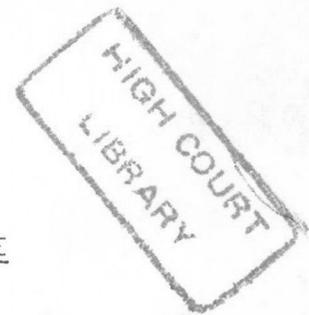


IN THE HIGH COURT OF MALAWI AT BLANTYRE



CIVIL CAUSE NO.524 OF 1979

MZUZU PANEL BEATERS

versus

ABOO S. OKHAI LTD.

Coram: Jere, J.

For the Plaintiff: Munthali of Counsel
For the Defendant: Msisha of Counsel
Official Interpreter: Sonani
Court Reporter: Caffyn

J U D G M E N T

This is a claim by Mzuzu Panel Beaters, a firm, hereinafter referred to as 'MPB', against the defendant, Aboo S. Okhai Limited, hereinafter referred to as 'Aboo', for the sum of K1,562.10t., being the sum due from Aboo to MPB for work done and materials provided by MPB, as a garage proprietor, for Aboo and at Aboo's request. MPB also claims for the cost of this action. This claim is hotly contested and Aboo has entered a defence and set-off. It is, perhaps, of assistance to set down the defence and set-off in extenso.

- "1. The defendant denies owing to the plaintiff the sum of K1,562.10 claimed in the statement of claim, or at all. The defendant admits owing the plaintiff K825.22 as shown hereunder.
2. The defendant pleads that in or about June 1978, the plaintiff agreed to carry out repairs and fit new spare parts to a motor vehicle belonging to the defendant, Registration No. BE 847, which had been involved in a road accident. The nature and extent of the necessary repairs to the defendant's motor vehicle were set out in an estimate prepared by the plaintiff after examining the defendant's motor vehicle.



- "3. The plaintiff failed to carry out the agreed repairs or to fit all the necessary spare parts to the said vehicle or carried out the repairs in a negligent and unworkmanlike manner.
- "4. In or about August 1978, the defendant sent its servant and/or agent to collect the said motor vehicle from the plaintiff's garage. The plaintiff represented to the defendant's servant and/or agent that: (a) most of the necessary repairs had been carried out satisfactorily and spare parts fitted to the said vehicle; (b) a few minor repairs had not been carried out and some spare parts had not been fitted to the said vehicle, but that the cost of completing the remaining repairs and of obtaining and fitting the remaining spare parts would be K144.57, which the plaintiff said it would pay to the defendant. The plaintiff by the said representations induced the defendant's said servant and/or agent to sign a "satisfaction certificate" on behalf of the defendant, and to accept delivery of the said vehicle.
- "5. The said representations were false and untrue. The defendant discovered after an examination of the said vehicle that the plaintiff had not properly repaired the said motor vehicle and that the cost of completing the necessary repairs to the vehicle were in excess of the sum of K144.57 indicated by the plaintiff.
- "6. The defendant obtained further estimates of the cost of completing the necessary repairs to the said vehicle and the lower of the estimates was K736.88.
- "7. The plaintiff made the said representations fraudulently and either well knowing they were false or recklessly not caring whether they were true or false.
- "8. The defendant will seek to set-off the said sum of K736.88 against the amount of the plaintiff's claim herein. Alternatively, the defendant pleads that by reason of the plaintiff's misrepresentations the defendant was induced to accept the said vehicle from the plaintiff before the necessary repairs had been done and spare parts fitted to it, the defendant thereby suffered loss and damage.
- "9. The defendant therefore claims damages amounting to K736.88."

MPB is a firm of garage proprietors. The Managing Director is Walli Ismail Karim, the first plaintiff in this case. According to the evidence of P.W.1, Mr. Karim, the claim arises in the following circumstances:-

On the 6th June 1978, a vehicle belonging to Aboo, Registration No. BE 847, was involved in an accident on the Rumphu/Livingstonia road. On the same day a salesman, who was in charge of the vehicle, reported at the garage of MPB and met Mr. Karim. He informed him about the accident and requested him to send a breakdown vehicle to tow BE 847 to Mzuzu for repairs. Mr. Karim accordingly sent transport to bring the damaged vehicle to the workshop in Mzuzu. The salesman, Mahomed Hussein, was a servant of Aboo, the defendant, and was acting as an agent for Aboo. This is not denied. The vehicle was insured and therefore the matter had first to be referred to the insurers before MPB could commence work on it.

On the 9th June 1978, two garages at Mzuzu sent their estimates to the Royal Insurance Co. Limited. One of these garages was the Malawi Young Pioneers' Garage. However, the estimate from MPB was accepted and is contained in a letter addressed to Royal Insurance Company Limited, Box 442, Blantyre, dated 9th June 1978, and produced in this court as Exhibit 1. The insurance company accepted the estimate and accordingly wrote to MPB instructing them to start work on the vehicle, advising that the charges would be paid on receipt of the invoice, save for an amount of K200.00 excess which had to be collected from Aboo. MPB thereupon commenced work on the vehicle and for a period of two months it was undergoing repairs. Mr. Karim described in this court the repairs and panel beating required to be carried out, and this work was identical to that set out in Exhibit 1. However, it was not possible to obtain spare parts for the steering rod, steering housing, and side dashboard, and Mr. Karim estimated the total price of these to be K253.57t. It was his evidence that these parts were not available either in Lilongwe or in Blantyre. He then prepared an invoice, produced as Exhibit 3, and sent it to the insurers on the 3rd August 1978.

