete and he was asked to return for it in two weeks' time. On the 29th of July, 1980 defendant handed over plaintiff's truck to a Mr. Stanley Voyatjis of Remus Distributors (Pty) Ltd., Zastron.

The circumstances under which the plaintiff's truck was handed over to Voyatjis are, briefly stated, the following: On the 8th of June 1980 plaintiff, who at that time owed some money (the exact amount of which is disputed) to Voyatjis signed a document reading as follows :

/"Remus.....

"Remus Distributors
P.O. Box 122
Zastron 8/6/80

Dear Sirs,

I hereby, I, A.S.T. Mokake, promise to deliver a truck, L.G. 228 to Remus Distributors at Zastron as payment of my outstanding a/c with the above Co. not later than Friday at latest Monday 16/6/80.

Signed at Mt. Moorosi 8/6/80
(Sgd) A.S. Mokake "

This document is hereinafter referred to as "the letter". Voyatjis after consulting an attorney, Mr. Harley, went in his company to the office of the General Manager of defendant, a Mr. Molapo, produced the above letter and asked for the delivery of plaintiff's truck to him. Molapo testified at the trial that he had doubts as to whether (the) ought to accede to this request and unsuccessfully sought to obtain the advice of the legal adviser to the Lesotho National Development Corporation, which body is the majority shareholder in defendant company. Molapo then consulted a colleague of his in the mechanical department of defendant, a Mr. Gilbert, as to what he should do.

After obtaining a document from Voyatjis certifying that he, Voyatjis, had legal authority to remove plaintiff's truck from defendant, and after receiving payment from Voyatjis for the work done to the truck by defendant, Molapo delivered the truck to Voyatjis and the latter removed it to Zastron. During August plaintiff went to the premises of defendant and discovered that defendant had handed his truck to Voyatjis. Getting no satisfaction from defendant he issued summons against it claiming damages in a sum of M15,000.

From the evidence it is clear that plaintiff did not fulfil his promise contained in the letter to deliver the truck to Voyatjis. The reason for his not doing so is not relevant to the present enquiry. It is however clear that as a result of this letter Voyatjis acquired no rights in respect of the truck and certainly acquired no right to claim delivery of the truck from defendant. Indeed had Molapo perused the letter he would have noticed that the latest date mentioned therein for the fulfilment of plaintiff's promise to deliver the truck, viz, 16/6/80 had already passed when plaintiff delivered the truck to defendant for repairs.

/The contract

The contract between the parties to the present dispute relative to the truck is one of bailment. It was decided in the case of Medallie and Schiff v. Rouse 20.SC 438 at p.440 that :-

> "..... it is a primary duty of a depository to return the thing deposited when it was required of him, and if he is unable to do so he cannot escape liability without proving that his inability does not arise out of his negligence".

This case was followed in Weiner v. Calderbank, 1929 T.P.D. 654 at p.664 and in Silhouette Chemical Works Ltd. v. Steyn's Garage Ltd., 1967(3) S.A. 564 at p. 568.

The degree of care with which the law burdens the depository or bailee is defined in the following passage from the judgment in Rosenthal v. Marks, 1944 T.P.D. 172 at p.176, per Murray J. :

> "The bailee is not an insurer of the article deposited for safekeeping and is consequently not liable for the effects of casus fortuitus. On the other hand he must display ordinary diligence and is liable for the consequences of culpa levis on his part; if the article is lost or damaged while in his custody, he must make compensation unless he can show that such loss or damage was occasioned despite the exercise by him of the care which a reasonable prudent and careful man might be expected to have taken in the particular circumstances".

Mr. Beckley, who appeared on behalf of appellant, argued that defendant had acquitted himself of the obligation to prove an absence of negligence on his part. In support of this contention he relied upon the fact that before delivery of the truck to Voyatjis defendant had been presented with a document (the letter) duly signed by plaintiff in which the latter had stated that he intended paying his account to Voyatjis by passing ownership in and delivering the truck in question to the latter before a certain date. He also relied on the fact that Voyatjis had assured defendant's general manager, Molapo, in writing that he had been authorised by plaintiff to take possession of the vehicle.

It seems to me that when defendant, acting through its general manager, accepted that the letter and the assurance given by Voyatjis constituted sufficient authority to defendant to part with the truck to anyone other than its owner it failed to display that standard of care which is in law required of a bailee. Had Molapo perused the letter he would have become aware

/that

that the letter contained no more than a promise to deliver the truck and that in any event the promise had not been fulfilled since the vehicle had been delivered to defendant for repair subsequent to the date on which plaintiff had undertaken to hand it over to Voyatjis. Until this promise was fulfilled by delivery of the truck to Voyatjis the ownership of the truck remained with plaintiff. As a reasonably careful man Molapo, acting on behalf of defendant, should have concluded that no transfer of ownership from plaintiff to Voyatjis had taken place. Moreover it was naïve of Molapo to think that he could rely on a statement of an interested party, such as Voyatjis was, to the effect that he had legal authority to remove the truck from defendant's possession. The obvious course which a reasonably careful man would in the circumstances have adopted would have been to get into touch with the owner of the truck in order to obtain his instructions in regard to its disposal. A failure by Molapo to do so was a clear breach of duty to take care. There is accordingly no doubt that defendant failed to prove that it had exercised the care required of it in law in regard to the preservation of the truck entrusted to it by the truck's owner. Defendant was accordingly correctly found by the Court a quo to have been liable to compensate plaintiff for such loss as he could prove that he had sustained by reason of defendant's breach of contract.

