

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 676 OF 2001

BETWEEN:

TEOFILO CHILENGE T/A
COMBINADO PESQUEIRO DE
METANGULA.....PLAINTIFF

- and -

THE ATTORNEY GENERAL..... DEFENDANT

CORAM: CHIMASULA PHIRI J

Mbendera of counsel for the plaintiff

G. Nkhata, Senior Deputy Chief State Advocate -defendant

Mrs Malani – official interpreter

Mr Pedro Matavata – private Portuguese Interpreter

JUDGMENT

Chimasula Phiri J,

The plaintiff's claim is for damages allegedly for negligence in the custody of a commercial boat delivered by the plaintiff to the defendant for repairs. The boat was damaged and totally lost. The plaintiff has claimed for up-keep expenses, replacement cost and loss of

profits until replacement of the boat. The plaintiff claims costs for the proceedings. The defendant denies the plaintiff's claim and prays for dismissal with costs.

PLEADINGS

By an Amended Statement of Claim the plaintiff pleaded as follows: -

- 1. The plaintiff is a Mozambican national and owner of the "Lichinga" a fishing boat which he used in commercial fishing on Lake Nyasa, Metangula in Mozambique.**
- 2. The defendant was at all material times the owner and operator of Mpwepwe Boatyard carrying on business at Mangochi in the Republic of Malawi.**
- 3. By a contract made on or about 9th April 1999 the plaintiff delivered his boat to the defendant for the defendant to rehabilitate the plaintiff's boat by fitting the bottom with cedar planks fastened with zinc screws. The defendant quoted the cost of rehabilitation at K41,450.00 of which K25,350.00 was to be paid by the plaintiff on taking delivery of the boat after repairs.**
- 4. It was an express or implied term of the said contract –**
 - (i) That the defendant would rehabilitate the "Lichinga" and take all necessary precautions for the safekeeping and maintenance of the boat in a proper condition.**
 - (ii) That the repairs to the "Lichinga" would be completed and the boat returned to the plaintiff by 30th June 1999.**

5. In the premises, from and after the plaintiff delivered the boat to the defendant under the contract made in April aforesaid, the defendant thereby was constituted *bailee* of the said “Lichinga” and thereby became burdened with the duties of care as are expected of *bailees* for valuable consideration.
6. In breach of the express term to complete all necessary repairs and deliver the rehabilitated boat by the date so stated the defendant failed to deliver the “Lichinga” by 30th June 1999.
7. Further, in breach of the implied term or alternatively as *bailee* of the “Lichinga” the defendant failed to keep the boat safely anchored and did not redeliver it to the plaintiff on demand whereby the Lichinga was and is lost to the plaintiff.
8. Further or in the alternative, the defendant by its servants and/or agents was guilty of negligence whereby the “Lichinga” got completely damaged.

Particulars

- (a) Failing to keep the boat safely and securely anchored.
 - (b) Alternatively, failing to keep the boat out of the sea in order to prevent it from drifting out to sea.
9. By reason of the matters aforesaid, the plaintiff lost the boat and has been put to expense and inconvenience and has thereby suffered loss and damage.

Particulars

- (i) Upkeep expenses for staff waiting for the boat.....K11,280.00**

- (ii) Replacement cost of the boat.....
US\$75,000.00**

- (iii) Loss of profits from 1st July 1999 to date of issue
of writ (31/01/2001 at US\$8,530.00 per week.....US\$665,340.00**

- (iv) Further loss of profits until judgment and or replacement of boat at
the same rate as pleaded in paragraph 9(iii).**

AND the plaintiff claims:

- (i) K119,280.00 being upkeep expenses due to delay in effecting repairs.**

- (ii) US\$75,000.00 being the replacement cost of the “Lichinga”.**

- (iii) US\$665,340.00 being lost profits for the period from 1st July 1999 to 31st
January 2001.**

