IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NUMBER 387 OF 1979

BETWEEN:

DUNCAN JOHN KUSANI .. .. .. PLAINTIFF

- and -

MESSRS LIMANI LIMITED .. .. .. DEFENDANT

Coram: Banda, Ag. J.
For the Plaintiff : Nakanga of Counsel
For the Defendant : Mhango of Counsel
Official Interpreter : Sonani
Court Reporter : Mazibuko

JUDGMENT

This is an action in which the Plaintiff sues the Defendant for the total sum of K8,000. There is a claim for the refund of K3,000 being the purchase price which the Plaintiff paid to the Defendants for the agricultural equipment which he bought. There is also a claim for the loss of profits in the sum of K5,000 which includes travelling expenses of K125.

It is necessary to make a brief reference to the facts which have given rise to the present action. The Defendants are dealers in agricultural equipment and maize mills and it would appear that sometime in July, 1978, they had placed an advertisement in a local paper announcing that they had some agricultural equipment for sale. The Plaintiff apparently saw the advertisement and because he was minded to engage in commercial farming he made enquiries with the Defendants. As a result of those enquiries the Defendants wrote a letter to the Plaintiff giving him the full details of the equipment they had in stock and how they could be operated. That letter is Exhibit 1 and it also gave the Plaintiff the terms of payment. It would appear that after receiving that letter and after some demonstration of how some of the equipment worked, the Plaintiff decided to buy a power tiller, rotavator, plough, ridger and a maize mill with its accessories. The total price for all the equipment came to K3,774.57 and the Plaintiff made an initial payment by cheque of K3,000. The cheque is dated 1st August, 1978, and it is Exhibit 5. The invoice for the equipment the Plaintiff bought is dated 24th September, 1978, and it is Exhibit 2.

It is the contention of the Plaintiff that it was agreed that all the equipment would be delivered to his farm within 10 days from the date he paid K3,000 and he stated that he regarded the date of delivery as very important because he was on leave and that he was anxious that he should be present

when the equipment was delivered so that he could witness the demonstration of the various equipment. This expectation by the Plaintiff was perhaps not unreasonable because the Defendants had indicated in their letter, Exhibit 1, that all the equipment was available. Unfortunately for the Plaintiff, the equipment was not delivered within 10 days and he had to go back to Lilongwe to report for duties. It is not very clear on the evidence before this court when the equipment was actually delivered but it would appear that it must have been between October and November, 1978. It was during that time that Mr. Chidiwa said he visited the Plaintiff's farm and it was he who apparently delivered the equipment. However soon after the equipment was delivered, it was discovered during a demonstration that the plough was not tilling the land satisfactorily because it was merely skating on the surface of the land instead of digging deep into it. No ridger was delivered. The maize mill, too, developed operational difficulties soon after its delivery. It is, I believe, important to observe at this point that paragraph 3 of the Defendants' letter to the Plaintiff which is Exhibit 6A cannot be true when it says that all equipment shown on Exhibit 2 were promptly delivered.

There can be no doubt that the plough which was delivered to the Plaintiff was unsuitable and this is conceded by both Mr. Chidiwa who arranged the demonstrations of the equipment and by the letter written by the Defendants to the Plaintiff. That letter is Exhibit 6B and it confirms that the plough which was delivered was unsuitable for use with the tractor they had sold to the Plaintiff. The Plaintiff has alleged that it was represented to him verbally by the Defendants that the maize mill was capable of grinding four bags of flour per hour. He has also alleged that it was represented to him verbally by the Defendants that the power tiller was capable of tilling two acres per day and he has contended that he bought the equipment because of these representations which, he later discovered, were not correct.

On the 11th December, 1978, the Plaintiff wrote to the Defendants informing them that, because of the delay to deliver some of the equipment which he had bought from them, he could no longer continue with the contract and he asked them to arrange the collection of all the equipment from his farm and he demanded the refund of the K3,000 which he had paid for the equipment. That letter is Exhibit 7. On the 12th January, 1979, the Plaintiff wrote another letter to the Defendants in reply to their letter dated 14th December, 1978, and apparently it was after he held discussions with the Defendants' managing director. In that letter which is Exhibit 15, the Plaintiff indicates that he was prepared to accept the delivery of the plough and the ridger if they would be delivered as soon as they were available. The Plaintiff was, in that letter, retracting from his position as exemplified in Exhibit 7 in which he was clearly repudiating the contract. However, in his letter dated the 28th February, 1979, which is Exhibt 14, the Plaintiff again wrote to the

