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IN THE HIGH COURT OF MALAWI

CIVIL CAUSE NO. 163 OF 1979

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BETWEEN:

LEONARD THOMAS MADANITSA PLAINTIFF

and

GEORGE MAJAWA DEFENDANT

Coram: Topping, Ag. J.
For the Plaintiff: Munthali of counsel
For the Defendant: Mrs. Msosa, Legal Aid Advocate
Official Interpreter: Kaundama
Court Reporter: Brown

JUDGMENT

In this civil action as originally pleaded the plaintiff claimed the sum of K1,600 being the balance of the amount due from the defendant for the price of a Bedford lorry registration number BE 1289 sold and delivered by the plaintiff to the defendant at his request. In his defence the defendant denied owing the sum of K1,600 as alleged in the plaintiff's statement of claim but admitted that he bought the plaintiff's vehicle BE 1289 and claimed that the plaintiff offered the lorry for sale at K1,800. He alleged that the plaintiff agreed to accept as part of the price the defendant's Land Rover BD 947, which was valued at K800 for the purposes of the transaction. The defendant's defence alleged that he had paid the sum of K200 as a deposit and that if this sum together with the agreed value of K800 for the Land Rover was taken into consideration the balance due was K800 and not K1,600. A reply was filed in which the plaintiff alleged that he had accepted the Land Rover in part exchange but he pleaded that by an agreement dated 1st February 1978 the defendant had agreed to deliver the Land Rover in working condition complete with certificate of fitness in part exchange for the lorry. The defendant was alleged to be in breach of that agreement and it was pleaded that the plaintiff did not take possession of the Land Rover and that consequently the value of the Land Rover was also due to the plaintiff.

Before the trial an application was made to amend the defence. No objection was taken to the amendment and the defence was amended to allege payment by the defendant on behalf of the plaintiff of a sum of K280 which was paid by the defendant on behalf of the plaintiff when the truck which was sold by the plaintiff to the defendant was seized in execution by the Sheriff in a suit in which judgment was given against the plaintiff. The amendment alleged that the balance due to the plaintiff was only K520 and not K1,600. The plaintiff thereupon amended his claim to reduce the balance claimed to K1,320. As K520 was admitted to be due and owing from the defendant to the plaintiff judgment for that amount was entered and the trial commenced as to the balance.

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It is common ground that the plaintiff and the defendant agreed in terms of Exhibits A and B to the sale of their respective motor vehicles on the terms set out therein. There are minor variations between Exhibit A, which is the plaintiff's copy of the agreement, and Exhibit B which is the defendant's copy, but these are not material. Both agreements are broadly in the following terms, and the only variations are as to the placing of various words.

'To Whom it may Concern

I Leonard Tom Madanitsa of the above address confirm that today 1st Feb. 1978 have sold my Bedford 3 ton lorry BE.1289 to Rex George Majawa of Box 5748 Limbe on the following terms:-

Price Agreed	K 1,800=
Less Part Exchange	
Land Rover BD 947	<u>800</u>
	1,000
Less Cash Received	<u>200</u>
Balance	<u>800</u>

The balance to be paid by instalments of K50 per month until the whole amount is paid. Commencing date will be end of March, thereupon ownership of vehicle will change. The Land Rover to be delivered to me in working condition complete with c.o.f. during February. If possible a Deed of sale to be drawn by lawyers for security."

The plaintiff in his evidence described how he had left his lorry for repair at K.V.M. Garage. After repair he decided to sell it, and the defendant, who had seen the lorry at the garage, approached him with a view to buying it. For a reason which is not in evidence, the plaintiff was doubtful as to the ability of the defendant to pay for the lorry, and initially he refused to sell it. He was however persuaded and as a result prepared Exhibits A and B, which show that the agreed price was K1,800. The price was to be satisfied as to part, by the tender of the Land Rover BD 947 at K800, an agreed valuation, by a cash payment of K200, and the balance by monthly instalments of K50. The plaintiff said that the defendant collected the lorry but failed to deliver the Land Rover. After some two months had elapsed the defendant deposited the Land Rover at K.V.M. Garage but the Land Rover had no certificate of fitness. The plaintiff refused to accept it and sued for the balance due on the sale.

It is clear that this is a credit sale and the property in the truck BE 1289 passed on delivery to the defendant, but the change of ownership was never registered.

