Y.B. AND F. TRANSPORT LIMITED AND SUPERSONIC MOTORS LIMITED

SUPREME COURT
NGULUBE, C.J.,
3RD NOVEMBER 1999 AND 9TH FEBRUARY, 2000
(S.C.Z. JUDGMENT NO. 3 OF 2000)
APPEAL NO. 106 OF 1999

Flynote

Commercial Law - lien - factors to be considered - breach of agreement - remedy - Sale of Goods Act.

Headnote

The appellants bought two minibuses at the price of K25.5 million each from the respondents. The appellants paid K25.5 million for one bus but were unable to pay the rest due to the closure of Commerce Bank. The respondents repossessed the second minibus and resold it for K20 million incurring a loss of K5.5 million. The appellants later took the remaining minibus to the respondents garage for repairs. The respondents impounded this minibus as security for payment of interest on the first minibus. The appellants sued the respondents claiming the return of the impounded minibus or its value, together with damages for loss of its use. They succeeded on the basic claim but were condemned in costs, one of the matters appealed against. On appeal it was argued that the seizure of the second minibus was wrongful since there were two separate transactions.

Held:

(1) The second minibus was not the subject of any unpaid price and the respondents could not conceivably have gone on to exercise a right of resale since they had none over this second minibus. There was no legitimate basis for the seizure and impounding of the second minibus in some kind of self help remedy.

(2) The appellants are to be paid the value of the minibus AAN 6996 which as at April 1996 was K25.5 million plus interest thereon from the date of seizure of the minibus until the date of the judgment in the court below.

(3) Each party is to pay their own costs for the action in the court below.

Appeal allowed.

Statutes referred to:-

(1) Sale of Goods Act 1893.

For the Appellant Mundia F. Sikatana, Veritas Chambers
For the Respondent No appearance

Judgment

NGULUBE, C.J.: delivered the judgment of the court.

We proceeded to hear this appeal in the absence of counsel for the respondent as allowed by the rules upon accepting assurances by counsel for the appellant and by the Master of the Supreme Court that they had been notified. The facts of the case can be briefly stated: In November 1995, the appellants bought from the respondents two minibuses at K25.5 Million each, that is, for the total sum of K51 Million. The appellants paid K25.5 Million and tendered

three post dated cheques for the balance of K25.5 Million. The post dated cheques were drawn on Commerce Bank which suffered a closure while the appellants failed to make any alternative arrangements to pay the outstanding balance.

The respondents repossessed on or about 26th January 1996 minibus registered number AAN 6995 which they subsequently resold: allegedly for K20 Million thereby incurring a loss of K5.5 Million, a loss the learned trial judge rejected. In April 1996, the appellants took the other minibus registered number AAN 6996 to the respondents garage for some repairs and paid the repair charges. However, the respondents impounded this second minibus – according to their defence and counterclaim – as security for the payment of K12,431,250.00 interest at 117% for five months on the outstanding balance of the purchase price, and as security for the payment of K5.5 Million loss on resale of bus AAN 6995 and for storage charges in respect of the impounded minibus.

The appellants were the plaintiffs in the action. They sued the defendants claiming the return of the impounded minibus or its value, together with damages for loss of its use. The plaintiffs succeeded on their basic claim but were nonetheless condemned in costs, one of the matters appealed against. At the conclusion of the trial and after considering the various contentions, the learned trial judge held that the closure of Commerce Bank was not a frustrating event so that the plaintiffs were in breach of the contract of sale by not paying the outstanding balance or making alternative arrangements for payment. The learned trial judge considered that as the party in breach by failure to pay, the plaintiff could get no damages from the court. It was held that the defendants were justified in impounding the second minibus as a lien for various outstanding moneys claimed until trial of the action which determined the rights of the parties. The court ordered that the second minibus be returned to the plaintiffs in good condition and working order. We understand this has not been done.

The learned trial judge also dismissed all the defendant's counterclaims except the claim for interest on the balance of K25.5 Million which was allowed at 65% per annum from 10th November 1995 to 12th April 1996 when the sale was mutually cancelled on one minibus.

We heard arguments and submissions from Mr. Sikatana. Some aspects of this case require comment. To begin with the learned trial judge appears to have accepted that there was only a single transaction for the sale of the two buses. The evidence of DW 1, Mr. Lutele who was the defendant's general manager confirmed that the sale was infact severable which was why the plaintiffs kept one bus while the defendants cancelled the sale of the other one, which was resold. This was presumably why the learned trial judge found no difficulty in ordering the return of the impounded minibus which had infact been fully paid for. In the second place, the Sale of Goods Act, 1893, which clearly applied to the transaction was overlooked and certain pronouncements made which flew in the teeth of this law, as far as the rights of the seller and the buyer were concerned. Thus, the court below looked with favour upon the seizure of the second minibus in the alleged exercise of some general kind of lien for usurious interest and storage charges, as well as for the alleged loss on resale of the other minibus (which loss was in any case not even accepted by the learned trial judge), such lien being said to have been justified until trial when the rights were to be determined. The defendant's claims were infact all disallowed, except for interest at a lower rate. The Sale of Goods Act is very specific about the unpaid seller's lien. Under the Act, there can be no lien pending determination of the rights of the parties at a subsequent trial. The lien is a lien for the price only and not for such things as storage charges for keeping the goods which are kept against the buyer's will: See Chalmers' SALE OF GOODS, 16th edition from page 173 where the learned author discusses the unpaid seller's lien under Section 41. Reference should also be made to the respected volume CHITTY ON CONTRACTS, "Specific Contracts", 26th edition especially paragraphs 4883 which reads----

