IN THE HIGH COURT OF MALAWI, BLANTYRE

CIVIL CAUSE NO. 43 OF 1985

BETWEEN:

CHESEBROUGH PONDS INTERNATIONAL LIMITED ..... PLAINTIFF

- and -

NORSE INTERNATIONAL LIMITED ..... DEFENDANT

Coram: BANDA, J.

Msisha, Counsel for the Plaintiff
Makhalira, Counsel for the Defendant
Manda, Court Reporter
Kaundama, Official Interpreter

J U D G M E N T

The plaintiffs are claiming damages against the defendants for an alleged damage to a machine known as Bekum BA.05 Blow Moulder.

The defendants, who are construction and engineering firm, were at the material time the owners and operators of equipment including an RB 22 crane. These equipment were available for hire on reward. On or about the 19th March, 1984, the plaintiffs verbally asked the defendant for the hire of the crane. It is the plaintiffs' contention that they made known to the defendants the type of work they wanted the crane to do and that they informed the defendants the weight of the machines they wanted the defendants' crane to shift. It was the plaintiffs' evidence that they told the defendants that the weight of the machines did not exceed 5 tonnes. It was the plaintiffs' further evidence that the defendants agreed to hire out to them the crane at the rate of K25.00 per hour and that the defendants assured them that a weight of 5 tonnes was well within the capacity of their crane whose full capacity was 12½ tonnes. There is no dispute that a contract of hire of the crane was concluded between the parties.

It was the plaintiffs' case that when the operator arrived at their site they expressed reservations about the strength of the rope slings which the defendants' crane operator /the produced. The plaintiffs' evidence was that/defendants' crane operator assured them that the rope was new and that it had been used in lifting things before and that it was fit for lifting the

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plaintiffs' machines. The crane operator concedes that he was asked if the rope slings were strong enough and that he told the plaintiffs that they were. In course of lifting a machine the rope sling broke causing the machine to drop to the ground from a height of 12 feet. There is some dispute on whether the machine which dropped was the second or third to be lifted. There is, however, no dispute that one machine dropped to the ground in course of being lifted and that it was damaged.

It is the contention of the plaintiffs that the damage was occasioned by the negligence of the defendants' crane operator while acting within his scope of his employment. Alternatively the plaintiffs have contended that the damage was caused by the failure of the defendants to supply a suitable crane or suitable rope slings or other accessories to carry out the tasks as requested by the plaintiffs.

The defendants' case is that they only agreed to hire out a crane and an operator to the plaintiffs and that the entire operations, including the operator, were to be under the control of the plaintiffs and that how the plaintiffs used the crane was their own responsibility. The defendants denied supplying the rope slings with the crane and it was Mr. Franzel's contention that if the plaintiffs accepted to use the ropes it was their own responsibility and he could not accept that the defendants were responsible. Mr. Morel amd Mr. Mtimkulu gave evidence for the defendants and it is clear to me that they were called only to come and inform the court that what was agreed to hire out to the plaintiffs was the crane and the operator. Indeed the only sentence Mr. Mtimkulu was able to remember from that morning of 19th March, 1984, was what the General Manager of Chesebrough Ponds International said to Mr. Franzel and which was, "Ok Raynor K25.00 per hour and we look forward to seeing operator and the crane." Significantly Mr. Mtimkulu was not able to remember anything else. I did not think Mr. Mtimkulu was an honest witness and if he ever felt that this court would believe a story which was patently false then he was deceiving no one else except himself.

It later became clear,however, that the rope slings were indeed supplied by the defendants together with the crane. The operator emphatically stated that the rope slings are always with the crane and that he uses them for lifting things. I am, therefore, satisfied and I find that it was not only the crane and the operator who were hired out to the plaintiffs but that the rope slings were together hired out with the crane. It was also the contention of the defendants that they were not asked to carry out any specific task. This contention is made in the defendants' letter to the plaintiffs produced in this court as Ex.3. The same contention was initially being made in Mr. Franzel's evidence but as his evidence developed, especially in cross-examination, it became evident that weights of the machines to be lifted and the capacity of the crane were specifically mentioned. This is also clear from the evidence of

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Mr. Morel. I am further satisfied, therefore, and I find that the task for which the crane was being hired to carry out was specifically mentioned. Indeed it was the operator's evidence that he knew he was going to use the rope. He could not have said that if he did not know the task he was going to carry out.

