IN THE HIGH COURT OF MALAWI

LILONGWE DISTRICT REGISTRY

CIVIL CAUSE NO. 264 OF 2004

BETWEEN

LFT. COL. MVULA …….. APPLICANT

AND

KATOTO RENT A CAR ……. RESPONDENT
REBECCA HILL

CORAM : HON. JUSTICE MZIKAMANDA

: Mr. Mapila, Counsel for the Applicant
: Mr. Chileng, Counsel for the Respondent
: Ms Z. Mthunzi, Court Reporter
: Mr.Gonaulinji, Court Interpreter

JUDGMENT

Mzikamanda, J.

In March 2005 the plaintiff commenced an action by way of a specially endorsed writ claiming K1,500,000.00 from the defendants being the replacement value of a motor vehicle Toyota Surf Registration Number MZ 4967, K5,000.00 per day loss of use and costs. The defendants deny liability.

The matter was largely heard by Nyirenda, J. as he then was. His Lordship heard the evidence of the plaintiff and one witness for the defence. I heard the second witness for the defence who also was the last witness in the case.

The amended statement of claim shows that the plaintiff at all material times owned a Toyota Surf motor vehicle Registration Number 4967 while the defendant operated a car hire business in the City of Lilongwe. By agreement between the plaintiff and the defendant it was agreed that in consideration of the plaintiff allowing the defendant to use his vehicle aforementioned as part of its business, the defendant would pay the plaintiff K5,000.00 per day and a 10% (ten per centum) service charge. It was an implied term of the said agreement that the defendant would return the vehicle aforementioned, on demand, to the plaintiff in good condition and repair, fair wear and tear excepted. The agreement between the parties was made partly orally, partly in writing and partly by conduct in the circumstances of the case. The agreement was made during various telephone conversations and meetings at the defendant's Offices and contract form was signed by the plaintiff and the defendant on 8th October, 2004. The defendants knew or ought to have known that the plaintiff was not intending to relinquish ownership of the vehicle and would at any time ask for it back.

Pursuant to the agreement the plaintiff allowed the defendant to take possession of the vehicle aforementioned and use it in his business. On 12th October, 2004 whilst the vehicle was in the custody of the defendant, it was involved in a road traffic accident near Mua Mission in Dedza and was damaged beyond repair. The plaintiff and the defendant thereafter agreed that the defendant would pay the

plaintiff the sum of K1,500,000.00 as replacement value of the vehicle which agreement has not been honoured by the defendant.

The amended defence shows that the defendant admits that the plaintiff owned the vehicle in question and that the defendant carried out a Car hire business. The defendant then avers that the agreement in question was illegal and unenforceable against the defendant as it contravened sections 6 and 7 of the Road Traffic (Operator and Road Service Permit) Regulations under the Road Traffic Act. The defendant denies the existence of the agreement and puts the plaintiff to struck proof thereof. The defendant also contends that the accident referred to in the statement of claim was a natural and reasonable consequence of Car hire business.

At the hearing the plaintiff adopted a statement he had earlier made. According to that statement a representative of Katoto Rent A Car by the name of Enock Phiri visited the plaintiff at his house on the grounds of New State House in Lilongwe to hire his Toyota Surf Registration Number MZ 4967 for the weekend from 8th October and return it on 12th October, 2004. They agreed on a hiring fee of K5,000.00 (Five Thousand Kwacha) per day. He released the vehicle which was driven by their driver Mr. Christopher Soko at around 12:00 noon. Later that afternoon the plaintiff went to the Officers of the defendant and signed a contract while Mr. Dennis Makawa signed on behalf of the defendants as its Manager.

In the morning of Tuesday 12th October, 2004 at around 7:00 am he got a telephone call from Enock Phiri telling him to report at the defendant's Offices.

He told him that the vehicle had been involved in an accident. At the Office he met Mr. Dennis Makawa, the Manager and Mr. Canaan Nyirenda the Managing director who told him that the vehicle had been involved in an accident near Mtakataka on the Salima – Balaka Road. The three of them left for the scene of accident. They confirmed the accident and eventually the vehicle was towed to the house of Mr. Nyirenda in Area 12, Lilongwe. He then told the Managing director to replace the vehicle or give the replacement value of K1.5 Million. That has not been done and he has problems in travelling. He tendered the contract form in evidence.

