ZAMBIA SAFARIS LIMITED v JACKSON MBAO (1985) Z.R. 1 (S.C.)

SUPREME COURT
SILUNGWE, C.J., NGULBE, D.C.J., AND MUWO.
28TH NOVEMBER, 1984 AND 10TH JANUARY, 1985.
(S.C.Z. JUDGMENT NO. 8 OF 1984)

Flynote
Civil Procedure -Pleadings - Departure from - Effect of.

Headnote
In the claim as endorsed on the writ the plaintiff alleged a complete failure of consideration in the sale of a vehicle. In the statement of claim he claimed damages for breach of warranty and the cost of repairs. In evidence at the trial the plaintiff alleged fraud or deceitful concealment of the condition of the vehicle. In spite of variance between the claim as endorsed in the writ and as stated in the statement of claim and in evidence at the trial, the High Court entered judgment in favour of the plaintiff on the basis of the alleged fraud and deceitful condition of the vehicle. The defendant appealed.

Held:
The extension of the plaintiff's case to fraud or deceitful concealment was a new cause of action which was a complete departure from the case which had initially been alleged. Such a radical departure from the case advanced could not be entertained.

Cases referred to:
(1) Schneider v Health [1813] 3 Camp 506
(2) Mumba v Zambia Publishing Company [1982] Z.R. 53

For the appellant: H.H. Ndhlovu of Jaques and Partners.
For the respondent: A. Patel of M.A. Patel and Company.

Judgment
NGULUBE, D.C.J.: delivered the judgment of the court: This is an appeal from the decision of the High Court which found in favour of the respondent (who was the plaintiff) in his claim against the appellant (who was the defendant) for either the return of a sum of K3,000 as money paid on a consideration which had wholly failed or for damages. The claim arose out of an oral contract of sale under which the respondent purchased from the appellant a Land - Rover, then twelve years old, which had what was called a "knock engine."

The claim as endorsed on the writ alleged a complete failure of consideration on the sale of a Land-Rover registration No. EN6411. The statement of claim alleged, in paragraphs 3 to 5, that the respondent had originally purchased a Land-Rover bearing registration No. AMA 123 for K2,800 out of which he paid K2,000 as a deposit; that the said vehicle AMA 123 was orally warranted to be

in good condition and thoroughly roadworthy; that the said warranty induced the respondent to purchase that particular vehicle; that the said vehicle had serious defeats whereupon

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the respondent had repudiated the contract of sale. The statement of claim further alleged that, as a result of the repudiation, the appellant Field Manager offered the respondent an alternative Land-Rover registration No.EN 6411 at a price of K3,000; and that this latter vehicle (the subject of this appeal) was also orally warranted to be in perfect mechanical condition; that after delivery had been taken, the respondent noticed a discharge of black smoke and discovered major defects in the engine; and (in paragraph 8) that therefore the appellant was in breach of warranty, Paragraph 9 of the statement of claim alleged that the respondent has spent a sum of K600 to effect repairs. He therefore claimed the sum of K600 plus damages for breach of warrant.

It was not only the statement of claim which was at variance with the claim on the writ. As will be seen the respondent's evidence did not conform to the statement of claim and the judgment was given allegedly on the statement of claim on another extension or variation of the case and without making it clear whether it was the return of the price or only the damages to which the respondent was entitled by the said decision.

The learned trial commissioner rejected as hearsay the evidence of the single witness called by the appellant who was not the person with whom the respondent had negotiated and concluded the transaction. Mr Patel argues that, in doing so, the learned trial commissioner cannot be faulted. He is probably right but then the respondent in his own evidence did say that he had personally made the decision to purchase the alternative Land-Rover; that he had been informed that the vehicle "was smoking"; that, as he was inexperienced in these matters he had requested the appellant to make available their own mechanic to inspect the vehicle and to advise him, but that the appellant had advised him to fook for his own independent mechanic. He took delivery of the vehicle and had it examined a few days later when the major faults were explained to him by the mechanic engaged by him in this behalf. He then saw the appellant and demanded a refund of the purchase price which was said to be, not K3,000 as pleaded but K3,800. On the respondent's own evidence, therefore. it is quite clear that he had been informed of the defect on the motor vehicle.

The fact that the respondent had effected repairs costing K600 only emerged in the respondent's statement of claim and was not alluded to either in the evidence or in the judgment. As will appear shortly, that fact was important, and ought to have been considered as we propose to do since this is a matter or the record before us.

On the evidence adduced by the respondent, the learned trial commissioner found that the appellant's officials had kept quiet and therefore fraudulently and deceitfully concealed the condition of the vehicle, well knowing that the respondent had no knowledge of motor mechanics. It is to be observed that this finding not only ran in the teeth of the respondent's evidence but in erect meant that the claim based on a positive oral representation by way of warranty, (that the Land-Rover was in perfect mechanical condition) was not upheld. The learned trial commissioner in

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fact extended the respondent's case to some sort of fraud or deceit by silence and on that basis found this transaction to be an exception to the maxim caveat emptor. Indeed, the learned trial commissioner went so far as to liken the alleged silence to the situation in *Schneider v Health* (1) in which seller fraudulently took a vessel from the slipway into the water, so as to conceal its rotten hull. We do not see that any such comparison even arises nor did the respondent's evidence support any such extension to his case when, on his own evidence, there was no concealment of any kind whatsoever.

What emerges from the foregoing is that this was not the happiest of cases. The writ alleged total failure of consideration but the facts did not, and could not, in point of law, support such a claim. The rule as to failure of consideration is certainly not designed to relieve buyers from the results of a bad bargain nor can it be used to defect the maxim caveat emptor in a case where, far from exercising his right of rejection of the ancient Land-Rover (in the same manner as he had rejected the earlier vehicle and assuming that he was entitled so to reject in terms of the Sale of Goods Act), the respondent repaired the vehicle at a cost of K600 and so dealt with the goods sold in a manner precluding restitution of the price to the buyer and the vehicle to the seller. On these facts, there was a statutory acceptance of the vehicle in terms of section 35 of the Sale of Goods Act, which is to the effect that, acceptance will take effect, among other things, if the buyer deals with the goods in a manner inconsistent with the seller's rights. But even more conclusive is the fact that far from claiming restitution, the statement of claim shifted the claim to one of damages for breach of warranty. In that event, section 53 of the Sale of Goods Act applies and limits the remedy to damages only and the question of rejecting the vehicle and recovering the price then does not even arise.

No warranty was given and none was found. The finding that there was a fraudulent and/or deceitful concealment by keeping quiet, was one not supported by any evidence and was in any case in the teeth of the evidence. In any event, the extension of the respondent's case thereby affected by the learned trial commissioner must be rejected as foisting a new cause of action which was complete departure from the case which the respondent had put forward. In our view, such extension was neither variation nor modification nor a development of the case as pleaded and, following *Mumba v Zambia Publishing Company* (2), such a radical departure from the case advanced cannot be entertained.

For the reasons which we have given, we agree with the submissions by Mr Ndhlovu that the findings below, upon which judgment was granted cannot possibly be sustained. Contrary to what Mr Patel has submitted, the issue was not simply one of credibility as between the respondent and the appellant; the issue was one of findings made in the absence of any supporting evidence and against the evidence that was accepted. This was a case where the plaintiff's case ought to have fallen of its own inanition, had the learned

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trial commissioner not seen it fit to find a foothold for the respondent on a case which he had not put forward on even made out. We allow the appeal and set aside the judgment 5 complained of.

We enter judgment for the appellant, with costs both here and below to be taxed in default of agreement.

Appeal allowed