On 2nd August 1978, the salesman, Mahomed Hussein, came to collect the vehicle, but before doing so he was asked to inspect it. After he had inspected it he pointed out that two items had not been fitted. Mr. Karim admitted that this was correct and told him that there was also a third item which had not been fitted, due to the fact that spare parts were not available either in Lilongwe or Blantyre. Since Mr. Hussein badly needed the vehicle he asked Mr. Karim whether it was possible to drive it back to Blantyre without these new items being fitted. Mr. Karim told him that the particular parts to be replaced were only slightly bent and the vehicle would be able to travel to Blantyre without any trouble. They thereupon agreed between themselves

that the parts, estimated by Mr. Karim to cost K253.75t., would be fitted when available and that Mr. Hussein would pay to Mr. Karim the excess charge of K200.00 due to be paid by Aboo, and as referred to earlier in this judgment. This left a balance of K53.57t. to be paid by Mr. Karim to Aboo. The question of the towing charge was also raised and the amount due was paid in cash. After discussing the matter with Mr. Hussein, however, this sum was claimed by Mr. Karim from the insurance company and was therefore due to Aboo. This left a total sum of K144.57t. due to Aboo which was duly recorded on a cheque issued by MPB and signed by Mr. Karim on the 2nd August 1978. All the foregoing details were duly endorsed on the back of the cheque, produced in this court as Exhibit DX3, and handed to Mr. Hussein. After satisfying himself that the vehicle was in order, Mr. Hussein then signed a Satisfaction Certificate and left Mzuzu for Blantyre.

The vehicle continued to travel to the north and Mr. Karim said he saw Mr. Hussein on several occasions with the same vehicle in Mzuzu carrying out hawking business. No complaints concerning it were ever received by Mr. Karim: on the contrary, Mr. Hussein expressed satisfaction with the way in which it had been repaired. MPB, however, did not receive the amount claimed in the invoice and so, on 7th September 1978, Mr. Karim wrote to the insurance company reminding them that the vehicle had been collected and asking them to pay the agreed price. He did not receive a reply to his letter, however, and sent a reminder on the 30th October 1978, produced as Exhibit 5. He also prepared a credit note since he had discovered that he had overcharged Aboo by K40.00. When he did not receive a reply to his reminder he decided to come to Blantyre and enquire of the insurance company what had happened to the cheque. He was told that it would be issued 'in no time'. The cheque was never received by him, however, and so he returned to Mzuzu early in December 1978. Later, he was advised that the cheque had been issued but was held by Aboo who alleged that the vehicle had been poorly repaired. He immediately wrote a letter to the insurance company, dated 14th December 1978, in which he refuted any allegation made by Aboo of poor workmanship to the vehicle. This letter was copied to Aboo and reads as follows:-

"Dear Sirs,

re: Outstanding Account K1,602.01

We refer to our letter dated 30th October 1978, of which we have had no reply from you.

On our visit to Blantyre, the time we called at your office, we were told that Mr. Okhai told you that their car was not properly done and therefore payment was not authorised. May we point out that according to Mr. Okhai's statement this is all lie. If the vehicle was not properly done they should have informed us or they would have sent back the vehicle to us to complete the job, but so far as we see, that this vehicle is always in the north on business trips since.

We shall be pleased to have your payment as our financial year is this month.

Yours faithfully,

W. K. Karim
for MZUZU PANEL BEATERS"

After some correspondence had passed between the insurance company and himself, Mr. Karim referred the matter to Messrs. A.B. Munthali & Company, who then entered the scene.

The evidence of P.W.2, Daniel Peter Zikasamba, confirmed that work had been carried out on the vehicle, and he said it had been properly done. This was the case for the plaintiff.

The defendant then gave evidence and called only one witness. The salesman, Mahomed Hussein, was not called to give evidence. The court was informed that he had left the employment of Aboo and had gone to the United Kingdom. The evidence therefore consisted of the testimony of D.W.1, Kassam Okhai. He admitted that his company owned the vehicle, Registration No. BE 847, and that it had been involved in an accident. He also admitted that MPB had submitted a quotation, which was accepted, for panel beating and generally repairing the vehicle that had been damaged. He went on to say that after a period of two months had elapsed he advised his salesman, Mahomed Hussein, to contact MPB, and Mr. Hussein was thereupon told that the vehicle was ready for collection. The witness then sent his salesman to collect the vehicle and, according to him, when it returned to Blantyre he found it had not been properly repaired. The salesman had brought with him a cheque, Exhibit DX3, and the witness told him to return it, together with the vehicle. Mr. Okhai said he did not remember communicating directly with MPB: his only communication with them was through the salesman. He then went on to say that the insurance company were well aware of his complaints. Later, he received a letter from Messrs. A.B. Munthali & Company, and he advised them that the matter was in the hands of the company's lawyers, Messrs. Savjani & Company. He produced to this court letters written to the insurance company.