It transpired during cross-examination that this was a second occasion on which the defendants borrowed the vehicle. He did not have a car hire licence or permit. He lent his car to the defendant. He said that K1,500,000.00 includes purchase price, duty and other expenses. DW 1 Mr. Enock Phiri adopted his statement. In it he stated that he was Sales representative for Katoto Rent-a-car. On 8th October, 2004 he contacted the plaintiff telling him that they had a client who wanted a 4x4 vehicle. He took the vehicle of the plaintiff to Capital Hotel for two weeks and hired it out. After two to three days the vehicle was involved in an accident at Mtakataka. One person died. The vehicle was beyond repair. The vehicle was towed to Lilongwe. It had been road worthy but had no A Class permit and had no red numbers which were required for hire. The vehicle had been given out as belonging to Katoto Rent-A-Car.

During cross-examination he indicated that the plaintiff used the vehicle for personal use. The defendants knew that the vehicle needed "Class A licence and red number to be on hire."

DW 2 Mr. Canaan Nyirenda, adopted his statement in which he said he was proprietor of Katoto Rent-A-Car. He said that sometimes in October, 2004 he was informed that his employees had hired a Toyota Hilux Surf from the plaintiff which was further hired to Sara Clark and friends from Legal Aid Department. At around midnight on 9th October, 2004 he received a phone call from Mtakataka police that the vehicle had been involved in a road accident. He called the plaintiff and informed him. The plaintiff agreed to seek compensation from the hirers. The vehicle was bought at US$1,500,000.00 according to the papers he saw. The vehicle was brought into Malawi duty free and had no Class A Permit. A claim against Katoto Rent-A-Car is not proper and the vehicle was not fit for use in Car hire in the absence of Class A Permit.

It transpired during cross-examination that he began his business of Car hire in 2004. He was unaware that his employees had previously had dealing of a similar nature with the plaintiff. He said that it was the hirer who should pay compensation for the lost vehicle. In this case it should be Sara Clark.

It is clear to me that the facts and the issues for determination in this case fall within a narrow compass. There is no dispute that the defendants employee, a sales representative, approached the plaintiff and offered to get the plaintiff's Toyota Hilux Surf Registration MA 4967 to be used in the business of Katoto Rent-

A-Car. Again there is no dispute that the plaintiff accepted the arrangement on the promise that after use the plaintiff would be paid an agreed sum of money. It is also not in dispute that the vehicle would be returned to the plaintiff in a state of good repair, except fair wear and tear. It is also not in dispute that the discussions leading to the agreement were crystallized in a contract document, Ex P1 and delivery of the said vehicle. There is ample proof on a balance of probabilities that a contract with respect to the said vehicle existed between the plaintiff and the defendant. In fact the defendant's submission show that they recognize the existence of such a contract although they argue that the same was illegal and therefore unenforceable.

The real issue therefore is whether the contract can be enforced by the plaintiff as against the defendant and whether he can have the damages prayed for. It is clear that the plaintiff had not met and had no direct dealings with Sara Clark and her friends. I notice that Sara Clark and friends were joined as parties to the defence but this really was to indemnify the defendants.

In arguing on the illegality of the contract the defendants have referred to the Provisions of the Road Traffic Act which require that a vehicle for hire must have "Class A" Permit and must have red numbers. Specific reference was made to the Road Traffic Operator and Road Service) Regulations 6 and 7 of the Road Traffic Act on this point. It is to be noted that the plaintiff's motor vehicle was for private use and the Sales representative knew this when he approached the plaintiff. It is also to be noted that it was the defendants who were in a rent-a-car business and not the plaintiff. It is the further argument of the defence that the contract having

contravened Regulation 6 and 7 of the Road Traffic (Operator and Road Service Permit) Regulations no party can claim benefit from the contract at all.

The relevant Road Traffic (Operator and Road Service Permit) Regulations provide that:

The case of *Chupa v Malawi Hotels Limited SCA 12 MLR 226* dealt with an issue of illegal contract under the Liquor Act Cap 50:07 of the Laws of Malawi. The Malawi Supreme Court was clear that for a contract prohibited by statute, no action may be brought by any party in reliance on an illegal contract. Thus a party may not require return or payment of money owed under illegal contract for sale of liquor by Liquor Act. The respondent in that case, an employer of the appellant, had deducted from the pension money of the appellant a sum of money to cover a debt incurred by the appellant in relation to liquor he consumed while he worked as operations Manager at Mount Soche Hotel. The appellant sought to recover the money withheld for the liquor debt on the ground that the contract for liquor sale in the circumstances was illegal as it was prohibited by the Liquor Act. It was held that he could not recover the money because indeed the contract was illegal and therefore unenforceable.

It was illegal ab initio.