As was decided in Swart v. Van der Vyver, 1970(1) S.A.633 (A.D.) at p.643 (D-E), patrimonial loss as a result of breach of contract is generally determined by a comparison between the existing patrimonial position of the aggrieved party and what it would have been had the breach of contract not taken place. It is for the aggrieved party to prove the fact of this difference and the amount thereof. Steenkamp v. Juriaanse, 1907 T.S. 980 at p.986, and Mouton v. Die Mynwerkersunie, 1977(1) S.A. 119(A.D.) at p.146. The difference must of course be related to the time at which performance should have taken place. In pursuance of this onus it is for the aggrieved party to put before the trial court all evidence available to him to enable the court to determine the compensation due to him. Turkstra Ltd. v. Richards, 1926 T.P.D. 276; Versveld v. S.A. Citrus Farms Ltd., 1930 A.D. 452 at p.460; Mkwanazi v. Van der Merwe, 1970(1) S.A. 609 (A.D.) at pp. 631-2. The courts have, however, recognized that if it has been proved that the aggrieved party has suffered damages, the difficulty of quantifying the sum due is no reason for the court not to endeavour as best it can to determine this amount on the evidence available to it. Turkstra's case (supra) at pp. 282-3;

/Versveld's

Versveld's case (supra) at p.459; Sandler v. Wholesale Coal Suppliers Ltd., 1941 A.D. 194 at p.198.

Now no evidence was led in this case of the value of the truck as at the date that the breach of contract occurred. Regard being had to all the circumstances of this case as disclosed in the evidence the absence of such evidence is understandable. As a result of defendant's breach of contract the truck was taken out of the country into a foreign jurisdiction. In view of the relationship existing between plaintiff and Voyatjis it would have been difficult, if not impossible, for plaintiff to have gained access to the truck in order to have it valued. From the evidence it would appear that plaintiff was adversely influenced by the presence of a police officer to sign, much against his will, the letter promising to hand over the truck to Voyatjis. Plaintiff refused to make good his promise contained in the letter. Despite this Voyatjis claimed to be the owner of the truck with the right to take possession of it from defendant. It is clear therefore that plaintiff and Voyatjis were at all relevant times at arms-length and that plaintiff could expect no assistance from that quarter to prove his case against defendant. Furthermore, in view of the fact that plaintiff's success in the action could well expose Voyatjis to a claim by defendant, it makes the likelihood of defendant obtaining Voyatjis' co-operation in pursuing his action even more remote.

There was however evidence before the Court a quo relative to the value of the truck at the time when defendant acted in breach of his contractual obligation by delivering the truck to Voyatjis. Plaintiff testified that at the time he handed the truck to defendant he had had a buyer for it for the sum of M15,000. He had bought it as a new truck in February 1978 for the sum of M18,000. It had done during the time he had it 38,000 Km. and was in good condition at the relevant time. He furthermore states that four months previous to the time he took the truck to defendant for repairs he had brought it to defendant to assess its value. The value put upon it by defendant was M10,000. It was suggested to the witness under cross-examination that it was in fact valued by defendant at only M5,000, a suggestion strongly rejected by him. No evidence was led by defendant in support of this suggestion.

The evidence as to the offer of M15,000, made in 1980, for the purchase of the truck is supported by the evidence of Mr.Joseph

Masoabi who said he was the offeror and that the deal had in fact been clinched. Mr. Makhooane testified that he was present when defendant had offered to purchase the truck for M10,000, M5,000 less than what plaintiff wanted for it.

The above represents the only evidence adduced by plaintiff with reference to the value of the truck.

Voyatjis described the vehicle as being in bad condition, he having spent M3,000 on the engine. Mr. Paul Nena, the sales manager of defendant company, testified that a new Toyota truck would in 1980 have cost a purchaser M16,044. A cash buyer would get a discount of 12½ per cent on that price. The witness stated that defendant did not deal in second-hand vehicles nor trade-in second-hand trucks but that plaintiff had stated to him that he wanted to sell the truck in question for M10,000. He did not tell him (the witness) that he had found a purchaser for the truck for M15,000. This witness at no stage saw the truck and did not give any estimate as to the value.

A manual, called a Commercial Vehicle Dealers' Digest, containing recommendations to dealers as to the prices at which they could buy second-hand vehicles and subsequently sell them was submitted in evidence on behalf of plaintiff. Nena was referred to this manual under cross-examination and stated that it only constituted a guide to prices which depended upon the condition of the vehicle. This manual indicates that a truck of the kind in question in this case, viz, a 1978 Toyota, had a trade-in value in 1980 of R8,150 and a recommended resale value of R10,000.

After weighing all this evidence the learned Chief Justice concluded that an appropriate award of compensation would be M10,000.

I can find no justification for the conclusion that in arriving at this calculation of the compensation due the Court a quo was guilty of any irregularity of misdirection. Nor could it be cogently argued that there was not sufficient evidence before the Court for arriving at its conclusion. So far from there being any striking disparity between the sum awarded and the sum which this Court would consider appropriate I am of the view that the trial Court's assessment is an eminently fair one which should accordingly not be disturbed.

In the result, therefore, the appeal is dismissed

/with costs.

with costs.

Signed: L. de V. van Winsen
.....
L. DE V. VAN WINSEN
Judge of Appeal

I agree Signed: I.A. Maisels
.....
I.A. MAISELS
President

I agree Signed: W.P. Schutz
.....
W.P. SCHUTZ
Judge of Appeal

Delivered on this 24th day of August 1981 at MASERU

For Appellant : Mr. Beckley
For Respondent: Mr. Masoabi