It was the evidence of D.W.1 that on 12th December 1978, after consulting the company's legal advisers, he took the vehicle for a second quotation. A quotation was obtained from Malawi Motors Limited, produced as Exhibit DX1, and another quotation was obtained from Nunes Panel Beaters, produced as Exhibit DX2. Mr. Okhai also produced a letter from the insurance company, Exhibit DX4, in which they advised him to arrange for the payment of the cheque when the faults to the vehicle had been rectified to his satisfaction.

This, in brief, was the evidence of DW1. It suffers severely because the man who actually transacted the business is no longer in the country.

It is clear from the evidence of both the plaintiff and the defendant that whatever complaints there were, the defendant never conveyed them to the plaintiff. I say this because if, as alleged by DW 1, on behalf of the defendant company, he instructed his salesman to return the cheque and the vehicle to MPB, it is surprising to see that the cheque was still with him up until the time he surrendered it to his company's legal advisers. In addition, the

vehicle was, and still is, in his custody to the present day. It cannot therefore seriously be said that he informed his salesman to return both the vehicle and the cheque. I do not accept his evidence to that effect.

The question before me is whether the act of accepting the vehicle was such as to show that he was satisfied with the work carried out. It was his evidence that he was not satisfied. He said, and I quote: "I looked at it and the panel beating was not properly done; it didn't look smooth and the door was not locking properly". It must be borne in mind, however, that the vehicle, the subject of this complaint, has been on the road throughout.

The exhibits produced by the defendant, Exhibits DX1 and DX2, suffer one major disadvantage in that they refer to the replacement of new parts. Some of the new parts were not estimated for in Exhibit 1. It is clear, in my view, therefore, that we are now talking of two different types of repairs to be carried out. Exhibit 1 clearly shows panel beating whereas Exhibits DX1 and DX2 clearly show the replacement of new parts. In these circumstances, I would say that Exhibits DX1 and DX2 do not assist the defendant's case at all. If he had wanted new parts to be fitted he should have made this clear before accepting Exhibit 1. In any event, his complaint does not appear to be a genuine one.

Learned counsel for the defendant has submitted that there was misrepresentation made by MPB at the time the vehicle was being collected and when the Satisfaction Certificate was signed by the salesman. Indeed, paragraph 4 of the Defence and Counterclaim is based on misrepresentation. Learned counsel has quoted a number of cases in support of his argument that there was misrepresentation when the Satisfaction Certificate was signed. With the greatest respect, however, there is no evidence upon which such an allegation can be founded. Mr. Hussein, the salesman, never gave evidence that he signed the Certificate because there was incorrect representation. Learned counsel laboured the point in cross-examination that when Mr. Hussein collected the vehicle he was not told immediately that two parts had not been fitted to it. However, there was ample evidence after that time to show that the plaintiff actually told Mr. Hussein that there were not only two but three parts that had not been fitted, and this fact was clearly detailed on the back of the cheque, Exhibit DX3. We were not told whether these three parts had ever been fitted to the vehicle since it was collected. In fact, it has been journeying to the north with the same old spare parts. As to the question of poor workmanship, Mr. Hussein inspected the vehicle and signed the Satisfaction Certificate. The vehicle was there for all to see: the doors were able to open and shut and it could not therefore be said that there was misrepresentation of any type. In any event, I think the introduction of misrepresentation in this particular case is misconceived for representations are

made on or before a contract is entered into. Representations can be a term of a contract, either in the form of an undertaking or warranty; or they can be mere representations, in which case there may be an innocent misrepresentation. Representations do not take place at the conclusion of a contract, see Anson's Law of Contract, Twenty-First Edition, at p.201, which provides as follows:-

"In dealing with Misrepresentation as a circumstance invalidating a contract, we must note, by way of introduction, that a man may, during the preliminary bargaining, make statements of fact which are afterwards embodied in the contract itself in the form of an undertaking or warranty that certain things are, just as he may promise that certain things shall be. In either case, the undertaking or promise is a term of the contract. On the other hand, he may make, during the preliminary bargaining, statements of fact, intended by neither party to be terms of the subsequent contract but which, nevertheless, may seriously affect the inclination of one party to enter into it. Such statements are known as "representations" or "mere representations". If they prove false the law will, in certain circumstances, grant relief. But the nature of this relief will vary according to whether the misrepresentation was innocent or fraudulent."

In these circumstances I have considered the evidence of the plaintiff. He made a good impression on the court. I believed his evidence. The defendant, on the other hand, was a poor witness. I did not believe his evidence. He told some obvious lies. He has suffered no damage for the vehicle has not been fitted with new parts. It appears to me that the whole purpose of obtaining Exhibits DX1 and DX2 was merely to confuse the issue.

The plaintiff succeeds in his claim. I do not accept the defendant's set-off and I give judgment to the plaintiff for the whole amount claimed and costs in this action.

Pronounced in Open Court this 23rd day of September 1980, at Blantyre.



N. S. JERE
JUDGE