In *SC Yiannakis Ltd v Tione Enterprises and Another {1993} 16 (2) MLR 782.* Mbalame, J. held that a contract that was in breach of the Land Act, in that it resulted in the defendant parting with possession of demised premises without

first obtaining the written consent of the Minister, was null and void ab initio as it was illegal. Neither party could enforce it.

A case that is more on point is *SR Nicholas Ltd v Hassan* *{1990} 13 MLR 415*. That case considered the legality and illegality of a contract for hire of a motor vehicle. That case distinguished *"plying for hire"* from *"carrying of passengers for hire or reward."* The case considered Section 75 (2) of the Road Traffic Act which is in the following terms:

> *"Any person who uses or causes or permits to used on any road any vehicle which plies for hire or carries passengers for hire or reward unless such vehicle is duly licensed as a public vehicle, and unless there is a road service permit in force authorizing such vehicle to ply for hire or be used for the carriage of passengers for hire or reward shall be liable for a first offence to a fine of K2,000.00 and imprisonment for six months…."*

It is to be noted that Section 75 (2) of the Road Traffic Act deals with a similar situation as do Regulations 6 and 7 of the Road Traffic (Operator and Road Service Regulations). It is easy to see that the mischief intended to be addressed by these provisions is similar.

Here the requirement is that an operator be registered in respect of any motor vehicle registered in Malawi, the owner or operator of which intends to use such motor vehicle for carriage of passenger for hire or reward. Again a road service

permit shall be issued for the public service vehicle category and such permit shall be marked with letter A whereas, a contract car shall be endorsed with letter and a hire car, shall be endorsed with letter "T". The case of *SR Nicholas Ltd v Hassen (Supra)* settled the point that a person who drives a vehicle is not a passenger in that vehicle. A passenger is a person who exercises no control and takes no part in the management of the vehicle. The case also agreed with the observation by Donovan, J. in *Cogley v Shenwood (1959) 2 All ER 313 at 319 that:*

> *"The expression plying for hire' is not defined in the Statute and .... That no comprehensive definition is to be found in the decided cases, but the term does connote in my view some exhibition of the vehicle to potential hirers as a vehicle which may be hired... It is a fairly common sight today to see in smaller towns and villages a notice in the window of a private house "Car for Hire." If the car in question is locked up in the owner's garage adjacent to the house, it could not in my view be said that at that moment the car was "plying for hire."*

As earlier observed the plaintiff had his Toyota Hilux Surf for personal use. It was never displayed or advertised for hire. It was not plying for hire. It can be said at once that the plaintiff was not an operator of Car hire business. Neither could the plaintiff be said to have put his vehicle on private hire as explained in *SR Nicholas Ltd v Hassen* that 'private hire' connotes that any member of the public could go and hire the vehicle and use it for a defined journey at a defined time.

The facts in S.R. Nicholas Ltd v Hassen (Supra) were that in August 1985 the respondent, driving a Mercedes Benz car, was involved in a collision with the appellant's truck. The respondent's car was taken to panel beaters (Nunes) for repairs. His attempts to obtain a Mercedes Benz from car hire firms proved unsuccessful, and as a result his employers, of whom the respondent was the managing director decided to buy a Mercedes Benz for his use. He would be charged for the use of the vehicle. When Nunes returned his vehicle on 3rd December, 1985, his employer billed him K12,296.00. The respondent instituted action against the appellant claiming special damages in respect of the hire charges excess on insurance and his no claim bonus. The Registrar ruled that the entire claim for hire charges should be dismissed as the agreement between the respondent and his employers had been an illegal one as it was in contravention of Section 75 (2) of the Road Traffic Act. The Malawi Supreme Court of Appeal held an appeal that the contract was legal as it did not contravene Section 75 (2) of the Road Traffic Act. The respondent was neither a passenger in the vehicle not was the vehicle for private hire to fall within the province of Section 75 (2) of the Road Traffic Act. The circumstances in which the hire between the respondent and his employers entered the hire agreement were very different from those envisaged by the Act. The Malawi Supreme Court of Appeal noted that illegality in a contract normally arises in two ways which necessarily mean that the contract is void or unenforceable. In dealing with this point the Court quoted with approval what Devlin, J. said in *St John Shipping Corporation v Joseph Rank Limited. [1956] 3 All ER 683 at 687 that:*

"There are two general principles. The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends on proof of the intent,. At the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all; and if unilateral, it is unenforceable at the suit of the party who is proved to have it. This principle is not involved here. Whether or the overloading was deliberate when it was done, there is no proof that it was contemplated when the contract of carriage was made.

The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is, if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not. A significant distinction between the two is this.