"4883. Seller's right to retain possession. *Section 41(1) provides:*

> "Subject to this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases:-- (a) where the goods have been sold without any stipulation as to credit; (b) where the goods have been sold on credit but the term of credit has expired; (c) where the buyer becomes insolvent."

Apart from an express term in the contract of sale, the seller's only right of lien arises under the Act and the seller cannot rely on the equitable principle of a vendor's lien. The gist of the unpaid seller's lien is his entitlement to retain the goods until the buyer has paid or tendered

the whole of the price; his lien is therefore a qualification on his duty to deliver the goods to the buyer, and the seller will in practice exercise his right of lien as a first step towards exercising a right of resale. The lien arises whether the contract is a sale of specific goods or an executory contract to supply unascertained goods, e.g. by instalments over a future period; in the case of unascertained goods, the lien will arise when the goods have been ascertained. The extent of the lien is limited to the price: it does not cover the expenses of keeping the goods, since the seller is detaining them for his own benefit."

In the case at hand, the second minibus was not the subject of any unpaid price and the defendants could not conceivably have gone on to exercise a right of resale, since they had none over this second minibus. There was simply no legitimate basis for the seizure and impounding of the second minibus in some kind of self-help remedy.

So much being premised, it was clear that Mr. Sikatana was on firm ground when he argued to the effect that the seizure of the second minibus was wrongful and that damages for loss of use ought to have been awarded in addition to return of the bus. Even on the learned trial judge's own terms (with which we have not agreed) the continued detention would have become wrongful at the very least after the judgment below and damages could have been awardable. However, the appellants indicated that the unreturned minibus was now a shell and they preferred to recover the value of it plus interest. This was their alternative prayer in their pleadings and the defendants, who have failed to comply with the judgment below, can not complain if we vary the judgment of the trial court accordingly. We hereby vary the judgment of the learned trial judge by entering judgment for the appellant for the payment by the respondents of the value of the minibus AAN 6996 which as at April 1996 was K25.5 Million Kwacha, plus interest thereon from the date of seizure of the minibus until the date of the judgment below. Such interest will be at the same rate selected by the learned trial judge for the other party, namely 65% per annum. Thereafter, at 6% per annum on the judgment as was awarded to the defendants on their own claim by the court below. This variation means the defendants can keep the bus.

Mr. Sikatana also advanced an argument against the award of interest to the defendants in respect of the sum owing until the cancellation of the sale of vehicle AAN 6995. We have considered the provisions of the Sale of Goods Act 1893 in a situation where an action for the price might have lain in terms of Section 49. We have also considered the comments by the learned author of Chalmers' Sale of Goods at page 270 to the effect that interest might be awarded under the Law Reform Miscellaneous Provisions) Act, 1934 (which is similar to our own) wherever it is possible to say that for a stated period the claimant has been deprived of the use of a definite sum of money on account of the other party's breach of contract. Though, therefore, the point was well taken that there was no agreement for interest to support any such claim as of right, yet in the circumstances and on the facts there is nothing to suggest that the trial court did not exercise its discretion properly in the matter. We will not disturb the award of interest made below.

Finally, there was a ground against the award of costs to the defendants. The plaintiffs claim was for the return of the minibus AAN 6996 or payment of its value. They were successful. On the other hand, the defendants' counterclaims were all dismissed, apart from a limited award of interest. The general principle is that costs should follow the event; in other words, a successful party should normally not be deprived of his costs. Such an unusual turn of events should have an explanation, for example, if the successful party did something wrong in the action or in the conduct of it. Here, the learned trial judge quite surprisingly considered that the plaintiff who had won the case had lost it apart from the return in good working condition of bus No. AAN 6996." The only thing the plaintiff had "lost" was the claim for damages for the detention of this minibus which even we have not awarded, having instead opted for the alternative claim of payment of the value plus interest in lieu of specific delivery up of the vehicle. In our view, it would be inequitable to refund the value plus interest in addition to again awarding damages for loss of use which latter would have been more appropriate if the minibus had actually been returned. The learned trial judge considered that the plaintiff was in breach of contract by not paying for one of the minibuses and that such breach entitled the defendant to the costs. This was decidedly a non sequitur. The question should have been "who has won the case?" If the court considered that the award of limited interest to the defendant meant the defendant had "substantially" won his counterclaim, then a better result would have been to declare that each side had substantially won their own cases and to have ordered each party to bear its own costs. This is the order we substitute in the court below.

As for the costs in this court, they are for the successful appellant and will be taxed if not agreed. The appeal succeeds to the extent indicated.