

IN THE LESOTHO COURT OF APPEAL

In the Appeal of :

STEPHEN K. MAKHOHLO Appellant

v.

RAZAK DAMBA 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 a judgment of Unterhalter A.J. in the High Court in which he awarded a sum of M8000 damages with costs against appellant in favour of respondent. For convenience the parties are referred to as in the Court a quo.

In that Court plaintiff (respondent on appeal) had sought an order for specific performance against defendant (appellant on appeal) for the return of a bus alleged by plaintiff to be in the possession of defendant which had, so plaintiff claimed, been bought for him, plaintiff, by defendant from a certain Rasool Abraham. In addition, plaintiff claimed special damages in a sum of R3 729,50 representing loss of earnings in respect of the operation/..

operation of the bus in question. An alternative claim was made for damages in the sums of R9 200,00 (the value of the bus) plus R3 729,50 (loss of earnings) suffered by reason of defendant's failure to deliver the bus to plaintiff.

Defendant conceded in his plea that he had bought the bus from Abraham but pleaded that he had done so for himself and not for plaintiff and that he had subsequently sold it as he was entitled as owner of the bus to do. He pleaded in the alternative that, were the Court to find that he had bought the bus for plaintiff - which he again denied - he had a counterclaim against plaintiff which exceeded in value the amount of plaintiff's claim. During the trial defendant's counsel stated that his client was not pursuing the counterclaim but that he did not abandon it.

The Court a quo was thus, in the first instance, seized with the enquiry as to whether plaintiff had established that the bus had been bought on his behalf by defendant. Unterhalter A.J. found that plaintiff had discharged this onus. The evidence disclosed that the bus had been sold and that defendant could accordingly not deliver the bus to plaintiff. The Court, therefore, considered plaintiff's alternative claim for damages and held plaintiff to be entitled to damages in the sum of M8000 and costs as detailed in its order of 3rd December 1982.

An appeal was lodged against this judgment, substantially on the basis that plaintiff had failed to discharge the onus of proving that defendant had bought the bus on his behalf and, in any event, that plaintiff had

failed/..

failed to prove his damages.

The main thrust of the argument by Mr. Botha on behalf of defendant was that, regard being had to all the evidence adduced in the trial Court, the presiding Judge had erred in reaching the conclusion that plaintiff had discharged the onus of proving that the bus had been bought by defendant from Abraham for himself, plaintiff. In any event Mr. Botha contended that plaintiff had failed to prove the quantum of the damages claimed by him.

The evidence on the question as to the party for whom the bus was bought comes from plaintiff, defendant and Rasool Abraham.

This evidence may be briefly summarised as follows.

Plaintiff testified that in 1978 he got to hear that Abraham was proposing to sell a bus belonging to him. He approached the latter who expressed a willingness to sell the bus to the witness for R3020 cash. Abraham was, however, not prepared to consider a sale whereby he would be paid for the bus in monthly instalments. Plaintiff informed Abraham that he would endeavour to borrow the money for the purchase price from his employer, defendant. He approached the latter, who told the witness to have Abraham come to see him to verify what Abraham wanted for the bus. After having seen Abraham, defendant, so plaintiff testifies, agreed to buy the bus for him, plaintiff.

Abraham confirms that plaintiff approached him in the matter of the purchase of the bus. He told plaintiff that he was still paying off the Trust Bank for money lent by the bank to enable him to buy the bus and that if plaintiff could/..

could get someone to help him to pay a cash amount of R3 200, not R3 020, and take over his, Abraham's, liability to the Trust Bank, he would be prepared to sell the bus. Later plaintiff asked him to go and see defendant as the latter, so plaintiff had told him, had promised to buy the bus for him, plaintiff. This witness went to see defendant who told him he, defendant, "wanted to buy the bus for Stephen", viz. plaintiff. The witness subsequently entered into a written agreement of purchase and sale (Exhibit C) in terms of which he sold the bus to defendant for R3 200, defendant to take over Abraham's liability in respect to the bus to Trust Bank. The amount of this latter liability is not stated in the agreement nor is any mention made in the agreement that the bus was being bought for plaintiff.