- (iv) Further damages for loss of profits from 1st February 2001 until replacement
of the boat at the rate of US\$8,530.00 per week.**

- (v) Cost of proceedings.**

Similarly by an Amended defence the defendant pleaded as follows:

- 1. The defendant denies the contents of paragraph 1 of the Statement of Claim
and puts the plaintiff to strict proof thereof.**

2. **The defendant denies the contents of paragraph 2 of the Statement of Claim and puts the plaintiff to strict proof thereof.**
3. **The defendant avers that the plaintiff and/or his crew violated Section 13 of the Immigration Act, Sections 22, 24 and 170 of the Customs and Excise Act. The defendant further contends that the plaintiff and/or his agents violated Sections 7 11, 14 and 19 of the Inland Waters Shipping Act 1996.**
4. **The defendant will, at the trial prove that the plaintiff having violated the Acts mentioned in paragraph 3 above could not have entered into a valid contract with the defendant.**
5. **The defendant refers to paragraph 3 of the Statement of Claim and aver that there was no contract entered into between the plaintiff and the defendant for the delivery and rehabilitation of the plaintiff's boat and puts the plaintiff to strict proof thereof.**
6. **The defendant refers to paragraph 4(i) of the Statement of Claim and contends that no contract was entered into between the plaintiff and the defendant. The defendant further avers that if a contract was entered into, which is denied, it was a contract for the repair of the boat whose penultimate clause specifically provided that the Fisheries Department will not be responsible for any loss or damage to the boat or to any equipment due to fire, theft or accident while the boat is in the boatyard or adjacent waters or defect which may develop subsequently from similar causes.**
7. **The defendant denies the contents of paragraphs 4(ii), 5 and 7 of the Statement of Claim and puts the plaintiff to strict proof thereof.**

8. The defendant refers to paragraph 8 of the Statement of Claim and denies that he or his servants was guilty of negligence whereby the boat was completely damaged. The defendant further contends that if he is guilty of negligence which is denied the plaintiff is guilty of contributory negligence.
9. The defendant denies the particulars of damages contained in paragraph 8 of the Statement of Claim.
10. The defendant denies all the particulars of claim contained in paragraph 9 of the Statement of Claim and each and every allegation of fact is denied as if the same was set out separately and *traversed seriatim*.

BURDEN AND STANDARD OF PROOF

Burden of Proof

The burden of proof rests upon the party (the plaintiff or the defendant), who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See Joseph Constantine Steamship Line vs Imperial Smelting Corporation Limited [1942] A.C. 154,174.

Standard of Proof

The standard required in civil cases is generally expressed as proof on a balance of probabilities. "If the evidence is such that the tribunal can say: We think it is more

probable than not, the burden is discharged, but if the probabilities are equal it is not." Denning J in Miller vs Minister of Pensions [1947] ALL E.R. 372; 373, 374.

ISSUES FOR DETERMINATION

These pleadings raise the following issues:-

- (i) Whether the plaintiff entered into contract with a private company and not the defendant?
- (ii) Whether the plaintiff violated laws affecting the capacity of the plaintiff to enter into valid contract with the defendant?
- (iii) Whether the plaintiff suffers from disability to claim in the light of a disclaimer clause in the clause?
- (iv) Whether the damages as stipulated in the Amended Statement of Claim are claimable?
- (v) Whether *jus tertii* would be available to the defendant as a defence to a claim founded on bailment?
- (vi) Whether there was contributory negligence on the part of the plaintiff causing loss and damage herein pleaded?

THE EVIDENCE

The defendant chose not to testify. Counsel stated that the joint affidavit of Joseph Zikwendz Makwawa and Martin Kufwiyani Banda was not relevant to the issue of liability. He stated that their evidence would only be needed in the event of the court proceeding on quantification of damages. Therefore, the evidence in this court consists only of the plaintiff's testimony.

