

CHRISTOPHER LUBASI MUNDIA v SENTOR MOTORS LIMITED (1982) Z.R. 66 (H.C.)

HIGH COURT

CHIRWA, J.

15TH MARCH, 17TH SEPTEMBER AND 15TH, OCTOBER, 1982

(1981/HP/44)

Flynote

Civil procedure - Declaration - When granted.

Civil procedure - Pleadings - Function of.

Civil procedure - Pleadings - Variation of - Need for evidence to support pleadings.

Evidence - Witnesses - Evidence of - Need to support pleadings in proving case.

Headnote

The plaintiff sought a declaration that a car which had been sold by the defendant was rightfully his. The plaintiff and the defendant agreed to the sale to the plaintiff of the new car after he sold the wreck of his old one to the defendant. For a while the plaintiff was unable to get in touch with the defendant's Managing Director and when he finally did so it was to find that the car had already been sold to a third party. The plaintiff obtained an interlocutory injunction restraining the defendant from dealing with the car in any way other than selling it to the plaintiff. However during the hearing of the case it was found that the statement of claim was not supported by the plaintiff's evidence.

Held:

- (i) A declaration is a discretionary judgment which must be granted with care, caution and justice having regard to all the circumstances of the case, and not where the relief claimed would be unlawful or inequitable or where an adequate alternative remedy which disposes of all the issues is available.
- (ii) The function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.

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- (iii) Where the pleadings are at variance with the evidence adduced in court, the case fails since the plaintiff's case is completely re-cast without actual amendment of the statement of claim, and not only will the court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice.

Cases cited:

- (1) Sithole v State Lotteries Board (1975) Z.R. 106.
- (2) London Passenger Transport Board v Moscrop [1942] A.C. 332.

Legislation referred to:

Halsbury's Laws of England (3rd edn.) Vol. 22, para. 1611.

For the plaintiff: M. W. Mwisiya, Mwisiya and Co.
For the defendant: G. Chaane, Chaane and Co.

Judgment

CHIRWA ,J.: This is an action by the plaintiff for a declaration that a metallic grey Renault 5 four-door saloon car is the property of the plaintiff and also for an injunction restraining the defendant from selling or giving away or dealing with the said car in any way than selling it to the plaintiff.

An injunction was obtained from my brother Chaila, J, on 15th January, 1981, on an *ex-parte* application, the order being to the effect that the defendant should not dispose of the car until the matter is determined on the writ as issued.

Evidence on behalf of the plaintiff is by himself and one Elliot Bill Moonga and no evidence was called on behalf of the defendant.

The plaintiff testified that on 10th September, 1979, his wife lost a Renault, R5, in a car accident which was about two months old. He decided to replace it. He took the damaged car to the defendant who gave repair quotation of K4,000 and advised the plaintiff that it was uneconomic to repair it as the costs of repair were more than the actual cost of the car and offered to buy the wreck at K1,500. Finally it was agreed that the wreck be sold at K1,200. The plaintiff later wanted to have a similar car that was damaged in the car accident and went to see the Managing Director of the defendant who advised him to see Ministry of Commerce and Industry Officials about it. At the Ministry of Commerce and Industry he saw Mr Moonga, PW2, who advised him to place an order through the dealers, who are the defendants. A meeting was held between the plaintiff, Mr Moonga and the Managing Director for the defendant at which it was agreed that R5 saloons be ordered and the plaintiff be included on it. The plaintiff's particular requirements were for a Renault R5 GTL, four-door, metallic grey with a fitted radio but he was told that radios are not fitted in cars shipped to Africa.

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The defendant duly obtained an import licence around April, 1980 and the plaintiff kept checking with the defendant and in July, 1980, he was asked to pay a deposit without specifying it, the defendant saying that he did not have the money as he was putting up premises worth about K1/4 million. The plaintiff then told the Managing Director for the defendant that he was selling his Peugeot 504 in order to pay the deposit and asked the defendant to find a buyer for it. Although this was agreed, the plaintiff did not give the car to the defendant as on each occasion he went there he never found the Managing Director for the defendant, he was told by the people there that Mr Eiman dealt with all the orders personally.

On about 9th January, 1981, he managed to find the Managing Director for the defendant and asked the Managing Director to let him know the price of the car when fixed by Commerce and Industry and he was told that the car was already sold and he then warned the defendant of appropriate legal action and he instructed his lawyers to take up the matter. As a result of this, injunction was obtained and on the evidence he asked for declaration that the R5 metallic grey colour is his properly.

PW2 is Mr Elliot Bill Moonga who testified that in 1979 he was with Ministry of Commerce and Industry and was head of Department that dealt with imports. During the course of that year the plaintiff came to see him in the course of his duties and wanted to apply for foreign exchange. He told the plaintiff that as the policy stood then, it was not possible for an individual to be allocated

foreign exchange. He advised him to order the car through a dealer and to this effect they walked to Sentor Motors where the plaintiff was introduced to the Managing Director and his requirements made known. The Managing Director told the two that he was awaiting for foreign exchange allocation and that he would treat Mr Mundia like any other customer. That is all that the witness knows in this matter and he left Ministry of Commerce towards the end of 1979 and he is not sure whether the defendants were allocated the foreign exchange or not.

