CIV/T/319/80

IN THE HIGH COURT OF LESOTHO

In the matter between :

STEPHEN KEFUOE MAKHOHLO Plaintiff

v

RAZAK DAMBHA Defendant

J U D G M E N T

Delivered by the Hon. Acting Judge Mr. Justice J. Unterhalter on the 1st day of December, 1982

In this action the Plaintiff claims specific performance by Defendant by returning a certain bus LB 570 into the possession of Plaintiff and special damages being damages in the sum of M3,729.50. As will appear hereafter the claim as specific performance is wrongly phrased.

Briefly Plaintiff's allegations are to the effect that the Defendant bought a bus for him and delivered it to him, the arrangement being that the Plaintiff would pay the cost of the bus from the proceeds of his operating it He alleges further that he paid Plaintiff M6,271.51 in terms of the arrangement. Plaintiff alleges further that the bus was involved in an accident in August 1979, that by arrangement with Defendant it was sent to L.T. Motors, Ficksburg for repairs, that when these were completed the bus was not restored to the possession of the Plaintiff, who at the date of the declaration did not know its present whereabouts.

In his original plea the Defendant in effect denied knowledge of all the relevant contents of the Plaintiff's declaration save the names and the addresses of the parties Thereafter the plea was amended, its effect being that the Defendant purchased the bus for himself and not for the Plaintiff. The Defendant admits that the bus was repaired

/and states

and states that he sold the bus as it was his property and denies that he was under any obligation to place the bus in the possession of the Plaintiff.

As an alternative to the relevant paragraphs of the plea Defendant stated the following :

> "In the event of the Honourable Court finding, and not otherwise, that the Plaintiff and the Defendant entered into an agreement as alleged by the Plaintiff, and which is still denied by Defendant, the Defendant pleads alternatively that he has a counterclaim as set out hereunder and annexed hereto which counterclaim exceeds the amount of the Plaintiff's claim.
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> WHEREFORE THE DEFENDANT prays that judgment on Plaintiff's claim against him be stayed until the final adjudication of his counterclaim against Plaintiff and that Plaintiff's claim thereafter be dismissed with costs and that Plaintiff's prayer for costs also be dismissed with costs."

The counterclaim then follows, and therein it is alleged among other things that the Plaintiff and the Defendant entered into a verbal contract in terms of which the Defendant purchased a certain bus LB 570 on behalf of and for the Plaintiff. It is also alleged that the Plaintiff in respect of the price paid only the amount of M6,271.51. Generally the effect of the counterclaim is to state that in terms of the agreement between the parties the Defendant expended a sum of M27,170 in respect of the bus, insurance charges, operating costs, repair charges and salaries, that the Plaintiff paid the amount of M6,271 51, and that as Plaintiff failed to make regular payments in terms of the agreement the Defendant was entitled to dispose of the bus, which he did for the sum of M8,000, and that there is therefore a balance owing to the Defendant of M12,898.49.

The Plaintiff gave evidence and said that he was employed by the Defendant as a truck driver, that he learned that one Rasool Abram was selling a bus, that he the Plaintiff wished to purchase it and that as he did not have the money to pay for it he applied to his employer the Defendant for the funds. The Defendant required to speak with Mr. Abram, they met and Defendant

/agreed to

agreed to purchase the bus for the Plaintiff Plaintiff says that the documents in regard to the bus were handed to him, that he arranged with the Defendant to pay for the bus from the takings of the bus which the Plaintiff was to operate, that he did operate thus and that he paid M6,271 51 on account of the bus

The Plaintiff testifies to the bus having been involved in an accident and arrangements for its repair being made by the Defendant, and that the bus was not returned to him.

In cross-examination he stated that the Defendant was buying the bus for him for the sum of M9,000 and it was put to him that this was improbable because in terms of the deed of sale between the Defendant and the seller, Rasool Abram, the Defendant was to pay M3,200 plus the outstanding balance that the seller owed to the Trust Bank, this being M9, 200 The Plaintiff was not clear in his replies in regard to the price but he did say that Rasool Abram had demanded cash in an amount of M3,200 and had stated that he also owed Trust Bank some money He said that in the end he would have had to pay M9,200 from the weekly takings to the Defendant

It was also put to the Plaintiff that the Defendant was insuring the bus and paying the insurance premiums The Plaintiff replied that he did not know this

It was put to the Plaintiff that the arrangement between him and the Defendant was that he the Plaintiff should run the bus for the Defendant, but the Plaintiff denied this. The Plaintiff said that he engaged the driver for the bus and he paid that driver from the proceeds of the salary that he earned as driver working for the Defendant

The Plaintiff also said that although efforts were made by Rasool Abram and himself to obtain the assistance of the Defendant in having the vehicle registered in the name of the Plaintiff this could not come about because the Defendant constantly sent the Plaintiff out on his duties as a truck driver. The Plaintiff denied that the

Defendant paid him a weekly commission from the takings from the bus.

