

DISTRIBUTABLE (37)
Judgment No. SC 41/05
Civil Appeal No. 167/03

**W.G. ENGINEERING (PRIVATE) LIMITED t/a SILVER CLOUD
MOTORS v**

PERMASAN (PRIVATE) LIMITED t/a RYANS TRANSPORT

SUPREME COURT OF ZIMBABWE
SANDURA JA, ZIYAMBI JA & GWAUNZA JA
HARARE, JULY 5 & October 3, 2005

M Gijima, for the appellant

M E Motsi, for the respondent

ZIYAMBI JA: The main issue in this appeal is whether it was proved in the High Court that an agreement of agency was concluded between the appellant and the respondent.

In the High Court the appellant sought an order compelling the respondent to transfer to it the registration of a horse, registration number 602-460 X, a trailer, registration number 561-766 Q and a pup trailer, registration number 599-656 C and to physically hand over the vehicles to it.

In support of its application, the appellant averred that it had concluded an agency agreement with the respondent in terms of which the appellant was to secure a buyer for the respondent's business as a going concern. In return, the appellant would earn a commission in the sum of US\$25 000 or alternatively, two horses, two trailers and a pup trailer. The appellant averred

that it had secured such a buyer and accordingly sought an order of specific performance against the respondent.

The alleged agency agreement was denied by the respondent through its Managing Director Roland Neville Creigh Smith ("Smith"). Smith averred that he, on behalf of the respondent, employed a consultant by the name of Trevor Batezat ("Batezat") to identify potential buyers for the respondent's business. Batezat identified Specialised Motors (Private) Limited as a potential purchaser. The Operations Manager of Specialised Motors was Widreck Gore the Managing Director of the appellant. It was agreed that upon successful conclusion of the sale of the company, Batezat was to earn a commission of three horses and three trailers. The sale was to be finalised by 5 September 2002 but this did not happen.

Meanwhile Batezat, unknown to the respondent and before the sale was finalised, registered two trailers into the name of a company wholly owned by him called Shoreline Investments and one horse and trailer in the name of the appellant.

The learned judge in the court *a quo* found that on the appellant's papers an agency agreement had not been established. She took cognisance of the fact that the appellant did not, in its founding affidavit, allege the terms of the agency agreement between it and the respondent apart from the amount of the alleged commission. In this regard the learned judge said: -

"It is not averred what the mandate of the applicant was. Was it merely (to) act as an introducer of a purchaser or was it to introduce a purchaser who would conclude a binding sale agreement with the respondent? These questions remain unanswered after reading the applicant's founding affidavit, by which its application will stand or fall.

Further, while it has been alleged in the papers that the applicant was mandated to find a purchaser for the respondent's business as a going

concern, the agreement that allegedly resulted from the introduction allegedly made by the applicant is in respect of the sale of Creigh-Smith's shareholding in the respondent. No attempt has been made to show that the terms of the agency agreement covered this transaction as well.

Further, it is not clear on the papers whether the applicant would become entitled to the commission merely upon introducing an interested buyer or upon the buyer actually purchasing and paying for the business of the respondent. It is noteworthy that the applicant claims that it waited until the agreement between the respondent and Specialised Motors (Private) Limited had been signed and a sum of \$50 000 000,00 deposited into the account of one M J Creigh-Smith before it procured the registration of one horse and trailer into its name. This tends to suggest that it was the applicant's understanding that its mandate would be complete upon the introduced purchaser paying for the business sold. However, because the applicant has chosen to proceed by way of application it is my view that, in the absence of clear evidence on the affidavits as to the exact terms and conditions upon which the alleged agency was agreed and fulfilled, there is no basis upon which I can hold that there was a binding agency agreement between the applicant and the respondent as alleged".

It was however contended on behalf of the appellant that proof of the contract of agency is to be found in the following paragraphs of the appellant's founding affidavit: -

"Trevor Batezat, the General Manager for the respondent conducted the sale to Paradise Holdings including the change of registration from Permasan Private Limited to Paradise Holdings.

It was while I was at respondent's premises that Trevor Batezat advised me that respondent was looking for someone to secure a buyer, who would buy respondent as a going concern, rather than as individual assets, Trevor Batezat advised that respondent's major shareholder Roland Neville Creigh-Smith had tried to sell respondent as a going concern since 2001 to no avail.

Trevor Batezat also advised that the person who would secure a buyer for respondent would be given a commission of US25 000,00.

After respondents' dealings with Paradise Holdings were finished, applicant through me then advised Trevor Batezat that applicant could secure a buyer for respondent and was interested in entering into the agreement wherein applicant would then get the commission after having secured a buyer.