It is trite law that declaration is a discretionary judgment which must be granted with care and caution and judicially, having regard to all the circumstances of the case. It will not be granted where the relief claimed would be unlawful or inequitable for the court to grant. Neither will the court grant it if an adequate alternative remedy is available-see *Halsbury's Laws of England*, 3rd edn. Vol. 22, para. 1611 on pp. 749-50. As Baron, D.C.J., put it in the case of *Sithole v State Lotteries Board* (1):

"I am therefore firmly of the view that the increasing tendency to proceed by way of actions for declaration is one to be deprecated and that the court should not entertain such an action where an alternative remedy is available which disposes of all issues between the parties."

In the present case as I have already pointed out, an interim injunction

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was issued on 15th January, 1981, on an *ex parte* application by the plaintiff. This application was supported by an affidavit sworn to by the plaintiff by which affidavit the plaintiff clearly shows that by 9th January, 1981, he had been told that the car in question had already been sold to a third party. I doubt very much if this interim injunction could have been issued by my learned brother if this fact was seriously appreciated and in the absence of any evidence of connivance between the third party and the defendant. I cannot further appreciate how the injunction can be effected if the property in question has passed on to third parties. Be as it may, I will deal with this matter on the general legal principle I have stated above from *Halsbury's* and the *Sithole* case.

The evidence on behalf of the plaintiff is conflicting as between the two witnesses as to what exactly transpired at the meeting between the plaintiff, his witness Mr Moonga and Mr Eiman the Managing Director of the defendant. The plaintiff says that as a result of the meeting Mr Eiman agreed to import a car answering a particular description on behalf of the plaintiff. On the other hand Mr Moonga said that Mr Eiman agreed to treat the plaintiff like any other customer and that this was sometime in 1979, certainly before the end of the year as he left the Ministry of Commerce towards the end of 1979. Paragraph 2 of the statement of claim states that the oral contract was made in May, 1980, and it was after this oral agreement that the plaintiff went to negotiate with the Ministry of Commerce who issued an import licence. The pleadings are at variance with the evidence adduced in court for according to documents 11 and 12 the application for import licence was made on 27th February 1980, and the licence was granted on 11th April, 1980.

The function of pleadings is very well known, it is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such. As was said by Lord Russell of Killowen at p. 347 in the case of *London Passenger Transport Board v Moscrop* (2):

"I have already stated my difficulty in justifying this implication but, with it as the basis of their order the Court of Appeal made a declaration that the representation clause was void. This appears to me to have been complete re-casting of the respondents' alleged cause of action and

the matter was unfortunately carried through without amendment of the statement of claim. This should not be so. Any departure from the cause of action alleged, or the relief claimed in the pleadings should be preceded, or at all events, accompanied, by the relevant amendments, so that the exact cause of action alleged and relief claimed shall form part of the Court's record, and be capable of being referred to thereafter should necessity arise. Pleadings should not be 'deemed to be amended' or 'treated as amended.' They should be amended in fact."

The manner in which the statement of claim was drafted, looked at against the evidence of the plaintiff himself who stated that the statement of

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claim was drafted with full understanding of what happened in the case, one cannot but echo the observation of Doyle, C.J., in the case of Sithole *supra* at p.116 where he says:

"The case is a classic example of the haphazard approach to pleadings and evidence which is only too common in the cases coming before the courts."

Further down he says:

"The failure in the respondent's evidence disclose a complete lack of consideration of what witnesses were required to prove and the facts which were sought to be substantiated by him."

Pleadings in the present case obviously disclose serious short-comings which are not supported by any evidence. On this point alone, this case fails because the case as pleaded is not supported by any evidence at all. Evidence shows that when the purported oral contract was made in May, 1980, defendant had already obtained an import licence to import into the country ten R5 saloon cars. There was no application to amend the pleadings and the statement of claim has to be then as it is, namely the case for the plaintiff.

Even if I may be wrong that the plaintiff's case fails on the ground that it is not supported by any evidence, the case would still fail on the ground that declaration sought is a discretionary judgment, such should not be granted where it would be inequitable to do so. The plaintiff's own evidence, both *viva voce* in court in the main trial and in his affidavit during the *ex-parte* application for an injunction, clearly shows that at the commencement of the proceedings the alleged car was already sold to a third party and I cannot see how any reasonable tribunal can declare that such a car, bought by an innocent third party, is the property of the plaintiff. It would not be equitable to the third party if such a declaration were issued and I would dismiss this action on this ground.

Further this action should be dismissed on the ground that the plaintiff has an alternative remedy available to him. From what can be gathered from the evidence the plaintiff is alleging a breach of oral contract made in May, 1980, as pleaded, but as I have said already, the pleaded case is not supported by any evidence at all. If there was a contract, the alternative remedy available to the plaintiff is to sue for breach of contract and if he call adduce evidence to persuade the court to order specific performance of that contract on the grounds that due to difficulties of obtaining new cars in Zambia damages may not be adequate, the court will gladly order specific performance of the contract.

On the whole of the facts of the case this action must fail and I order that, the interim injunction granted by court on 15th January, 1981, be dissolved I award costs to the defendant to be agreed,

in default, to be taxed.

Claim dismissed