Mr Rasool Abram gave evidence for the Plaintiff. He confirmed that the Plaintiff made enquiries of him regarding the purchase of the bus, that it was for sale, that he required the purchaser to pay him M3,200, and that the person who bought the bus would pay the balance that he owed to the Trust Bank. Mr Abram said that the Plaintiff informed him that his employer had promised to buy the vehicle for him, that he, Mr. Abram, went to Defendant and informed him of the price namely, M3,200 to be paid to him and the balance to the Trust Bank, that the Defendant stated that he wanted to buy the bus for the Plaintiff and he entered into the written agreement in terms of which he sold the bus to the Defendant. He also said that he wanted to effect the transfer of that bus to the Plaintiff but the Defendant refused saying that the law did not allow this. He also said that when he spoke to the Defendant about arranging the transfer the Defendant was always saying that the Plaintiff was busy. He said that the transfer papers were never signed

The Defendant closed his case and Defendant's counsel applied for absolution from the instance and this was refused for reasons that I gave in a judgment. The Defendant then gave evidence and stated that Mr. Abram came to him and informed him that he, Mr Abram, was selling his bus in regard to which details of the purchase price were given by the seller. The Defendant sent Mr. Abram to the Defendant's attorney to sign a written agreement of sale and paid M12,220 of which M 9,200 was paid to the Trust Bank

The Defendant said that he did not register the vehicle in his name as he did not know the business of running a bus and wanted to see whether it would be a payable proposition He insured the vehicle and paid premiums. He confirmed that the vehicle was involved in an accident and repaired by L.T. Motors in Ficksburg after which he sold it for the sum of M8,000 He denied that he purchased the vehicle for the Plaintiff. He also denied that he sold it to the Plaintiff for M9,200,

/saying he

saying he would not have sold it at a lesser price than he paid for it. He denied that the Plaintiff operated the bus and said that after running expenses he received an amount under M4,000 from the proceeds of the operation of the bus. He said that he had nothing to do with the management of the bus

In cross-examination he said that the bus was operated under the name of the seller, that is Rasool Abram. Although there was no agreement to operate under the seller's name, he said that he did so and without the consent of the seller He gave as his reason that he was running the bus on a trial basis. He denied that he instructed Mr Abram to deliver the documents in connection with the vehicle to the Plaintiff. He said that Mr. Abram was not introduced to him but came on his own and denied in effect that Mr. Abram had come to him because of the Plaintiff's interest in the bus

It is to be noted that this aspect was not put to Mr Abram when he was cross-examined.

He said that when the Plaintiff left his employ they were still on good terms and this also applied to his relationship with Mr Rasool Abram.

He said that Plaintiff was paid by him the sum of M40 a week for the management of the bus He denied that the Plaintiff gave him the sum of M6,271.51. It was put to the Defendant in cross-examination that the Plaintiff had said that he, the Plaintiff, had hired a driver for the bus and that the Plaintiff had not been challenged in this regard. He said the Plaintiff knew that he, the Defendant, was going to pay the driver.

In re-examination he said that he had traded in the bus for M8,000 when he purchased a truck from the Leyland Company.

The Court then questioned the Defendant in regard to the contents of the counterclaim. It was pointed out to the Defendant that the counterclaim stated that the Plaintiff owed the Defendant money as the price of the

/bus and

bus and that the counterclaim also stated that Plaintiff had paid the amount of M6,271 51. He was asked if he had given his attorneys instructions in regard to this, and his reply was that he had not and that he had given the summons to his attorneys when he received it. He was then asked to explain how they came to draw the papers if he did not give them the instructions, and he said that he could not understand how that had happened. He was asked to explain how the amount of M6,271.51 happened to be the same amount as the Plaintiff had stated that he had paid the Defendant, and his reply was "I am not too certain, My Lord." He said that he thought that his attorney could give an explanation and that his attorney was available to give the explanation.

The Court asked if he had failed to register the vehicle in a name other than that of the seller because he wanted to have some kind of security as far as the Plaintiff was concerned and he said that that was not the case. He said that the Plaintiff was employed to take care of the monies that were collected from the bus, and when asked why the driver of the bus could not account for those monies by paying them into his office instead of arranging for this to be done by Plaintiff, he replied that it was because it was a separate business He said he had told his advocate that the bus was to be operated under the seller's name and that Mr Abram was not introduced to the Defendant but had come to him directly.