There was also evidence by the plaintiffs that throughout the operation of lifting the machines the crane was jerking, suggesting that there was something mechanically wrong and that this was drawn to the attention of the operator who stated that there was nothing wrong with it.

It is the evidence of the plaintiffs that after the machine was damaged they decided to repair it themselves as they were anxious to have the machine put into production. Their maintenance staff worked on the machine during normal and overtime hours including Saturdays and Sundays. They have produced the costs of the repairs including labour and other charges. They have also produced the estimated cost of repair to the cabinet which was among the parts which were damaged after the machine dropped to the ground.

This is a civil case and the onus is on he who asserts and should prove his claim on a balance of probabilities.

It appears to me that the principle in cases of bailment is that where the owner lets out a chattel on hire he must take reasonable care to see that it is in reasonably fit condition for the purpose for which the chattel is to be used. Therefore in an ordinary contract of hire the owner impliedly assumes some contructual responsibility for the fitness of the chattel for the purpose for which the hirer requires it. However the extent and existence of the duty depends on the contractual intention of the parties which is to be ascertained from the terms of the particular contract. Mr. Makhalira was, therefore, right when he submitted that it is not for this court to impose duties on the parties. Those duties must be ascertained from the terms of the contract. He contended, therefore, that what was agreed between the parties was that a crane to lift a load of not more than 5 tonnes should be hired out to the plaintiffs. With respect to learned Counsel his latter contention totally disregards the weight of evidence which has been adduced on the terms of the contract which were agreed between the plaintiffs and the defendants. It is from the total evidence adduced in this case that I must ascertain the extent and existence of the rights and duties of the parties.

Mr. Msisha has submitted that while this case must turn on the evidence and credibility of witnesses this court will and must apply the legal duties and legal principles which arise in cases of this nature.

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I have carefully considered and have subjected the evidence in this case to a critical review and I am satisfied that the defence witnesses came out as not very credible witnesses. I gained a distinct impression that some of them gave evidence which was liable to mislead the court and others attempted to deny facts which were clearly undeniable. I thought the plaintiffs' witnesses were impressive and I am satisfied that they were telling the truth. I am satisfied that the machine which broke was tied by the operator himself and not by Chesebrough Ponds International employees. Consequently, I am satisfied that it is not true to suggest, as the defendant's crane operator attempted to do, that the machine dropped to the ground because the plaintiffs' employees did not properly tie the ropes onto the machine.

I am satisfied that the rope slings cut because they could not stand the strain of lifting machines which weighed between three and five tonnes. In my judgment the fact the rope slings managed to lift one heavier machine does not make any difference, the point is that the ropes were not fit to carry out the specific task which the defendants were required to carry out. The operator stated that those were the ropes he had used to lift even heavier loads than he was required to lift at the plaintiffs' premises. The defendants' operator agreed that it was his duty to tie the ropes onto the machines and, therefore, even if it is accepted that he let the plaintiffs' employees tie the ropes to the machine the fact that he proceeded to lift the machine without satisfying himself by checking that slings were properly tied would be a breach of his duty. I am satisfied that the crane could not have been fit for the purpose it was hired if its implements were not fit for the job for which it was hired. There was also the evidence that the crane was jerking and for the defendants' operator to continue lifting the machines where there was clear evidence that there must have been something mechanically wrong with the crane would, in my judgment, be gross negligence!

I am satisfied and I find on balance of probabilities that the plaintiffs have established their claim against the defendants and there will be judgment against the defendants in the sum of K3,972.02 and costs of this action.

PRONOUNCED in open court this 1st day of April, 1986, at Blantyre.

R.A. Banda
JUDGE