Abraham testifies that he took the licence and the "Blue Card", the Registration Card in respect of the bus, to defendant who instructed him to hand over these documents to plaintiff. Abraham testified that he had intended to effect transfer of the bus to plaintiff but defendant refused to agree to this saying, somewhat inconsequentially it would seem, that,

"the law does not allow that, because I personally, the defendant, am not buying the bus, but the bus is being bought for.....the plaintiff".

The bus was in fact not registered either in the name of plaintiff or defendant and the former complained in evidence that defendant had frustrated his attempts to effect transfer of the bus into his, plaintiff's, name.

To return to the evidence of plaintiff, he

testified/..

testified that after the bus had been bought by defendant Abraham handed over to him, plaintiff, the "necessary documents" relative to the bus. He goes on to recount the arrangements made between himself and defendant relative to its operation. He states that he arranged with defendant to hand over to defendant in payment for the bus the weekly takings made on the bus. He did so as from the 6th of February 1979 up to August 1979 when the bus was damaged. At the latter point he had paid in all a sum of R6 271,51 to defendant. The damaged bus was then taken to L.T.Motors at Ficksburg by defendant for repair. After it was repaired plaintiff testifies that he never regained possession of the bus, it being thereafter held by defendant. Plaintiff states further that it was he who employed the driver of the bus, paid him and organized the operation of the bus. He claims that all the expenses for fuel were for his account.

Under cross-examination plaintiff stated that he had wished to reduce his agreement with defendant to writing but the latter refused to do so saying that "he trusted me". The witness admitted that no arrangement had been made between him and defendant about the re-imbusement of defendant by him of monies paid by the latter by way of premiums for the insurance of the bus, which insurance had been effected by defendant.

As to the amount which the witness paid to defendant it was put to him in cross-examination that he had not paid to defendant more than "something in the region of R4 000". This he denied. He also denied that he had been paid

"commission"/..

"commission" from the bus takings by defendant. In further explanation of the payments made by him to the driver of the bus the witness stated that he used for this purpose the salary he received from defendant for driving a truck. When asked why he did not pay the driver out of the takings he said

"I did not do so because I was very keen to complete the money owing to the defendant. I wanted to complete it sooner."

In regard to the cost of repairs to the bus plaintiff testified that he and defendant had agreed that after the bus was repaired it would be decided how much he would have to pay for the repairs.

Defendant's version of the events, as foreshadowed in the plea, was that he had bought the bus from Abraham for himself and not for plaintiff. He said he implemented his contract with Abraham by paying the seller R3 020 and settling the latter's outstanding account of R9 200 with the Trust Bank. The documents relating to the bus were, he testified, kept in the vehicle but no steps were ever taken to have it registered in his name. The reason advanced by the witness for this was that before doing so he wanted to see whether "the business would function", presumably meaning, would pay. If it did not pay he proposed to turn the bus into a truck and employ it in his business. He nevertheless insured the bus and was content to operate it under the licence which had been issued to the seller to conduct a bus service on a particular route. Defendant said that after the bus was damaged he had it repaired and on the completion of repairs sold it for R8 000. He denied that plaintiff was

responsible/..

responsible for operating the bus and said that the running costs thereby involved came out of the takings from the operation and he received only the net amount which he puts at a figure of under R4 000. He conceded, however, that plaintiff was the one concerned with keeping the records of takings of the bus and its management.

Under cross-examination defendant conceded that he, without any agreement or authorization from the seller was, unknown to the latter, operating the bus for his own account over a route assigned by licence to the seller. His attempted explanation for this conduct - which was clearly illegal - were unconvincing.

The trial Court made no credibility findings in regard to the various witnesses but appears to have based its findings on the probabilities and on the fact that in his counter-claim it was alleged by the pleader - acting as the trial Court found on the instructions of his client, the defendant - that defendant had in fact bought the bus for and on behalf of plaintiff. The effect of this allegation, despite the fact that it was specifically couched in the form of an alternative to the denial of such an agreement, coincided with the factual basis on which plaintiff's claim had been founded. The counter-claim also contains the averment that plaintiff paid defendant an amount of R6 271,51 which was the figure claimed in the declaration to have been paid by plaintiff to defendant, a claim supported by plaintiff's testimony at the trial.