He admitted that he wanted the authorities to continue under the impression that the road transportation licence was still in the name of Abram the seller and when asked whether he was aware that this would be deceiving the authorities he replied: "I am not sure " After the Defendant had closed his case the Court suggested that the Plaintiff be recalled whereupon Mr Kolisang for the Plaintiff applied for his recall

The Court informed the Plaintiff that in terms of s.168 of the Road Traffic and Transport Order No. 15 of 1970 a person who carried on motor carrier

/transportation

transportation is guilty of an offence unless he is the holder of a certificate issued to him under the Order He was warned that he was not obliged to answer questions in relation to this matter and said that he did not have a licence but had wished to apply for one but was obstructed by the Defendant. He gave no satisfactory explanation as to why he did not enlist the services of a lawyer to obtain the transportation certificate for him.

The Court informed the Defendant's counsel that he should consider the advisability of calling the Defendant's attorney to give an explanation as to how it came about that the matters alleged in the counterclaim were stated therein. Counsel requested an adjournment which was granted but when the Court re-assembled counsel stated that he would not call the attorney as the attorney had merely signed the pleading which had been drawn by an advocate in Johannesburg who had held the consultation with the Defendant. Counsel was then asked if he desired to call the advocate to testify and counsel declined stating that there were difficulties in regard to so doing.

Although Plaintiff's claim is for specific performance by Defendant for the return of the vehicle, in effect, from the evidence, it is clear that Plaintiff is vindicating the vehicle on the basis that it was sold to him by the Defendant and delivered to him on credit terms. In Laing v. South African Milling Company Limited, 1921 A.D. 387 INNES, C.J. said at p 394 :

> "Now, the rule of the Civil Law was clear. The sale and the delivery of goods did not operate to transfer the dominium unless the price was paid, security found or credit given That principle was adopted in Holland and has been recognised and enforced by our South African Courts."

Thus, if it is found that Plaintiff's version of what occurred is correct, then ownership in the vehicle passed to the Plaintiff and he is then entitled to claim its delivery from the Defendant who took it from him when the repairs were to be effected. If the vehicle is no longer available then the Plaintiff is entitled to its

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value as at the date of the trial Mlombo v Fourie, 1964(3) S.A. 350 T.P.D. at 357(H).

It is correct, as counsel for the Defendant submitted, that there are improbabilities in the version as given by the Plaintiff. It is unlikely that the price arranged by the parties according to the Plaintiff was the sum of M9,200 when the Defendant paid a total of M12,200 to the seller and the Trust Bank And that the Defendant insured the vehicle, again points to the probability that he did so because the ownership of the vehicle vested in him. As against this, however, there is the probability that the Plaintiff as a truck driver was ignorant of the implications in regard to the payment to the Trust Bank and was confused as to whether the price was M3,200 or M9,200 There are also improbabilities in the Defendant's version that the Plaintiff was merely to manage the bus. It seems hardly likely that the Defendant required the Plaintiff to collect the monies and pay them in when the driver of the bus could quite easily have brought them directly to the Defendant's office and paid them in to a member of Defendant's staff who could issue an appropriate receipt for what was paid in Although the Defendant denied that he continued to have the vehicle remain registered in the name of the seller as a form of security for the Defendant, it is conceivable that this was a means of protecting the Defendant by insuring that there was no conclusive evidence that the vehicle belonged to the Plaintiff because of the registration in Plaintiff's name. His explanation that he continued to use the seller's name without the seller's permission is inadequate when he states that this was done because he was engaged in ascertaining whether he could operate the bus as a profitable enterprise

What tilts the balance against the Defendant, apart from the evidence of Rasool Abram, is what appears in the counterclaim, namely the allegation in paragraph 3 thereof that the Defendant purchased the bus on behalf of the Plaintiff and the allegation in paragraph 8 thereof that the Plaintiff paid the amount of M6,271,51, being the same amount as that alleged by the Plaintiff.

/Mr Botha

Mr. Botha on behalf of the Defendant has referred to Seedat v Tucker's Shoe Company, 1952(3) S.A. 513 T.P.D. At page 516(H) this is said :

> "It is not, in my opinion, proper to draw conclusions adverse to the credibility of a party merely because there is a discrepancy between his evidence and the pleadings which are formulated, not by the party, but by his legal adviser. If it is established that the party made statements of facts to his legal adviser or anyone else in conflict with his trial evidence, this would be a different matter "

This case was followed in Star Motors v. Swart, 1968(3) S.A. 60 T.P.D. where a witness was not asked if he was the source of information that had found its way into the pleading. It will be remembered that in the present matter a full opportunity was given to the Defendant to call his legal advisers to offer an explanation as to how the version stated in the counterclaim came to be there. Ordinarily an inference would be drawn that the practitioner would not plead in a particular manner unless he had received instructions from the client so to do. It may be that there is an explanation, but if the opportunity to give that explanation is not accepted then in my view this strengthens the inference that allegations were made because the client had instructed the attorney or his counsel to that effect. Kiloverter Sales (Pty) Ltd. v Mackenzie's Garage (Pty) Ltd. 1975(1) S.A. 223 N.P.D. at D-E.

