IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NUMBER 780 OF 1979

BETWEEN:

MANDALA MOTORS LIMITED .. .. PLAINTIFF

- and -

H. M. KHEMBO .. .. DEFENDANT

Coram:

Banda, Ag. J.
For the Plaintiff: Naphambo of Counsel
For the Defendant: Mutuwawira of Counsel
Court Reporter : Kelly
Official Interpreter: Sonani

J U D G M E N T

The plaintiffs, who are ford dealers in this country, sue the defendant to recover a sum of K983.00 being the balance of the purchase price of a motor vehicle which they sold to the defendant.

It is not disputed that on or about the 18th August 1973 the plaintiff sold to the defendant a motor vehicle, which has been described as a Ford Cortina GXL, at a price of K4,383.00. The defendant paid at the time of the sale a sum of K3,400.00 leaving a balance of K983.00 the subject matter of this action.

The defendant has contended that the plaintiffs guaranteed and warranted the road-worthiness and good quality of the motor vehicle as a brand new car. The defendant has also submitted that the motor vehicle sold to him was of inferior description because it had factory faults which resulted in oil leaks from the wheel hubs, diff and gear box. It has been suggested by the defendant and there can be no doubt, on the evidence before me, that these oil leaks occurred during the first 6000 miles of the defendant taking delivery of the car. It is also the contention of the defendant, if I understand his position correctly, that/sale in this case was by description in that the plaintiffs had told him that a Ford Cortina GXL was the best of all Ford Cortina models and the defendant has argued that the particular car sold to him did not correspond to that description. The defendant has submitted, therefore, that the motor vehicle sold to him was of inferior quality and that it was not worth the price the plaintiffs charged him and that he is entitled to withhold the balance in dimunition of the price.

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The motor vehicle which was sold to the defendant was a Ford Cortina GXL and the defendant has conceded that the motor vehicle which he wanted to buy was a Ford Cortina GXL and that the vehicle which was sold to him was no other than a Ford Cortina GXL.

It is not disputed that at the time the vehicle was purchased the plaintiffs gave a verbal warranty to the defendant. There is some conflict on the actual clauses of that warranty. According to Mr. Thomas, who was Workshop Manager at the relevant time and now the Sales Manager, the warranty was limited to repair manufacturer's defects which occurred during the warranty period. He stressed, however, that any damages incurred by the defendant were entirely the defendant's own responsibility. The warranty was to last 6000 miles or 6 months whichever occurred earlier. The defendant on the other hand has stated that the warranty also included a clause which obliged the plaintiffs to replace the defendant's car if the defects continued to recur. I am unable to accept the defendant's contention on this matter and I find that the clause which he has advanced in his evidence was not part of the warranty the plaintiffs gave. I find that the warranty was limited to repairs of manufacturer's defects which occurred during the period of the warranty. Indeed if the clause as suggested by the defendant was part of the warranty, I gained the impression in course of this trial, that the defendant is not the kind of man who would have sat idly by without attempting to take full advantage of it.

There can be no doubt on the evidence as disclosed by the job cards/Invoices exhibited in court, and I am prepared to find, that there were oil leaks on the car and that these leaks continued to recur intermittently for sometime. It is important to observe, however, that there were only two occasions when oil leaks were reported during the period covered by the warranty. This was during the first service when the car had almost clocked 2000 miles and again when the car had clocked 6,085 miles. The next oil leak is reported when the car had done 15,716 miles. From then onwards the oil leaks are reported at regular intervals. It is also important to remember that the car had been involved in two road accidents although the extent of the damages were not fully disclosed to/court and it was significant to observe the defendant's attempt to play down these accidents. On his own evidence it would appear that the first accident occurred during the warranty period as can be seen from Exhibit 8 and the second accident would appear to have occurred after the warranty had expired. There was some mention of the fact that some damage was caused, in the second accident, to the rear axle of the vehicle. This is supported by Exhibit 2 which also shows that the vehicle had clocked 16,501 miles when this fault was reported. It is quite evident, in my judgment, that this particular car was subjected to a very extensive use as can be gathered from the invoices exhibited in the court. The mileage which the car clocked within a short period of time was considerable and, in my view, it would be totally unreasonable to expect that a car which was subjected to that severe physical strain would not experience

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some oil leaks. If it is true, that the defendant first noticed the oil leaks when he drove the car to Salima I find it difficult to understand why the defendant would have waited for almost a month before he reported it. It is also important to note that the motor vehicle was brought to the plaintiff's garage on 18th August 1973 not because of the oil leaks but because it was due for service and the oil leaks were one of the items which had to be looked into during the service.

