MIMOSA MINING COMPANY (PRIVATE) LIMITED
versus
ELTON NYOKA

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 17 June & 5 October 2016

Civil Trial

B. K Mataruka, for the plaintiff
Defendant in person

TSANGA J: Plaintiff, Mimosa Mining Company (Mimosa), issued summons for the return of a motor vehicle, a Toyota Hilux, Registration number ACI 7353 and Engine No. 5554140. In the alternative, it sought payment of US$27 206.98 from its former employee Elton Nyoka, the defendant, whom it says has failed to pay for the vehicle which it sold to him. It says that it cancelled the sale when he failed to pay for the vehicle and demanded the return of the vehicle.

Background facts

The facts are that as part of cost reduction and cost minimisation strategy, Mimosa embarked on a retrenchment exercise directed at downsizing positions in order to keep the company afloat. On the 25th of June 2014, Elton Nyoka as one of the employees, applied for voluntary retrenchment package and requested to purchase the vehicle in question for the sum of US$16 087.00. The voluntary retrenchment was accepted by Mimosa with the agreement however, that the motor vehicle would be disposed to him at book value. A letter had been written to him on the 7th of July 2014 on how the voluntary separation package would be computed, taking into account components such as notice pay, severance pay, years worked, and relocation allowance, amongst other considerations. This letter was also very clear that the disposal of the car to him would be at book value.

Three valuations of the vehicle had thereafter been obtained by Mr Nyoka, one being from Automobile Association of Zimbabwe at $ 25 000.00; Amtec at $21 500.00; and Duly's at $ 23 000.00. These were taken into considerations in arriving at the book value of the car as $ 27 206.98 which had been purchased at $64 490.63. The vehicle was being used by Mr

Nyoka as a personally allocated vehicle. An agreement of sale was entered into on the 19th of August 2014 and transfer of the vehicle into Mr Nyoka's name had been obtained.

Thereafter Mr Nyoka's retrenchment benefits had been computed and a "Voluntary Separation Package Agreement" agreement had been signed by the parties in July 2014 indicating the amount payable to him as $111 317.16 less tax. The net amount that was paid to him was $ 70 116.59. It was transferred into his bank account on the 5th of September 2014. These are common cause facts.

The evidence

Mr Edmore Tafirenyika who is Mimosa's Finance and Administration Manager, gave evidence on its behalf. His evidence was that the amount paid out to Mr Nyoka did not include the deduction of the vehicle's purchase price as its accounts department had inadvertently omitted to make the deduction for the vehicle. In December 2014, a letter was written to Mr Nyoka by Mimosa's lawyers indicating that the account's department had overlooked to make the deduction from his final pay out. After failing to obtain payment from Mr Nyoka, Mimosa had cancelled the agreement of sale for the vehicle and asked him to return the vehicle within two days if he still failed to pay. This he has still not done to date.

Mr Nyoka's evidence was that an agreement of sale regarding the vehicle had been entered into on the 19th of August 2014. It had facilitated the ZIMRA process of getting the car registered into his name. He confirmed that he remained in full possession and use of the vehicle. He described the agreement as a non-monetary settlement in the sense that he was only to be paid what was due to him after the deductions had been made. His justification for refusal to pay was that in his view Mimosa had taken into account the purchase price of the vehicle before it paid him out.

Materially, other than his bold assertion that the amount for the vehicle had been taken into account in computing his package, he did not place before the court any evidence to support this claim, given that the categories for assessing what was due to him had been clearly outlined. Furthermore, he conceded in cross examination that he had not paid for the vehicle and that there was no contract that said he was not supposed to pay. He also conceded in cross examination that there was no evidence from the benefit package that there was any deduction of $27 206.98. He further conceded that his own computations which he complied following his voluntary retrenchment in which he now sought to claim more benefits that he considered owing to him, clearly acknowledged that he had not paid for the vehicle. In essence, there is no factual basis for his refusal to return or pay for the vehicle.

The legal arguments

Mimosa's legal submissions as argued by its legal practitioner, Mr *Mataruka*, are that the written document embodies the full agreement between the parties. (*Union Government* v *Vianini Ferro Concrete Pipes (Pvt) Limited*[1]*; Kovi* v *Ashanti Goldfields Zimbabwe Ltd & Anor*[2]. It contends that there was a valid contract, a *merx and a pretium*, which are the vehicle and the purchase price of US$27 206.98. He also argued that the word "disposed" as contained in the agreement of sale which confirmed that it had disposed of the motor vehicle to Mr Nyoka, connotes a sale. Furthermore, he submitted that Mr Nyoka was placed *in mora* and that Mimosa has a right to sue for specific performance. (*Dobrock Holdings (Pvt) Ltd* v *Turner and Sons (Pvt) Ltd*[3]*; Asharia* v *Patel & Ors.* [4] Additionally, the honest mistake made by Mimosa is said not to entitle Mr Nyoka to unjust enrichment. (*Gonclave* v *Rodrigues*[5]*; Industrial Equity* v *Walker.*[6] In this regard, reliance is placed on the principles of unjust enrichment as follows[7]:

a) The defendant must be enriched
b) The enrichment must be at the expense of another
c) The enrichment must be justified
d) The case should not come under the scope of classical enragement actions
e) There should be no positive rule of law which refuses an action to the impoverished person.

His submissions also stressed the fact that no evidence was produced by Mr Nyoka to substantiate his claim that the amount paid out to him already contained the deduction for the motor vehicle. He asserted that the duty to prove this was on Mr Nyoka since he is the one who alleged. He also points out that Mr Nyoka equally failed to adduce evidence to support his second line of argument that the vehicle had been given to him as part of the retrenchment package.

