

E T IMPORT AND EXPORT (PVT) LTD
versus
MORRAN INVESTMENTS
and
EMMANUEL NYANDORO
and
TAPFUMANEYI NYANDORO

HIGH COURT OF ZIMBABWE
BHUNU J
HARARE, 19, 20, 21 May 2004 and 6th October 2004

Civil Trial

Mr *Mapondera*, for the plaintiff
Mr *Nyemba*, for the respondent

BHUNU J: The plaintiff E.T. Import and Export (Pvt) Ltd and the 1st defendant Morran Investments are both trucking companies in the transport business using trucks for hire or reward to transport goods. Their directors Mr Tigere Muswera and Emmanuel Nyandoro the 2nd defendant respectively have been friends for a very long time.

The plaintiff is the owner of an international horse truck registration number 655-911W hereinafter referred to as the truck.

The truck remains registered in the plaintiff's name. Sometime in 2002 it was given to the 1st defendant who in turn gave it to the 3rd defendant, his brother Tapfumaneyi Nyandoro. The truck is now currently in the possession of Tapfumaneyi Nyandoro who now claims to be the owner of the truck.

The circumstances under which the truck was given to the 2nd defendant and ended up in the possession of the 3rd defendant are hotly disputed.

Mr Muswera's story is that he is the owner of the plaintiff company. The 2nd defendant is his friend of long standing. The 2nd defendant has assisted him on many occasions. He has borrowed money from him from

time to time and more importantly he assisted him to buy the truck in question from the United States of America. He gave the 2nd defendant money to buy the truck for him from the United States of America.

It so happened that sometime in 2002 he needed money to purchase a flat. He decided to approach his friend the 2nd defendant for a loan. He asked for \$4 million dollars of which the 2nd defendant agreed but said that he needed security. Mr Muswera then offered him the truck for use to recover the amount advanced. It was also agreed that at any time Mr Muswera could repay the loan and recover the debt. From his evidence it appears that the true nature of the agreement was a high breed between a pledge and a lease.

The 2nd defendant made out a cheque in the sum of \$4 million dollars to National Real Estate for the purchase of the flat. It is common cause that the cheque was not honoured, it bounced. When approached the 2nd defendant promised to replace the bounced cheque with a bank cheque.

Mr Muswera later got the replacement cheque from the 3rd defendant whom we now know to be the 2nd defendant's brother. He estimated the value of the truck to be 30 million dollars. He however agreed with the 2nd defendant that it be insured for \$25 million dollars but the defendants went on to insure it for \$100 million dollars.

Both the 1st and 2nd defendants never asked him for change of ownership up to this day. He was however approached much later on by the 3rd defendant who was now demanding change of ownership claiming that some of the money used to buy the truck was his although he was not privy to the verbal agreement between the 2nd defendant and Mr Muswera.

Mr Muswera denied having sold the motor vehicle as alleged or at all. It was his evidence that he could not have sold the truck for a paltry \$4 million dollars when he could easily have sold it for more than \$25 million dollars.

The 2nd defendant's version is that Mr Muswera approached him soon after he had repaid him a loan of \$2.5 million saying he was in desperate

need for money. He needed \$4 million dollars. He told him that he did not have the money at that time. He had squandered his girlfriend's money and her relatives were at his throat threatening to cause havoc.

Mr Muswera then offered to sell the truck to him for \$4 million dollars accepting the cheque knowing fully well that there were no funds in the 3rd defendant's bank account to meet the cheque. This was despite the fact that he had referred him to a friend Mr Eric Nhodza who needed the truck and had the necessary funds.

Mr Muswera nevertheless insisted on selling the truck to him opting to wait until there were funds in the 3rd defendant's account.

At that stage he then contacted his workshop manager and his brother the 3rd defendant and told them of his intention to buy the truck.

They later met at Mr Muswera's house whereupon after inspecting the truck Mr Chibvongodze the workshop manager advised him that apart from the engine the rest of the truck would need attention.

He then collected the motor vehicle together with the registration book.

Thereafter he left for Zambia living instructions that they should contact Mr Muswera for change of ownership.

He told the court that although he bought the truck he did not really need it. He then decided to donate the truck to his sister and brother the 3rd defendant.

He admitted that under normal circumstances the truck could not have been sold for \$4 million dollars. He estimated its value at \$12 to \$13 million dollars.

He insisted that he bought the truck for \$4 million dollars the question of a pledge or lease did not arise.