I direct myself to the onus probandi in civil cases where the degree of proof is lower than in criminal cases. It is proof on a balance of probabilities. In my judgment I find that the oil leaks which were present on the vehicle were of a minor nature and did not affect the quality or performance of the car. I also find that there was no defect on the car which constituted a danger to other road users. I must therefore reject the defendant's contention that the performance of the car was faulty and that it was unroadworthy. Indeed if it was, the car would not have clocked over 70,000 miles and according to the defendant's own evidence it is apparently still on the road. I am satisfied and I find that the plaintiffs fulfilled their obligation under the warranty by repairing the manufacturer's defects, during the period the warranty was in force, at no cost to the defendant. It is evident that the plaintiffs, in their desire to maintain good customer relationship with the defendant, continued to repair the faults free of charge, even after the warranty had expired.

There was also the question of a petrol tank which was replaced with a new one. The defendant argued that the tank was damaged when the faulty metal straps which hold the tank became loose and that as a result of friction the tank was cut and started losing fuel. Mr. Thomas on the other hand stated that the tank was extensively damaged giving a clear impression that it had been hit on a rock. I find myself again preferring the evidence of Mr. Thomas on this point to that of the defendant. Mr. Thomas impressed me greatly. He gave his evidence in a cool and sober manner and I was struck by the lack of any exaggeration in his evidence. This contrasted very sharply with the defendant who, in his effort to put his case in the best possible light, tended to grossly exaggerate his evidence and in the result he said things which were clearly not true. Consequently I find that the tank was damaged by the defendant and it had nothing to do with a defect which could be attributed to the manufacturers.

There was also mention made of the damage to the rear axle. As I have already indicated earlier in this judgment the car was involved in an accident and on the defendant's own concession somebody damaged the diff of the car and it rear/ was necessary to send the/axle to Mandala Motors to straighten it. In my judgment that clearly cannot be attributed to a defect emanating from the manufacturers. The need to remove and fit a new rear axle occurred when the car had /miles clocked 16,501/and this aspect of the defendant's case cannot have any bearing on his main contention that the car was of inferior description and quality. Similary I find that the

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damage to the rear axle cannot be attributed to the manufacturers.

I must now consider the defendant's main ground of contention that the car which was sold to him was of inferior description and quality. The term "sale of goods by description" applies to all cases where the purchaser has not seen the goods but is relying on the description alone. It applies to cases where the buyer has never seen the article but has bought it by description and this is especially so in cases of unascertained goods which are identified by description. However it is now settled law that there can be a sale by description where the article is displayed to and inspected by the buyer as long as it is sold not merely as a specific article but as an article corresponding to a description so that the buyer relies in part on that description: Beal v Taylor (1967) 1 W.L.R. 193.

One of the questions I have to determine in this case is whether the sale in the instant case was a sale by description or whether it was a sale of a specific article. In my judgment, there can be no doubt on the facts before me, that the sale here was for a specific car which was at the plaintiffs' premises. However even if I am wrong in so finding and it is held that there was a sale by description it seems to me that the plaintiffs discharged their contractual obligation which was to sell to the defendant a Ford Cortina GXL car. Section 15 of our Sale of Goods Act imposes on the seller a duty of compliance. The seller is regarded as promising that the goods would comply with the description. There was in my judgment, in the instant case, a clear conformity to the full contractual description of the goods. The plaintiffs agreed to sell to the defendant a new Ford Cortina GXL and it was the car which was sold and delivered to the defendant. It was not a case where the defendant agreed to buy a new car and a secondhand model was delivered: Andrews Brothers Limited v Singer (1934) I K.B. 17. It cannot be argued by the defendant in the present case that the car which he bought was a different kind from the one he agreed to buy. The oil leaks which I have already found to be minor, did not affect the quality, character or performance of the car. Consequently, I am satisfied on the balance of probabilities that the plaintiffs have proved their case against the defendant and I find the defendant liable and there will be judgment for the plaintiffs in the sum of K983.00 with costs.

Pronounced in open court this 16th day of January, 1981, at Blantyre.

R. A. BANDA
ACTING JUDGE