Defendants asking them to arrange the collection of the equipment from his farm because of the delay in the delivery of the other equipment. The Defendants by their letter dated the 5th March, 1979, and which is Exhibit 8 refused to accept the return of the equipment and instead they told the Plaintiff that a new plough and ridger had arrived and that they would deliver them if he paid the balance. This demand, in my judgment, contradicted what the Defendants had earlier told the Plaintiff by their letter dated the 17th January, 1979, which is Exhibit 6B in which they categorically informed the Plaintiff that the new equipment would be delivered to the Plaintiff's farm and a demonstration conducted as soon as they arrived in Blantyre. It is for this reason that I find the Defendants' change of heart difficult to understand. They had originally agreed to deliver all the equipment the Plaintiff had bought but when they were required to replace the unsuitable equipment which they had themselves supplied, they demanded full payment before delivery. In my judgment, the Defendants could not insist on the full payment when they had not themselves fully performed their part of the contract.

Mr. Nakanga who appeared for the Plaintiff has submitted that the Defendants were in breach of their contractual obligation which entitled the Plaintiff to repudiate the contract. He has also contended that the Defendants had represented to the Plaintiff that the power tiller was capable of tilling two acres per day and that the maize mill was capable of grinding four bags of flour per hour. Mr. Nakanga has argued that these representations were terms of contract whose breach entitled the Plaintiff to repudiate the contract. In other words Mr. Nakanga was submitting that these terms of contract were conditions and not warranties. It was also Mr. Nakanga's contention that the Defendants' failure to deliver the plough and the ridger to the Plaintiff was tantamount to failure to perform the contract and that the Defendants were, therefore, in fundamental breach of the contract because the tractor could not perform its work without the plough and the ridger.

Mr. Mhango, who appeared for the Defendants has submitted that the court must decide whether the breach, if there was any, entitled the Plaintiff to repudiate the contract. He has further submitted that the court must determine whether in the present case the contract was divisible or indivisible. He has argued that where there is an indivisible contract failure to deliver any part of the contract would entitle the Plaintiff to repudiate the contract. Mr. Mhango has argued that there was, in the present case, a divisible contract and that the part of the contract which was fulfilled must be severed from the rest and that the obligations which arise under it should stand. He has submitted that the Plaintiff had accepted partial delivery and that he cannot now resile from it and repudiate the contract.

On the issue of damages, Mr. Mhango has submitted that the court must be satisfied that there is no uncertainty about the loss the Plaintiff has suffered. Mr. Mhango has argued that damages must not be uncertain and that they must not be remotely connected to the claim and he has urged this court to consider whether the damages claimed by the Plaintiff could be said to have been in the contemplation of the parties. Mr. Mhango has contended that there is so much uncertainty about the alleged loss by the Plaintiff that it is impossible for the court to know with any degree of certainty what that loss was. He has submitted that the claim for damages cannot be sustained because there is no evidence to prove it and that whatever evidence there is is very uncertain and remote. Mr. Mhango has also argued that there is no basis for the claim of interest. He has argued that there was no money which was due and payable to the Plaintiff which could attract interest.

This is a civil case and the onus of proof is lower than in criminal cases. I must be satisfied on a balance of probabilities. It is now necessary to consider the nature of the contract which the parties entered into. Mr. Mhango for the Defendants has contended that Exhibit 1 is the contract and that parole evidence cannot be introduced to contradict its contents. With respect, Exhibit 1 cannot by any stretch of the imagination be regarded as a contract. Exhibit 1 is a letter from the Defendants to the Plaintiff giving the latter information on the equipment on which he had made enquiries. It is clear, in my judgment, that the contract in the present case, was partly in writing and partly oral and I must consider both the documents produced in this case and the oral representations made to enable me to discover what the parties intended to be their contract and what its precise terms were intended to be. In ascertaining the parties' intention, I must consider not only the documents and the oral representations made but also the circumstances under which and the purposes for which the contract was made. In my judgment, there can be no doubt that the Plaintiff wanted to buy and bought the agricultural equipment from the Defendants to allow him to engage in commercial farming and it was his intention to start farming in the 1978/79 season. I am satisfied and I find that the Defendants were aware of the Plaintiff's intention that he had wanted the equipment for agricultural purposes starting in 1978/79 season. I am satisfied and I find that at the time the Plaintiff was buying the equipment, the Defendants had told him that the power tiller was capable of tilling two acres per day and that the maize mill was capable of grinding four bags of flour per hour. The Defendants had the special skill and knowledge of the equipment they sold to the Plaintiff and I am satisfied that this is the kind of information that a potential buyer would want to know before deciding to buy the equipment. Such a buyer must know the performance of the equipment he is buying. Consequently I am satisfied and I find that these representations were terms of the contract

whose breach would give rise to an action for damages rather than repudiation. I cannot, therefore, accept Mr. Nakanga's contention that these representations were conditions of contract whose breach entitled the Plaintiff to repudiate the contract.

