

TEMBA DENNYMUS
versus
ISIAH NYAMADZAWO

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 16, 17 March and 27 September 2017

CIVIL TRIAL

CW Gumiro, for the plaintiff
E. Ndlovu, for the defendant

TAGU J: The plaintiff issued summons against the defendant claiming payment of US\$ 23 000.00 (Twenty three thousand dollars) as damages or replacement value of the plaintiff's vehicle. The defendant in his plea to the claim denied liability on the basis that he never dealt with the plaintiff but with the plaintiff's wife one Violet Temba. He said he received the said vehicle from the plaintiff's wife who is the defendant's sister. By arrangement with his sister he paid to ZIMRA duty for the said vehicle and his sister failed to refund him an amount of \$5 000.00 that he had paid as duty for the release of the vehicle at the Zimbabwean border. By arrangement with the plaintiff's wife he became the owner of the vehicle in question as per set-off arrangement.

At the Pre-Trial Conference two issues were agreed as follows:

- 1) Whether the plaintiff at any time dealt with the defendant,
- 2) Whether the plaintiff is entitled to the relief being sought.

During the trial three witnesses testified on behalf of the plaintiff. These were the plaintiff himself Temba Dennyumus, the plaintiff's wife Violet Temba and their nephew one Marshall Washaya. The defendant who is a blood sister to plaintiff's wife Isiah Nyamadzawo was the only witness in his defence.

After assessment of the facts and hearing all the evidence adduced before this court, it became very clear that this was a simple case of unjust enrichment.

The undisputed facts in this case were that the plaintiff was at the material time residing and working in the United Kingdom. He is and at all times was the owner of a NISSAN NAVARA PICK-UP white in colour. On or about the 5th of July 2013 the plaintiff imported the said vehicle into Zimbabwe from the United Kingdom for purposes of reselling it. He imported the said vehicle in the name of Marshall Washaya who was to receive it in Namibia and then sell it on behalf of the plaintiff for a profit. Marshall Washaya duly collected the said vehicle from Namibia and it developed mechanical problems on the way to Zimbabwe.

When he arrived with the vehicle at the Zimbabwean border Post, the vehicle was assessed by ZIMRA officials and the duty required to release the vehicle into Zimbabwe was assessed at \$ 5 000.00. Marshal Washaya did not have the money to pay duty. Neither did the plaintiff at that time to pay for duty. Marshall Washaya then phoned the plaintiff and suggested that the plaintiff should borrow from the defendant. The defendant duly accepted to lend and advanced the \$ 5000.00 to Marshal Washaya and the vehicle was released at the border.

The plaintiff told the court that he phoned the defendant and the defendant agreed to pay duty on his behalf on condition that the defendant would recover his money after the sale of the vehicle. Marshall Washaya tried to sell the vehicle but prospective buyers detected the mechanical fault. The vehicle had to be fixed by the plaintiff and his wife Violet Temba. After the vehicle was fixed it remained in the custody of Marshall Washaya. While the vehicle was in the custody of Marshall Washaya the defendant came and took it away in the absence of Marshall Washaya. When prospective buyers were found the defendant refused to return the vehicle and later sold it to another buyer. He was not given anything from the proceeds of the sale. He valued his vehicle at \$28 000.00 after factoring in other expenses that included repairs and the freight charges from United Kingdom to Zimbabwe though he wanted to sell it for more.

Violet Temba corroborated the evidence of plaintiff that she too talked to the defendant asking defendant to give Marshall Washaya \$5 000.00 after the plaintiff had spoken to the defendant first. She further confirmed that when prospective buyers were found the defendant gave several promises to return the vehicle but did not do so. She too later learnt that the defendant had sold the vehicle and nothing was given to the plaintiff. She vehemently denied that she told the defendant to take the vehicle as his after she failed to repay the defendant's \$5 000.00.

It is common cause that the plaintiff owed the defendant \$5 000.00. In my view, even if it is assumed, which I do not accept that the plaintiff's wife had authorised her brother, the

now defendant, to take the vehicle as his as a set-off, it would not make sense to set-off a vehicle valued over \$28 000.00 for a debt of \$5 000.00. In any case that vehicle did not belong to the plaintiff's wife.

The plaintiff's case is premised on unjust enrichment. In paragraph 7 of his declaration the plaintiff said:

“Despite demand, Defendant has failed and/or neglected to pay damages being the replacement value of the Plaintiff's vehicle **unjustly enriched** upon defendant.” (the bolding and underlining is mine for emphasis)

The requisite for a relief premised on unjust enrichment are trite, as held in the case of *Industrial Equity v Daniel Leslie Walker* HH-30-96 where it was held that:

“I am of the respective view that the principal prerequisites for general actions on enrichment can be regarded as aptly summarised.....as follows:

- (a) The defendant must be enriched;
- (b) The enrichment must be at the expense of another (i.e. the Plaintiff must be impoverished and there must be a causal connection between the enrichment, and impoverishment),
- (c) The enrichment must be unjustified,
- (d) The case should not come under the scope of the classical enrichment actions;
- (e) There should be no rule of law which refuses an action to the impoverished person. Obviously these requirements can only be fulfilled if any given case the action is based on a defined set of circumstances.”

The prerequisites of a claim of unjust enrichment were fulfilled by the plaintiff.

The defendant also brought in the defence of set off as justification for the acquisition of ownership of the motor vehicle. The defence of set off is clearly defined by RH Christie *Business Law in Zimbabwe* 1998 2nd ed, at p 112 as follows:

“Set off or compensation, comes into effect when two parties are reciprocally indebted to each other, a natural obligation being sufficient; *Municipality of Kwekwe v Spar Age International (Private) Limited* 1985 (1) ZLR 300 (S). It takes effect automatically, by operation of law, and does not have to be claimed but like any other fact it must be pleaded and proved so the court can take it into account”.

In the present case the plaintiff owed the defendant an amount of USD\$5 000.00. The debt is not being denied by the plaintiff. The motor vehicle in issue is valued at more than the USD\$5 000.00 that is admitted as the amount owing. The court is therefore being urged to set off the amount of USD 5 000.00 from the plaintiff's claim of USD 23 000.00 leaving a balance of USD 18 000.00 due and owing to the plaintiff. In my view the defendant accordingly failed

to justify the enrichment accruing to him over and above the USD 5 000.00 that was due to him from the plaintiff.

In the result I reject the defence of set-off raised by the defendant. The defendant is clearly liable to pay damages in lieu of the value of the vehicle less what he is owed. The plaintiff managed to prove on a balance of probabilities that he dealt with the defendant, and that he is entitled to the relief being sought.

IT IS ORDERED THAT

1. The defendant shall pay to the plaintiff the sum of US\$ 23 000.00 (Twenty three thousand dollars) as damages being replacement value of the plaintiff's vehicle.
2. The defendant shall pay costs of suit on a higher scale.

Kachere Legal Practitioners, plaintiff's legal practitioners
Mabundu & Ndlovu Law Chambers, defendant's legal practitioners.