I do not think that the contradiction between

defendant's/.f

defendant's plea and counter-claim can be allowed to affect the enquiry with which the trial Court was concerned. A party is entitled to plead in the alternative and the counter-claim is in the present case expressly advanced as an alternative method of meeting plaintiff's claim as formulated in the declaration. There are, of course, limitations upon the right of a party to plead inconsistent defences. Barry, J.P. in the case of Whitehead's Trustee v. Van Eyk, 4 E.D.C. at p. 8, held that

"the proper view of the case seems to be that several pleas ought to be allowed to be pleaded together although they are inconsistent if they are required bona fide and appear to be necessary to meet the real justice of the case."

The test would appear to be whether the inconsistency is prejudicial or embarrassing to the plaintiff. See Middelburg Coal Agency v. Johannesburg Municipality, 1916 T.P.D. 224.

I do not think that the pleading in this case can be described as an embarrassment to plaintiff. Admittedly the phraseology used by the pleader drawing the counter-claim was unfortunate. What he intended to say was, I have no doubt, that should the Court find that he had entered into an agreement as alleged by the plaintiff, he nevertheless had a claim in excess of the amount claimed by plaintiff. I accordingly do not think that any adverse inference can be drawn against defendant because of the form of his pleadings.

However in regard to the improbabilities inherent in defendant's case, I am unpersuaded that the conclusion arrived at by the trial Judge is unsupportable.

There/..

There is no evidence to contradict that of plaintiff and Abraham as to the manner in which the purchase of the bus from the latter was first mooted. It was clearly owing to the initiative of plaintiff that the matter of the purchase of the bus was raised with the then owner of the bus. Nor is there evidence to contradict that of plaintiff and Abraham that the latter went to see defendant about the purchase of the bus at the instance of the plaintiff who wished to acquire ownership of the bus. While it is true that from then on the actual contractual arrangements for the acquisition of the bus were conducted between Abraham and defendant, nevertheless there seems to be nothing improbable about Abraham's evidence that when he went to see defendant the latter told him that he was buying the bus for plaintiff. Moreover this evidence was not rejected by the trial Court.

Counsel for appellant argued that it was highly improbable that defendant would agree to buy an expensive vehicle for a lowly-paid employee who could offer no security for the eventual payment of the purchase price. But on the other hand if regard is had to the actions of the defendant with reference to the bus the probabilities point in the opposite direction. Defendant took no steps to have the bus registered in his name as one would have expected from an owner. The operation of the bus was left in the hands of his lowly-paid employee. The latter was left to engage and pay the driver of the bus and collect from him the takings from its operation. Had defendant regarded himself as the owner of the bus it is inexplicable that his office staff was not entrusted with this function, which, from his point of view/..

view, would have been a more efficient and surer way of collecting the returns produced by the operation of the bus. Instead he left it to one of his lorry drivers to determine what amounts were to be handed over to him each week with no check on the correctness of the sums. Such a procedure is indicative of an acceptance by defendant of the fact that the sums that plaintiff was handing over to him represented instalments on a capital sum due by plaintiff to defendant in respect to the purchase of the bus by defendant for plaintiff.

It was further contended on behalf of defendant that plaintiff had failed to prove any damages. Defendant's damages would be represented by the market value of the bus. Plaintiff failed to produce evidence of such value. However defendant in his counter-claim alleged that the R8 000 was the "fair and reasonable market value" of the bus. There is no evidence on record to suggest that the sale of the bus was undertaken under circumstances which would have been likely to affect its market value or that the price of R8 000 was any more or less than that which defendant had alleged it to be. Defendant's evidence was, without more, that he sold it for R8 000 from which, in the absence of evidence that extraneous factors existed which could have affected the price, it can be inferred that such sum represented the market value of the vehicle. I am not disposed to differ

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from the finding of the trial Court that R8 000 represented the market value of the bus.

The appeal is dismissed with costs.

L. DE V. VAN WINSEN
JUDGE OF APPEAL

I. A. MAISELS
PRESIDENT

W. P. Schutz
.....
W. P. SCHUTZ
JUDGE OF APPEAL

Delivered this 22nd day of August 1983 at MASERU