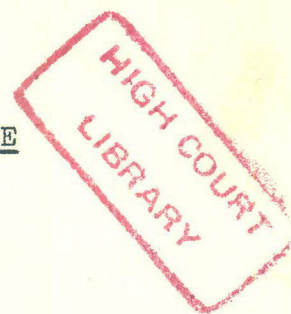


IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE No. 25 of 1979



B E T W E E N:

GLOBE ELECTRICAL (TRANSVAAL)(PVT) LIMITED

.....

PLAINTIFF

and

GLOBAL AUTO & ELECTRICAL ACCESSORIES COMPANY

.....

DEFENDANT

Coram: JERE, J.

Kaliwo of Counsel for the Plaintiff

Mutuware of Counsel for the Defendant

Kelly: Court Reporter

Sonani: Official Interpreter

J U D G M E N T

In this action the plaintiffs issued a writ on the 11th January 1979 claiming the sum of K25,580:61t, being a balance of the price of electrical goods, electrical fittings, items and accessories sold and delivered to the defendants and also claiming costs of this action. It is one of those rare cases where the particulars of the invoices and the dates were correctly set out in the writ itself. I say it is one of the rarer cases because most times the courts have complained that there are no particulars in the writ itself.

The defendants failed to enter an appearance and on the 5th February 1979 judgment and costs were obtained in favour of the plaintiffs. A writ of execution was issued. However, the defendants applied to the court to set aside the judgment and in their affidavit, more particularly paragraph 10 of that affidavit, denied that the defendants owed the plaintiffs the sum of K25,580. or any other sum at all. The defendants also in this affidavit denied ever receiving the invoices as particularised on the writ. This application to set aside the judgment was allowed by my brother judge, Mr. Justice Mead. A defence was entered which denies indebtedness by the defendants to the plaintiffs in the sum of K25,580:61t. and also denies receiving the goods particularised in the writ. There is a set-off and counterclaim to the tune of K8,169:37t. and of course the defendants claim for costs of the action.

Then Mr. Kaliwo for the plaintiffs tried to move the court to set aside the defence on the grounds that the defence does not disclose any defence and that it is frivolous. However, this was rejected and the defendants finally entered an amended defence and amended counterclaim. To say the least the amended defence and the counterclaim is confused and contradictory. In short what the defendants are saying is that the plaintiffs must prove their case. Hence a number of contradictory paragraphs in the amended defence and counterclaim.



I will examine the evidence in this case. The first plaintiff's witness was one Mr. Donald Julius Blumgart. He told the court that his company has its headquarters in Johannesburg, South Africa, and that he is on the export side of the company. It was his evidence that sometime in 1977 he got in contact with the defendant company. The defendant company expressed a wish to purchase the plaintiff company's goods and the first order from the defendants to the plaintiffs is dated the 9th September 1977, which is Exhibit No. 1 (a) in this court, and an accompanying letter which is Exhibit No. 1 (b). In this letter the defendants are asking for goods on a revised order No. GAS/030/77 and ask for a revised pro forma invoice quoting c.i.f. Blantyre by road through Rudvian Freight Service (Pvt) Limited, Johannesburg. According to the witness the goods were sent and the plaintiff company invoiced the defendants. These invoices are Exhibit No. 2 (a), (b) and (c). There was a second letter which the defendant company sent for the attention of witness, Mr. Blumgart, Exhibit 3(b), with the order No. GAS/036/77 which is Exhibit 3(a). These documents emanate from the defendant company. The goods, according to the plaintiff's witness, were supplied and the defendants were accordingly invoiced. See number of invoices tendered in court marked 4(a) to 4(j). His evidence was that these were to be paid within 90 days after the receipt of the goods. It was his evidence that he has not received anything for these goods. In fact he was informed by the defendants that the goods were not competitive and as a result they were not being sold. However, the defendants placed a third order around February/March 1978. This was a verbal order. The witness said he got the order when he came to the country on a business trip and at that time the defendants gave him the verbal order. It was then hand-written and he sent the goods to the defendants and they were received on behalf of the defendant company by a Mr. Mtonga, who was the manager of the defendant organisation. As a result they sent the invoices again to the company. These are Exhibits 5(a) to 5(c). It was his evidence that all these goods were sold to the defendants. By 1979 the plaintiffs had not received any money. They asked the defendant company, who refused to pay, saying that they did not order the goods but when asked to return the goods the defendants refused to return the same. It was the evidence of the witness that some of the goods were sent by road, some via Nachala and some small items were sent by air. He recognised an invoice which was part verbal and part written. The witness also told the court that there were certain incorrect charges and that he credited the defendants for them. He produced in court Exhibit No. 6(a) to 6(e). These were credits to the defendant company. It was his evidence that after these credits the defendants stopped making further queries. The plaintiff company had not received the monies. It was his evidence that there was an offer for K500 which he turned down. He wanted to be paid in full.