I would draw attention to what was said many years ago in Great Australian Gold Mining Company v. Martin, (1877) 5 Ch. D 1 per JAMES L.J. at 10 He said that Counsel's signature on a pleading is a matter to which the Court was in the habit of paying the greatest possible respect It is to that extent a voucher that the case was not a mere fiction In this matter plea and counterclaim are signed at the end by the attorney for the Defendant and counsel informed me that the attorney is Mr Keeton. I am entitled to assume in terms of the case that I have just referred to that the attorney as a responsible member of his profession vouches that

the allegations are not a mere fiction, in the sense not that they are necessarily true but that he had received instructions from his client to plead accordingly.

Mr. Botha has further urged upon me that as the counterclaim is conditional the Court should disregard it because the counterclaim was not proceeded with I cannot accept this submission. It is common practice that when a pleading is amended it is perfectly proper for counsel to cross-examine a witness as to how the amendment came about, in order to test credibility and in order to assess probabilities. As a fact the present counterclaim was drawn, and filed in Court. Relevant questions arise from its contents and such questions may be put and inferences drawn from the answers given. The inference that I draw is that the Defendant did make certain statements to his legal advisers, the effect of which is to confirm in essence the version of the Plaintiff that the Defendant purchased a vehicle for Plaintiff, delivered it to him, gave him credit and received on account of the price the sum of M6,271.51. This being so I hold that the Plaintiff was the owner of the vehicle and that he was entitled to vindicate it.

Mr Botha has submitted that there was inadequate proof as to the value of the vehicle In Pioneer Motors (Pty) Ltd v. Mokake, a judgment in the Lesotho Court of Appeal (2/1981), it was held, following a series of South African decisions, that the difficulty of quantifying the sum due is no reason for the Court not to endeavour as best it can to determine an amount on the evidence available to it That case was also concerned with the claim by an owner of a vehicle which had been disposed of and in regard to which the Plaintiff claimed its value.

The Plaintiff did not call evidence in regard to the value, the reason being that he did not know where the vehicle was and thus could not engage the services of a valuer to examine it It was submitted by Mr Botha that evidence could have been led as to the value of a similar type of vehicle. In my view, however,

/there is

there is evidence before the Court which can guide the Court in determining the value. That evidence is the evidence of the Defendant that he traded in the bus for the sum of M8,000. In such circumstances that value is in all probability close enough to the value that it bore at the time that it was traded in. It is true that that time is earlier than the time of the trial and the vehicle may have depreciated in value. As against that, however, it is notorious that prices of motor vehicles, because of the inflation, have risen considerably in the past few years. It would in my view be appropriate to balance any depreciation that may have occurred against any appreciation in value because of the current inflation. That the Court in certain circumstances can take judicial notice of notorious factors appears from the case of Paola v. Hughes (Pty) Ltd. and Another, 1956(2) S.A. 587 N.P.D. at 596(B) There the Court took notice of the fact that chandeliers do not depreciate significantly.

I hold, therefore, that the Plaintiff has established his claim to the value of the vehicle in the sum of M8,000.

Plaintiff has claimed special damages being the loss of earnings in the sum of M3,729.50. Presumably he makes this claim because, having been deprived of the use of the bus, he has thereby lost the opportunity of gaining the income that would have arisen from the continued use of the bus. There was inadequate evidence to support this claim but in any event it cannot be made for the reason that follows.

On Plaintiff's version he was operating the bus without the motor carrier transportation certificate that was required to be issued to him in terms of the Road Traffic and Transport Order No. 15 of 1970. He was therefore operating unlawfully. In Dhlamini v. Protea Assurance Company Ltd. 1974(4) S.A. 906 A.D. it was held that where a hawker claimed for loss of income because of injuries received in a motor car accident she was not entitled to such damages because the income

/had been

had been derived from a hawker's business in regard to which she had no licence and where trading as a hawker without a licence was a criminal offence. It was held that there were considerations of public interest that made it important to licence a hawker and that compensation for lost income of such a nature would be against public policy

In the present matter it is in my view likewise a matter of public interest that vehicles should not travel on the roads in Lesotho, where they are operated for the conveyance of members of the public, unless the proper road transportation certificate has been issued. This is for the protection of the public; and it is in my view against public policy to give compensation for the lost income claimed in the circumstances of the present case. For this reason Plaintiff's claim for M3,729.50 is dismissed.

The judgment of the Court is that the Defendant is ordered to pay the Plaintiff the sum of M8,000.

J. UNTERHALTER
ACTING JUDGE.

For the Plaintiff : Mr. G.M. Kolisang
For the Defendant : Mr A.D. Botha.