The plaintiff testified that some time in 1998 he bought a company known as Combinado Pesqueiro de Metangula. He then borrowed some money from the bank to buy a fishing boat. He sourced the boat from Maputo. The boat he bought was manufactured in 1996. The engine fitted in this boat was brought in from the United Kingdom.

The business known as Combinado Pesqueiro de Metangula operates in Niassa Province on the other side of Lake Malawi. The boat had to be transported from Maputo to Metangula. This entailed shipping it by sea from Maputo to Nacala. From there, it had to be put on rail up to Cuamba. From Cuamba to Metangula it was transported by road. It was in the course of this last leg of the journey that the boat was damaged and could not be put to immediate use. Efforts to repair it in Metangula, Mozambique proved futile. There was no workshop with appropriate equipment to hoist and repair the bottom of the boat. It is at this stage that the plaintiff learnt that repairs could be carried out in Malawi at Mpwepwe. Knowing that repairing in Malawi would involve taking his boat out of Mozambique into a different country, he approached his Government for clearance to have the boat repaired in Malawi. The Mozambique Government approved. He came to Malawi and met the Fisheries Department at Mangochi. He was taken to Mpwepwe Boatyard where he met Mr Ngozo, the Manager, together with other members of staff. When he presented his issue, Mpwepwe Boatyard told him that they could repair the boat. He then went to the Police, Immigration and Customs Department in Mangochi to inform them of what he intended to do and to alert them not to be alarmed should they see a foreign boat. The authorities cleared him. He then went to his High Commission in Lilongwe to report on what he had arranged. After that, he went back to Metangula Mozambique and brought the boat to Malawi. He could

not remember the exact date when the boat arrived in Malawi. However, according to the plaintiff his skipper and crew left Metangula by water and crossed into Malawi. He himself came by road on his Land Rover 110 crossing the border where he again informed the authorities that his boat was coming and would enter Malawi.

On or about 10 December 1998 the boat was assessed at Mpwepwe and a verbal quotation was given for the repairs at a cost of K60,005.00. He paid the bill by cash on receipt number 114071 (exhibit P1). A written quotation was issued on 14th December 1998 (Exhibit P2). Along with exhibit P1 there was issued Job Card Number 98/98 (Court Exhibit 3) which contained an exclusion clause. In essence, under the contract of December 1998 the defendant was not liable for any damage or loss of the plaintiff's property whilst the repairs were undertaken. The boat was left with the defendant on understanding that the repairs would be completed on 22 January 1999. The repairs were not completed until some time in February. The plaintiff collected his boat on 12 February 1999 as per Exhibits P4 and 5.

The plaintiff stated that he took the boat to Mozambique and started using it. He discovered that it was taking in water. At first he thought that this could correct itself with time as the planks matured. He was alarmed and dismayed when the problem became worse. He therefore decided to take the boat back to Malawi. He repeated the processes at Immigration, Customs and the Police. The boat came to Malawi in April 1999. The plaintiff met Mr Ngozo, the manager at Mpwepwe Boatyard. The boat was examined. The plaintiff was told that the problem of water seepage was due to the use of ordinary nails in fastening the planks. Mr Ngozo assured the plaintiff that the problem would be rectified under a new contract. Mr Ngozo issued Exhibit P6.

The terms of the new contract were that the Boatyard would replace the bottom of the boat with new cedar planks fastened with zinc screws. They were not able to determine the full costs save that the sum of K8,000 would be required for consumables and for the skipper when testing the boat. The full cost of the work

would be provided on an invoice to be issued on completion of the work. It was contemplated that the repairs would be completed and the boat ready for collection by 30 June 1999. The boat was not ready for collection on 30 June. On 12 August the plaintiff received a letter Exhibit P7 advising him that the boat would be ready for collection on any date after August. The boat was not delivered in August nor was it ready in September or October. The plaintiff stated that during this time, he was in Maputo, Mozambique. He phoned Mr Ngozo on at least 3 occasions to find out the progress on the repairs to his boat. During one of those conversations, Mr Ngozo told him that his was ready for collection. This conversation took place in November. He made arrangements with his workers in Mozambique to come to Malawi for collection of the boat. He arrived in Malawi early December. He went to the Boatyard and met Mr Ngozo. He did not see the boat. Instead Mr Ngozo took him to a place where he saw a heap of salvage. His boat had been completely destroyed.