Mr Nyoka's submissions are that he was not properly advised of the termination of the agreement. He submits that the cancellation was supposed to be between him and Mimosa without involving lawyers. He therefore contends that the cancellation was a nullity and of no

[1] Union *Government v Vianini Ferro Concrete Pipes (Pvt) Limited 1941 AD 43 at 47*
[2] *Kovi v Ashanti Goldfields Zimbabwe Ltd & Anor 2007 (2) 354 (H)*
[3] *Dobrock Holdings (Pvt) Ltd v Turner and Sons (Pvt) Ltd 2006 (2) ZLR 353 (H)*
[4] *Asharia v Patel & Ors 1991 (1) ZLR 276 (S).*
[5] *Gonclave v Rodrigues 2004 (1) ZLR 122 (H)*
[6] *Industrial Equity v Walker 1996 (1) ZLR (H) 269 at 300 B*
[7] Annual Survey of South law 1996 p150 at p152.

force and effect. Mr *Mataruka*'s response to this submission is primarily that if Mr Nyoka disputes the cancellation of the agreement, then the agreement remains valid and does not detract from the fact that he has not paid the value for the vehicle. I agree. Furthermore, he highlights in response that there was indeed a reason why the letter was communicated to his lawyers. The letter was written to his lawyers who were representing him at that relevant point in time in a labour dispute pertaining to his severance package.

Mr Nyoka also submits that when his severance package was communicated to him, there was a missed opportunity to include a clause authorising Mimosa to deduct staff debts inclusive of the purchase of the vehicle using the in-house *Policies and Procedures Manual.* He maintains that the fact that this was not done is what converted the agreement into a non - monetary transaction and that it is this failure that removed his obligation to pay. In other words, he concedes yet again that he was indeed supposed to pay but relies on the failure to capture the nuts and bolts of payment as per in-house staff manual, to absolve himself from doing so.

Mr Nyoka's argument lacks merit and does not in any way absolve him from paying for the car which the parties agreed would be disposed of at USD27 206.98. I am in agreement with the plaintiff's response to this submission rejecting the argument that an additional contract should have been entered into and that there is no requirement for parties to enter into an agreement of sale and then an acknowledgement of debt. Furthermore, the plaintiff is correct that Mr Nyoka could not purport to attach the said manual to his submission when he had failed to produce it during his evidence. In any event, it is not disputed that Mr Nyoka was leaving and hence payment would and should logically have been made from his severance package.

In his submissions the defendant also rejects the unjust enrichment argument on the basis that Mimosa will not suffer at all from his alleged unjust enrichment, given its multinational status and its performance figures. This argument has nothing to do with the reality that he has not paid for a car that he was supposed to pay for. It is simply clutching at straws. The evidence given is clear that his offer to purchase the vehicle was accepted at an agreed price. The evidence is also clear that he admitted he has not paid for it. Mimosa's explanation is that it forgot to make a deduction. It is from this state of affairs that the unjust enrichment arises. Mr Nyoka has clearly enjoyed, at his choice, full use of the vehicle without paying for it.

At the core of unjust enrichment is the principle that one should not be unjustly enriched at the expense of another or receive a benefit or property without paying just compensation.

Mimosa locates its claim for unjust enrichment as arising from the fact that following the cancellation of the agreement of sale for failure to pay the purchase price of the vehicle, Mr Nyoka has retained use of the vehicle for over two years. It is this retention without making payment that has brought in the issue of unjust enrichment. There is no doubt that the defendant has been enriched by the receipt of a benefit- being the car in this instance. There is equally no doubt that the benefit is at the expense of the plaintiff. It is also a fact that under these circumstances it would be unjust to allow him to retain the benefit without any payment. Mr Nyoka's argument that Mimosa should bear responsibility for the failure to deduct because it will not suffer any monetary loss is not an argument which can hold because the critical issue is that he has received a benefit at its expense.

Whilst Mr Nyoka is not at fault for Mimosa's failure to deduct the value of the car from his final monetary benefits, what is crucial is that this fact was brought to his attention within a reasonable period of time. I note that the agreement of sale having been entered into in August 2014, and the payment of defendant's benefits having been effected in September 2014, the letter advising of the failure to deduct went out to Mr Nyoka in December 2014, just over three months from the agreement of sale. In other words, the error was brought to his attention timeously and the time lapse was not unreasonable. He should certainly at that point have returned the car. He chose not to. Returning the motor vehicle at this point would not be appropriate as over two years have passed since the agreement of sale.

I conclude that Mimosa as plaintiff does have a valid claim against Mr Nyoka the defendant. The plaintiff has had to come to court to get the defendant to pay for the vehicle. Whilst ordinarily a successful litigant is entitled to costs for being put to unnecessary expense by the unsuccessful party, I find in this case that albeit the plaintiff pleads an honest mistake, it was not a mistake that was compatible with due diligence and reasonable prudence. I cannot overlook the carelessness on its part in failing to make the necessary deduction. It was the plaintiff's crucial duty to ensure that it made all the necessary deductions before it issued out the final cheque. After all, plaintiff's accounting department remembered to recoup an amount of $ 10.00 owed by the defendant from the amount that was to be paid to him, yet it forgot to deduct $ 27 206.98 for the car. Deducting $10.00 for staff expenses yet neglecting to make a deduction for an entire car was certainly negligent and tantamount to being penny wise and pound foolish. Plaintiff must therefore assume responsibility for the costs it has had to incur to vindicate its claim.

Accordingly, I make the following order:

1. It be and is hereby ordered that the defendant pays to the plaintiff the sum of **US$27 206.98** being the agreed price for a motor vehicle, a Toyota Hilux D/C, registration number ACI 7353, engine no. 2KD -5554140
2. Each party to pay its own costs.

Gill Godlonton and Gerrans, plaintiff's legal practitioners