Respondent's General Manager then called Roland Neville Creigh-Smith on his mobile South African number, being 002782775329 and advised said Roland Neville Creigh-Smith that applicant had accepted the offer that, upon securing a buyer who would buy respondent as a going concern, then applicant would get a commission, of US 25 000,00 or two horses and two trailers and a pup trailer ..."

What does the term "secure a buyer" mean? As the learned judge found, the expression does not clarify whether the buyer was merely to be introduced to the respondent or whether the mandate was only completed when the sale was successfully concluded. Indeed the probabilities favour the latter interpretation as the respondent was hardly likely to part with US 25 000 or 3 horses and 3 trailers if the sale was not successfully concluded. See *De Villiers and Macintosh: The Law of Agency in South Africa, Third Edition* by S.M. Silke at p 372 where the authors state: -

"The contract created when a property is placed in the hands of an agent on commission terms by an owner desirous of disposing thereof is, in the absence of specific provisions, not a contract of employment in the ordinary meaning of the term; and consists merely of promises binding on the principal to pay a sum of money upon the happening of a specified event which involves the rendering of some service by the agent. The agent's right to commission depends, in the first instance, therefore, upon the ascertainment of this specified event.

There are two particular classes into which promises of this kind may fall. The first is where the commission is promised if the agent succeeds in introducing to the principal a person who makes an adequate offer. The second is where the agent is promised his commission only upon completion of the transaction (ie the conclusion of the sale) which he is endeavouring to bring about between the offeror and the principal.

While promises of the first class, namely, to pay remuneration merely on the introduction of an offer, are not impossible, the general balance of probability is against an arrangement of this character; and such a construction of the contract would require clear and unequivocal language. Normally the principal has in contemplation an actual sale as the event upon which his promise to pay commission must be fulfilled and the agent realizes this".

From what has been said above it is clear that there was insufficient evidence, before the court *a quo*, to establish the terms of the alleged agency agreement.

It was also contended on behalf of the appellant that it had carried out its mandate in terms of the alleged agency agreement. But what was the mandate? Counsel for the appellant does not tell us. If the mandate was

merely to introduce the respondent to a prospective purchaser as the appellant appears to suggest in his papers filed of record, was that fact established on the evidence? The respondent denied that the appellant introduced Specialised Motors to it. The learned judge found that this raised a factual conflict which could not be resolved in the appellant's favour on the papers before her.

The learned judge's approach was in my view correct. The conflict of fact could not be resolved on the papers and oral evidence was necessary. The appellant adopted the wrong procedure. In this regard the learned judge remarked: -

"In my view, there are other conflicts of facts in the applicant's application. The applicant must have been aware that such conflicts would arise as there had been a spate of litigation between the parties over the same vehicles before this application was filed. To have proceeded to file a court application in these circumstances was perilous. See *Masukusa v National Foods Limited and Anor* 1983(1) ZLR 232 (H). In the premises, I would dismiss the applicant's application for specific performance of the alleged agency agreement on this ground. The applicant used the wrong procedure to procure its remedy".

The learned judge having found that there was no agency agreement between the appellant and the respondent dismissed, correctly in my view, the claim by the appellant that it had acquired ownership of the vehicles, the subject of this application. The appellant, however, contended that the fact that for two months the vehicles were parked on its premises to the knowledge of the respondent and sporting its logo and colours was, on its own, indicative of delivery of the same having been made to the appellant.

It is to be noted that the appellant did not allege that there was delivery to it of the vehicles. In this connection the learned judge said: -

"The applicant does not allege in its application that there was delivery of the vehicles to it. The applicant took possession of the

vehicles and had them registered in its name, purportedly in terms of the disputed agreement of agency. The taking of possession of the vehicles in such circumstances amounts to a unilateral act of acquiring possession that would not transfer ownership at law. Even if there was an agreement of agency between the parties, for the possession of the vehicles by the applicant to divest ownership from the respondent, the respondent must have delivered the vehicles to the applicant with the intention of vesting ownership of those vehicles in the applicant. This is not alleged in the application and on that basis alone, I would hold that ownership of the vehicles still vests in the respondent".

As the learned judge correctly stated: -

"... a unilateral act of taking possession of property is not sufficient to acquire ownership in that property at law. The cooperation of the predecessor in title together with the requisite mental attitude on the part of both is required. The law requires that the person giving up possession does so with the intention of divesting himself or herself of ownership in that property. This is what is meant by delivery at law. (See *Marcus v Stamper & Zoutendijk* 1910 AD 58)".

Accordingly there is no merit in the appeal and it is hereby dismissed with costs.

SANDURA JA: I agree.

GWAUNZA JA: I agree.

Mbidzo, Muchadehama and Makoni, appellant's legal practitioners

Mabulala & Motsi, respondent's legal practitioners