He stated that he was given a letter dated 1 November 1999 in which Mpwapwe Boatyard made certain strange accusations. One of them was that his worker Mr Abbasse had taken anchor chain with him when he left for Mozambique. The other accusation was that Mpwapwe Boatyard was not able to test the boat because there was no battery. The plaintiff pointed out that these accusations were false because on Exhibit P9 these items were returned to the plaintiff on 23 October 2001. The plaintiff argued that if these items had been taken by Mr Abbasse, then it is extremely surprising that they were available for hand over to him by the same Boatyard.

On the question of breaches of statutory provisions, the plaintiff's answer is simply that he went through all the authorities both in Malawi and Mozambique for his boat to come to Malawi for repairs. He believes that everything was authorised because his boat came to Malawi twice and at no time was he arrested or the boat detained for breach of any of these provisions. The boat did not come to Malawi to do business or under any disguise. It was visible to all. It was not in any way hidden

from the authorities. If there have been any of these breaches it is surprising that it has taken the Attorney General 7 years to raise the issue.

With regards to the allegation that at the time of contracting under contract number 2, the Malawi Government had already sold the business to a private company, the plaintiff referred to Court Exhibit 1 dated 14 May 1999. He pointed out that the said exhibit is the document under which the business was sold by the Government to the company. 14 May 1999 is later than 9 April 1999 (Exhibit P6). 9 April 1999 is the date when the second contract was entered into. He also pointed out that under clause 7 of Court Exhibit 1, the Malawi Government contracted to remain liable for all contracts entered into before 14 May 1999 unless the party contracting with Malawi Government had been informed and accepted to switch over to the company. In relation to that possibility, the plaintiff stated that at no time was he told that the business was changing hands. At no time was his consent sought to any change over. He knew only the Malawi Government as the party with whom he contracted. He did not contract with the company.

On allegation that the agreement included a term by which the plaintiff was required to guard and provide security services for the boat, he emphatically denied the existence of such an agreement. He wondered how he would have entered into such an agreement when he was outside Malawi and the boat was delivered in the hands of the defendant. He accepted that his servant Mr Abbasse was indeed at some point in Malawi. He stated that his servant's presence in Malawi was not to provide security services but to provide liaison between the boatyard and himself in Maputo. He therefore denied any negligence of any sort.

STATUS OF THE EVIDENCE

The effect of this is that the defendant's allegations in the defence stand bare without any supporting evidence. The overriding principle, which has guided the

courts is that “*he who asserts must prove*”. See Yanu Yanu Co. Ltd –vs- Mbewe 11 MLR 405. In the present case and concerning the serious allegations made by the defendant in the Amended Defence:

- (i) No evidence was called to prove the breaches of the alleged statutory provisions.**
- (ii) No evidence was called to contradict the evidence of the plaintiff on the formation of the material contract.**
- (iii) No evidence was called to show that the material contract entered into contained an exclusion clause.**
- (iv) No evidence was produced to support the view that there was contributory negligence on the part of the plaintiff, which caused the damage to the boat.**

The cross examination of the plaintiff by the defendant did not assail the plaintiff’s version of the events and the circumstances that led to the destruction of the boat. In fact, the closest relevant aspect in cross-examination was that the boat was not repaired immediately because the plaintiff had not paid any deposit. However, the plaintiff was emphatic that he had been told by Mr Ngozo not to pay any deposit because the defendant had enough money for spares, which were required to repair the boat. The plaintiff clearly indicated that he had money on him but Mr Ngozo advised the plaintiff to keep the money. Even after the boat had been lost in December 1999, he continued engaging his Embassy to work with the Malawi Government on his loss.