In the former class one has only to look and see what acts the statute prohibits; it does not matter whether or not it prohibits; it does not matter whether or not it prohibits a contract; if a contract is deliberately made to do a prohibited act, that contract will be unenforceable. In the latter class, one has to consider not what acts the statute prohibits,... if the parties enter into a prohibited contract that contract is unenforceable."

I find the above dictum to be instructive in the present case. The provisions of the Road Traffic that relied upon in the defendant's argument do not state any prohibition of contracts, nor would such prohibitions be implied in my view. I hold the view that the provisions in question prohibit operating a motor vehicle hire business or road service without permit. The classification A and the use of red numbers is evidence of such permit or authorization. I am of the firm view that the principle applicable in the present case is the first where one has only to look and see what acts the statute prohibits. I have already observed that the plaintiff was not in Car Hire business, nor was he operating his Toyota Hilux Surf plying for hire. In fact he was approached by DW 1 and was requested to let him his Toyota Hilux Surf on hire. Indeed the contract form was signed by the plaintiff on the other hand and a manager of the defendant on the other. The vehicle was to be returned a few days later. There were no dealings between the plaintiff and Sara Clark and her friends who allegedly ended up driving the vehicle and getting involved in a fatal road accident with it. I also noted that it was the defendants who were in a car hire business. It was them who were operating and who placed the vehicle on hire by other people later. The Road Traffic Regulations herein before referred to require Permit before the vehicle was placed in operation of the car hire business. To my mind it is the defendants who should have ensured that the vehicle they got from the plaintiff complied with the Regulations before they allowed a hirer to take it out. They are the operators. They are the ones who did road service in the motor vehicle hire business. It was not incumbent for the plaintiff to obtain the operator or road service permit as he was not in a car hire business. It is also clear to me that by operating a car hire business using the plaintiff's vehicle before it got classification A and before it had a road service

permit to cover hire the defendants unilaterally intended to go against the acts prohibited by the statute. The same intention can not be implied on the plaintiff and therefore there was no mutual intent to contravene the law. The object of the plaintiff in entering the agreement he did can not be said to be committing an illegal act. Where intent to commit an illegality is unilateral, the contract is unenforceable at the suit of the party who is proved to have it. It follows that the innocent party is entitled to rely on it. Any illegality following the contract was not of the plaintiff's making but the defendant, and the defendant can not be allowed to rely on his own illegality to escape liability. There is another ground on which the plaintiff should be allowed to rely on the contract. It is that the circumstances obtaining in the present case are very different from those envisaged by the Road Traffic Act. And just like in *SR Nicholas Ltd v Hassen* I would hold that the contract herein is not illegal and enforceable. The plaintiff let the vehicle to a specific person for a specific period as was the case in *SR Nicholas Ltd –vs- Hassen (Supra)*.

The defence indicated that the accident that resulted in the total loss of the vehicle was a natural and reasonable consequence of Car hire business. The defence never showed that this formed part of the terms of contract between the plaintiff and the defendants. He who alleges must prove the point that he alleges. Cars let out do not just get involved in accidents resulting in write offs. The argument by the defendants that the accident that resulted in damage beyond economic repair of the vehicle in question as being a natural and reasonable consequence of Car hire business is not made out. After all between the plaintiff and the defendants, it is the defendants who are in Car hire business and who are

in a position to state and prove what the natural and reasonable consequences of Car hire business are. They have not done so.

As regards the measure of damages in this case I agree with the case of *Leisbosch Dredger v SS Edison [1933] AC 449 at 463 that:*

> *"the measure of damages then in case of total destruction of the chattel that is a going concern is the market value to enable the plaintiff to obtain a replacement."*

The plaintiff claims K1,500,000.00 as the replacement value of the vehicle. This is a claim for special damages. The case of *SR Nicholas Ltd v Hassen (Supra)* noted that special damages must be proved by adequate evidence and not merely repeating the averment on oath. The case nonetheless also noted at Page 426 that:

> *"However, we know of no rule of law which states that the test of reasonableness is inapplicable where special damages are under consideration."*

In the case at hand I am of the view that the claim for K1,500,000.00 replacement value passes the reasonableness test. I have assessed the evidence in this matter and I see no bar in my awarding that sum. I award the sum claimed. I have some difficulty in assessing loss of use as I am unable to find a basis for that. I refuse to award any damages for loss of use.

The plaintiff's action succeeds to the extent stated above.

PRONOUNCED in Open Court this 15th day of July, 2009 at Mzuzu.

R.R. Mzikamanda

J U D G E