In cross-examination he reiterated the fact that he had received firm orders from the defendant company. He again reaffirmed the fact that credits were allowed on the items that were not received in the country.

The evidence of the plaintiff's second witness named Kenneth Ronald MacLartney, was to the effect that he was an accountant mainly on the credit and collection of monies. It was his evidence that monies from Malawi came in slowly and at the end of the period he drew a debtor's reconciliation document. This is Exhibit No. 7.

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This document clearly shows the credits allowed and the balance as at present.

The evidence of the defendant company was first given by a Mr. Maxwell Mtonga. He said he was the manager of the defendant company from 1977 to 1979. He admitted that he knows the plaintiff company and that his company had business dealings with the plaintiff company. He explained that initially they had agreed that pro forma invoices would be issued c.i.f. Blantyre and then the defendant company would compare the prices with different exporters and they would choose the most competitive prices. It was his evidence that before the plans were finalised to order goods they were called to redeem some goods. They had made an original arrangement with Press Agencies to look after their documents. When the defendants heard that the goods had arrived they agreed to pay the necessary customs duties and they cleared the same, and the witness confirmed Exhibit 2, the invoice. It was his evidence that he found that the prices were higher than if they were obtained elsewhere. He said that some goods had not arrived although the invoices showed that they had arrived. It was his evidence that the goods that had not arrived added up to K3,593:88t. He agreed that they had received credit notes for this but although they received this credit note they did not recover custom duty and surtax on the goods which was paid to the Malawi Government. He said they had paid clearing charges of K17:88t and he says this amount cannot be recovered. He said the goods were meant for sale, since they had not arrived, although they were allowed a credit, they had incurred a loss because they would not make a profit on the goods they could not sell. He put forward the amount K8,169:37t as the loss sustained by the defendant company. He also stated that most of the goods had arrived by air instead of by road, hence making them more expensive. He denied that Exhibits 1(a) and (b) and 3(a) and (b) were firm orders. According to him they were mere trade enquiries. He said he had no opportunity to speak to Mr. Blumgart and never at any stage agreed to return the goods. He went on to explain the difference between a pro forma invoice and a pro forma order and reiterated that in his view they did not make a firm order. He was asked to read over Exhibit 3(a). He interpreted this to mean a mere enquiry. He could not account for the signature of a cheque which was stated to be a first instalment. Later on he stated quite significantly, I quote -

"This is because the goods were received by us so we offered to pay instalment, we had adopted the goods as our own and we wanted to sell them. We paid customs duties and surtax."

He stated that he had not any documents emanating from the defendants clearing agents. He was therefore unable to produce documents to show what he calls his loss. What he said he did not receive was 160 hurricane lamps and that he had received a credit for these. He worked out his profits and came up to the figure earlier mentioned in this judgment. In cross-examination he admitted that the value of goods received by the defendant company was approximately K25,000. Asked about the counterclaim he stated that the counterclaim is for the loss that the defendant company were making because the goods were more expensive than other competitors. He also took into account the goods that did not arrive.

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The evidence of the defendant's second witness, Mr. Jutter Charles Kansawa was brief. Nothing in substance was said that added much to what the first defence witness stated.

In short this was the evidence before me. It is clear, and abundantly clear, that the defendants did receive the goods as stated by the plaintiff's witnesses supported by the various invoice documents. I have considered the defence that the defendant company did not receive the goods. I find this defence is without merit; first because of the evidence for the plaintiffs and secondly because of the admissions made by Mr. Mtonga and substantially confirmed by the second defence witness. The evidence is overwhelming. I find it as a fact that the plaintiffs did send the goods as particularised in the writ and that they sent these goods on the request of the defendants and that the defendants received the goods. There can be no doubt in my mind at all. I have wondered as to why the defendants failed to pay for the goods or even to return the goods when asked by the plaintiffs. In my view this is more or less a question of business morality rather than a question before me to settle. I think this is not a good practice. In these circumstances therefore I find that the plaintiff company succeeds in its claim. I have considered that the claim is for less than what Exhibit 7 states. I do not think this is really material. It may well be that in the confusion that has been going on the amount has been reduced but in any event I am not asked for the higher amount. The court is not asked to adjudicate upon the higher amount contained in Exhibit 7. I therefore give judgment for the amount claimed and costs.

I have looked at the set-off and counterclaim. The evidence for the defendant is extremely shaky. It is unsupported by any documentary evidence. I think the truth of the matter is what Mr. Mtonga told the court that the counterclaim is for the loss that the defendants were making because the goods were more expensive than their competitors. I do not think that this supports the counterclaim as revealed in the pleadings. I therefore dismiss the counterclaim with costs.

Pronounced in open court this 18th day of November 1980 at Blantyre.


N. S. JERE
JUDGE