THE LAW AND FINDINGS OF THE COURT

A bailee for reward must exercise a higher degree of care appropriate to the circumstances in which he is rewarded **British Road Services Ltd –vs- Arthur V Crutchley &**

Co. Ltd [1968] 1ALL E.R. 811 C.A. In Malawi this law has been applied by the Supreme Court in **Ali –vs- Njanji** 10 M.R.L. 84. The High Court has also applied the same law in **Imperial Group Ltd –vs- Radio and Electrical Services** 10 M.L.R. 348, **Gondwe –vs- Barrows Engineering Co.,Ltd** 11 M.L.R. 40.

If a chattel that has been deposited with a bailee is lost or damaged, the onus is upon the bailee to prove that the loss or damage has occurred without negligence or default on his part – See **Bullen & Leake**, page 236.

It is not enough for a party to merely allege. The burden is upon that party to prove by appropriate evidence the allegation he makes.

See the Supreme Court decision in **Yanu Yanu Company –vs- Mbewe** 11 M.L.R. 405 at page 410 to 411.

From the evidence and exhibits, it is clear that by April 1999 Government had not yet divested its interest in Mpwapwe Boatyard to a private company. At the time the plaintiff delivered the boat on the second occasion, Mpwapwe Boatyard was a Government entity.

When the boat was delivered to Mpwapwe Boatyard on 9 April 1999 for repairs as per Exhibit P6, bailment ensued. The plaintiff was thereby constituted a bailor and the defendant became bailee. The Government through the Mpwapwe Boatyard was under duty to take reasonable care according to the circumstances of the bailment.

The defendant has made many allegations but has not adduced any evidence on those allegations. It follows therefore that all those allegations made by the defendant cannot be sustained.

Assuming it was not necessary for the defendant to call evidence to confirm the defences based on legal concepts, the court will proceed to consider the merits of such defences.

Breaches of statutory provisions do not vitiate a contract entered into by a party tainted by the breach unless by express provision in the statute or by general principles, such a breach renders the contract illegal or incapacitates a party from entering into a valid contract. One typical example is the Companies Act. The Companies Act by Section 321(2) requires every external company to comply with Part XIII of that Act. Any default by the external company to do so invalidates any contract made in Malawi during such time as the default continues. The effect of this provision is that rights of a defaulting external company arising out of or incidental to a contract so made in Malawi are unenforceable by action or other legal proceedings.

The Immigration Act has no provision similar to the provisions in Section 321(2) of the Companies Act. The Customs & Excise Act has no provision creating incapacity to contract on account of any breaches.

The Inland Waters Shipping Act provides in Section 4(2) that the provisions of Part II of the Act do not apply to a vessel the home port of which is outside Malawi. It is also significant that Section 4(1) specifically says that Part 11 of the Act applies to every vessel used on inland waters, which is used for hire or reward in Malawi. Part 11 of the Inland Waters Shipping Act covers Sections 4 to 22. This means that all the provisions relied on by the Attorney General in his defence under the Inland Waters Shipping Act, 1996 have no application to the case by reason of Section 4(1) and 4(2) of the Act.

Secondly, a distinction needs to be drawn between contracts that are illegal *ab initio* and therefore void, and those contracts that are only avoidable at the behest of the innocent party untainted with the illegality.

In addition, not every illegality taints the contract. The question is always whether the illegality goes to the root of the contract. In the case at hand, assuming that there were breaches of the Immigration Act, such breaches do not go to the root of the contract for repairs. Equally, assuming that there were breaches of the Customs & Excise Act such breaches do not go to the root of the contract made by the parties. Accordingly, no question of unenforceability of the contract arises. In the further alternative, the Malawi Government having given advice on how

the plaintiff should go about having his boat repaired, it would be altogether unjust and inequitable for the same Government to avoid a contract under which they have taken a benefit.