As I have already indicated earlier in this judgment, it is Mr. Mhango's submission that the contract in the present case was divisible and that, therefore, the part of the contract which was fulfilled should be severed from the rest and that the obligations under it should stand. With respect I am unable to accept that submission. In my judgment, the contract in the present case was entire and indivisible. The contractual obligations arising from it cannot be severed. Each part of the contract is inextricably connected to the other. Each equipment bought was depended on the other for its practical use to the Plaintiff. This was no contract which could resolve itself into a number of considerations for a number of acts as would be the case in a contract to deliver goods by instalments in which the price is fixed by item or instalment. I am satisfied that in the instant case, there was no series of separate contracts which would be divisible or severable see Jackson v Rotax Motor and Cycle Co. (1910) 2 K.B. 937. In my view, the contract in the present case was one entire contract for the sale of agricultural equipment at a fixed price for an entire number of goods.

I find that time was of the essence of the contract and that it was vitally important that the equipment be delivered as quickly as possible if the Plaintiff was to grow any crop in that growing season of 1978/79. In my judgment, the Defendants by their inordinate delay and by their subsequent refusal to deliver the plough and the ridger to the Plaintiff were in breach of their contractual obligation and it was a breach which went to the root of the contract The Mihalis Angelos (1970) 3 A.E.R 125. The passage which Denning M.R. cites in that case from an old case of Cutter v Powell (1795) 2 Smith L.C. at 30 is relevant:-

> "It is of the essence of every contract that each party thereto should have the right to consider it as of binding force from the moment it is made and should have the right to base his conduct on the expectation of its being fulfilled by the other party. If, therefore, the other side by an unqualified refusal to perform his side of the contract, destroys that expectation, he destroys that which is the basis of the contract and his conduct may be treated as a breach going to the whole of the consideration".

In my view, even if the Defendants had managed to deliver the plough and the ridger in March, 1979, the Plaintiff would have been perfectly entitled to repudiate the contract. The Plaintiff had bought the equipment from the Defendants in August, 1978, in order for him to use it in the growing season of 1978/79 and the Defendants knew this fact. The tractor which was delivered with the rotavator could not plough the land without a plough nor could the Plaintiff ridge his land without a ridger. I cannot, therefore, accept the Defendants' suggestions that the rotavator was equally capable of doing the work of a plough. I cannot see how a man who intends to engage in commercial farming by the use of a tractor could be expected to undertake such a venture in the absence of a plough and a ridger. These pieces of equipment are very essential in any agricultural enterprise which will involve the use of a tractor to plough the land and the failure by the Defendants to supply these two items of equipment to the Plaintiff was, in my judgment, a fundamental breach which entitled the Plaintiff to repudiate the contract. Consequently, I am satisfied on a balance of probabilities that the Plaintiff has proved his claim in respect of K3,000.

I must now consider the Plaintiff's claim in respect of loss of profits. The Plaintiff has argued that by reason of the Defendants' delay to deliver the plough and the ridger, he lost the profits which he would have made from the sale of his produce had he cultivated his farm. He stated that he had intended to cultivate 25 acres of maize and that because of the Defendants' delay, he was not able to do so. However, the evidence before me is that the land which the Plaintiff had cleared was very much less than 25 acres and the Plaintiff himself was not very certain about the acreage of land he had cleared. Mr. Chidiwa's estimate was that about 10 acres of land had been cleared although not all of it had been stumped. The onus is on the Plaintiff to satisfy me on a balance of probabilities that he lost the profits claimed. There is no evidence, apart from what the Plaintiff himself said, that he would have realised the profits claimed if he had cultivated the whole of the 25 acres. There is no evidence on which I can make any such finding. Consequently, I am not satisfied on a balance of probabilities that the Plaintiff has proved his claim in respect of the loss of profits. Similarly, the Plaintiff has not satisfied me on a balance of probabilities that he was entitled to claim interest. Mr. Mhango was right when he submitted that there was no basis for the claim of interest because there was no money due and payable to the Plaintiff and was withheld. Nor can I find from the evidence before me that it was the intention of the parties that interest would be paid. Similarly, I find that there is no evidence to prove that the Plaintiff incurred any travelling expenses.

In view of my finding in this judgment, the Defendants' counterclaim must fail. In the circumstances, there will be judgment for the Plaintiff in the sum of K3,000 with costs.

PRONOUNCED in open court this 23rd day of February, 1981, at Blantyre.

R. A. BANDA
ACTING JUDGE