The plaintiff called one witness, Mr. Mudaliar, who is the proprietor of K.V.M. Garage. He was an elderly gentleman who was not too clear at times on what occurred between the parties, and I have been careful to note that a considerable portion of his evidence must be hearsay. However, he did give evidence that the plaintiff's vehicle was repaired and the bill came to about K300. The plaintiff satisfied this debt by paying K100 down and was to pay the balance by instalments. At the date of hearing some K80 remained due and

owing. Mr. Mudaliar told the court that he allowed the defendant to take the lorry and after two months the defendant brought his Land Rover for repairs. A quotation was given but the defendant told him not to proceed with the repairs. These were clearly facts which the witness knew himself and were not hearsay.

The defence case is that the defendant did all that he could to comply with the terms of the agreement Exhibit A but that because P.2 Mr. Mudaliar refused to release the lorry without some security for the debt he, the defendant, and the plaintiff, agreed together that the contract would be varied so that the defendant deposited the Land Rover with Mr. Mudaliar as security, and the defendant took away the lorry. The defendant agreed that he took the lorry and used it, but said that it gave him a lot of trouble. It was unserviceable for long periods. He agreed that he did not pay any money to the plaintiff after delivery of the lorry, except for the amount which he had to pay to the Sheriff. He said that the Land Rover when delivered was in good condition but needed slight attention to one trafficator and attention to the spare wheel before it could go for examination for certificate of fitness. The defendant was going to attend to these matters himself, but claimed that P.2's garage would not release the Land Rover. He is therefore saying that the contract was frustrated as to that particular clause because of the plaintiff's conduct in instructing the garage not to release the Land Rover. At the same time he is also saying that the contract was varied as to the question of the certificate of fitness because he was required by the plaintiff to deposit the Land Rover as security for release of the truck.

The onus of proof in this matter rests upon the plaintiff to prove on the balance of probabilities his case. In support of it there is his own evidence and that of P.2. The defence case rests entirely upon the defendant's own evidence. There can be no doubt that the terms in Exhibit A were the terms upon which the sale was to take place. So far as the plaintiff is concerned he carried out those terms by delivery of the lorry. The defendant claims that he carried out his part of the bargain to the best of his ability.

The plaintiff's case is supported to some extent by the evidence of Mr. Mudaliar. His evidence is important. While doubtless some of his evidence may have been hearsay it is clear that as to the payment for repairs to the plaintiff's truck and as to deposit of the Land Rover his evidence is not hearsay. He may be regarded as an independent witness in that his sole interest was to ensure that he was paid for the work which he did on the plaintiff's truck. At no time was it suggested to Mr. Mudaliar that the defendant had been required to deposit the Land Rover by way of security. I do not believe the defendant on this point. The defendant was evasive when cross-examined about this matter, and I am sure that if such a request for deposit were made P.2 would have known about it. P.2 said that the defendant brought his vehicle for repairs. The defendant did not bring the Land Rover until after two months had elapsed from the date of delivery of the lorry. P.2 appeared to be satisfied with the plaintiff's ability to settle the debt, and I reject the defendant's contention that he deposited the vehicle by way of security and was therefore unable to comply with the term as to the certificate of fitness.

The defendant alleges that the lorry gave him trouble. In his evidence in chief the plaintiff described how he used to meet the defendant, who would say to him that because the lorry was giving him problems he had no money. This tends to support the plaintiff's case.

It is clear to me that the plaintiff's story is the more likely of the two, for it is supported by the evidence of Mr. Mudaliar. There is nothing apart from his own evidence to support the defendant's story, which does not seem likely having regard to the rest of the evidence. It seems highly unlikely that the plaintiff would take any step which would have prevented the defendant from completing such repairs as were necessary to enable the Land Rover to obtain a certificate of fitness. After all, the Land Rover would thereupon accrue to him and become a valuable saleable asset. If therefore the defendant's evidence was accepted as correct it would mean that the plaintiff deliberately prevented the performance of the contract and parted with his lorry to the defendant receiving no advantage in return. I cannot accept that this would be so.

I find that the defendant was in breach of contract by failing to deliver the Land Rover as agreed in terms of Exhibit A and that the amount due to the plaintiff is K1,320. The plaintiff already has judgment for K520 and there will be judgment for the balance of K800 against the defendant, with costs to be taxed or agreed.

Pronounced in open court this 7th day of March, 1980, at Blantyre.

R.G. TOPPING
ACTING JUDGE