The 3rd defendant Mr Tapfumaneyi Nyandoro the 2nd defendant's brother gave evidence on his behalf and in support of his brother's story.

It was his testimony that he came to know Mr Muswera through his brother and had a meeting at his office. His brother later told him that he

had bought the truck from Mr Muswera for \$4 million dollars. The amount was paid. He was co-coordinating the transaction as the truck was to be given to him. He assessed the value of the truck to be in the region of \$6 to \$7 million dollars.

He contradicted his brother the 2nd defendant in some material respects. He denied that the truck was donated to him and his sister as alleged by the 2nd defendant. It was his sworn evidence that he got the motor vehicle from his brother for value. He had given the 2nd defendant his title deeds to finance his operations. He needed the title deeds to secure \$7 million dollars.

That being the case he was adamant that he got the truck from the 2nd defendant for value, it was not a donation as alleged by him. He heard from both Mr Muswera and his brother that the truck had been sold. He was not however privy to the contract. To that extent his evidence is hearsay and unreliable.

Under cross-examination he told the court that his brother had an overdraft of \$7 million dollars. He then promised him that if he surrendered his title deeds he would buy him a truck.

Relying on representations made to him by his brother sometime in February 2003 he drafted an agreement of sale and approached Mr Muswera with a view to effect change of ownership. Mr Muswera immediately denied that there was any contract of sale.

Both the 2nd and 3rd defendants told the court that they effected a lot of repairs to the plaintiff's motor vehicle. They produced a bunch of receipts showing spare parts which they alleged were fitted onto the truck.

Mr Muswera maintained that the defendants own several similar trucks. There was no way of knowing which truck the parts reflected on the receipts were fitted onto. Indeed upon examination of the receipts it turned out that one of the receipts was endorsed with the registration number of a different truck. The defendants immediately sought to withdraw that receipt in haste.

The true nature of the agreement between the plaintiff and the 3rd defendant falls to be determined on the credibility of the evidence of Mr Muswera and the 2nd defendant. The 3rd defendant was not privy to the terms of the agreement. His evidence is based on what he claims he was told by his brother and Mr Muswera.

From the above summation of evidence it is clear to all and sundry that the 2nd defendant was not an honest and credible witness. He has been exposed as a devious and dishonest character who is prepared to twist facts to his financial advantage.

He told a highly incredible and unbelievable story. It is highly unlikely and not in the least probable that a man in desperate need for money would insist on being under paid for the value of his truck with a cheque for which he knows there are no funds in the bank.

It is clear that the 2nd defendant lied to his brother the 3rd defendant to induce him to part with his title deeds saying he would buy him a truck. When the matter came to trial he lied to the court that he had donated the truck to his sister and the 3rd defendant a fact which was hotly disputed by the 3rd defendant.

The truck was given to the defendant in December 2002. It is incredible that he failed to demand change of ownership up to this day. He did not draft an agreement of sale. He left everything to 3rd defendant who had no clue what the terms of the agreement were.

He lied that he did not need the truck when he was broke. He had no money in the bank

He needed to cheat his brother to release his title deeds to secure a loan of \$7 million dollars. It is improbable that the 2nd defendant could have offered to bail out Mr Muswera by buying from him a truck he did not need when he himself was in a worse financial predicament needing to be bailed out by his brother to the tune of \$7 million dollars. In the circumstances how could he afford to squander \$4 million dollars which he did not have?

Mr Muswera for the plaintiff was an honest and credible witness. He told a simple and believable story. He was credible and unshaken under rigorous cross-examination. I prefer his evidence to that of the 2nd defendant which is false in fact and misleading.

The plaintiff has withdrawn paragraph 3 and 4 in which it sought damages in the sum of \$25 million dollars and an order declaring the security deposited by the defendants under case number HC 5605/03 specially and specifically executable.

In the final analysis the remaining claims against the defendants can only succeed. It is accordingly ordered:-

1. That the plaintiff's claim be and is hereby granted with costs against the three defendants jointly and severally one paying and the others to be absolved.
2. That the lease and or pledge agreement between the 1st and 2nd defendant for an international horse truck registration number 655-911W be and is hereby cancelled.
3. That the three defendants be and are hereby ordered to return the international horse truck registration number 655-94W to the plaintiff.

Mapondera & Company, the plaintiff's legal practitioners
V. Nyemba & Associates, the respondent's legal practitioners