Thirdly, an exclusion clause must be set up by direct evidence. Its existence must be proved. The burden is upon the one who alleges for its existence to prove.

The defendant did not prove that the contract of April 1999 contained an exclusion clause. In the totality of the evidence received by the Court, there is no document containing an exclusion clause except Court Exhibit 3. However, Court Exhibit 3 expressly links itself to the first contract of December 1998. The linkage is quite clear. Both in terms of dates, the receipt number and the job card number. A close examination shows quite clearly that the first contract had an exclusion clause. However, it is not open on the material before the court to extend the operation of this exclusion clause to contract number 2, which was made in April 1999. That the two contracts are quite separate and distinct is also quite evident from Exhibit P7, the letter dated 12 August 1999. In that letter, the defendant refers to the contract of April 1999 as the second contract.

Fourthly, contributory negligence is a matter of fact, which must be proved by direct evidence. The burden is upon the defendant not only to set up but also to prove in what way the plaintiff is liable for contributory negligence.

The defendant did not call any evidence to establish contributory negligence. What the court has is a bare allegation that there was contributory negligence. The defendant has not established that the contract between the parties imposed a duty upon the plaintiff to look after the boat whilst it was in the custody and care of the defendant. The defendant has failed to discharge the burden cast upon it and therefore the allegation should be dismissed.

Fifthly, the defendant has raised a coloured defence of *jus tertii*. In fact, the defendant seems to contend that the plaintiff has not proved ownership of the boat and therefore his action against the defendant should not succeed.

The law on *jus tertii* has changed in England and is now regulated by a statute. The statute is of course The Torts (inference with goods) Act 1977, which was passed in England following the 18th report of the Law Reform Committee. Since the passing of this Act and by Section 8(1), “*in any action for wrongful interference with goods the defendant is entitled to show.....that a third party has a better right than the plaintiff as respect all or any part of the interest claimed by the plaintiff, or in right of which he sued and any rule of law (sometimes called jus tertii) to the contrary is abolished*”.

This Act does not apply in Malawi since it does not belong to the category of English statutes that are received in Malawi. Therefore, in Malawi the position continues to be the common law as existed in England prior to the 1977 Act. See **Clerk & Lindsel on Torts** 6th edition paragraph 27 – 77 and 22 – 79.

It follows from the foregoing articulation of the law that it is not open to the defendant to torpedo the title of the plaintiff in these proceedings. The defendant does not deny that the boat was delivered to the defendant by the plaintiff. Accordingly, it was not open to the defendant to raise the defence of *jus tertii* at the time that the boat was delivered to them nor is it open now in these proceedings to question the title of the plaintiff.

CONCLUSION

The plaintiff has proved his case on a balance of probabilities. The material contract is the one in Exhibit P6 and entered into in April 1999. The parties to that contract are the plaintiff and the defendant. The material contract was made prior to the sale by the defendant of the business to the private company on 14 May 1999. The contract of April 1999 contained no exclusion clause. It contained no provision requiring the plaintiff to provide guard or security services over the boat.

When the boat was delivered to the defendant by the plaintiff, the defendant became bailee for reward. The boat was damaged or completely destroyed whilst in the custody and care

of the defendant. The defendant has not discharged its burden to show that the loss occurred without negligence or default on its part. Allegations of illegality have not been made out. In addition, it is not open to the defendant to question or torpedo the title of the plaintiff in these proceedings. Accordingly, the defendant is wholly liable to the plaintiff for the loss.

COSTS

The issue of costs is in the discretion of the court. Normally costs follow the event. The plaintiff has proved the liability of the defendant successfully. Therefore, I condemn the defendant to pay costs incidental to these proceedings.

PRONOUNCED in open court this 6th day of December 2005, at Blantyre.

Chimasula Phiri

JUDGE