

Banda 5.

IN THE HIGH COURT OF MALAWI, BLANTYRE
PRINCIPAL REGISTRY

CIVIL CAUSE NO.380 OF 1985

BETWEEN:

B.A. MPONDA PLAINTIFF

AND

N.T. KHAMBADZA
t/a KHEI DISTRIBUTORS (PVT) LTD. DEFENDANT

Coram: MTEGHA, J.

Nakanga, Counsel for the Plaintiff
Defendant not present, unrepresented
Kalimbuka/Namvenya, Official Interpreters
Phiri, Court Reporter

J U D G M E N T

The plaintiff in this case, B.A. Mponda, brought this action against the defendant, Noel Khambadza, trading as KHEI Distributors (Pvt) Limited, to recover damages for breach of contract and a declaration indemnifying him in such damages which he might be liable to pay or may reasonably be required to pay to his customers as a result of such breach.

In his pleading the plaintiff averred that on or about the 10th April 1985 the defendant agreed to sell and deliver to the plaintiff 50 metric tons of salt at the price of K13,000.00. The defendant well knew that the salt was for resale at a profit. However the defendant delivered only 13 tons of the salt and failed to deliver the remaining 37 metric tons. As a result the plaintiff lost a profit of K5,217.00 had he resold the salt to the Bishop of Tete in Mozambique with whom he had a contract.

The defendant agrees in his pleadings that there was such contract between the plaintiff and himself for the sale of 50 metric tons of salt at K13,000.00. He pleads, however, that there was a term of contract that the salt should be collected from the warehouse by the plaintiff within two days after the agreement, and that when the plaintiff failed to do so the salt had to be sold because there was much demand and a refund of K9,620.00 was made, and since the plaintiff had reported the matter to the Police, the defendant repudiated the contract.

I will now examine the evidence which has been adduced in this case, bearing in mind that this is a civil case where the plaintiff need only prove his case on a preponderance of probability. Unfortunately when the case was set down for hearing the defendant did not appear. It was his counsel's explanation that he tried to locate the defendant both by phone and correspondence, but could not be found. I therefore adjourned the case to give opportunity to the defendant's counsel to locate the defendant. On the third day the learned counsel for the defendant reported that he could not locate the defendant. As such, he requested for a further adjournment or else I should discharge him. After considering the matter I refused further adjournment and discharged counsel. I then proceeded to hear the case, because, as learned counsel for the plaintiff said, the plaintiff is entitled to be heard. Order 35 of the Rules of Supreme Court was considered.

I now proceed to evaluate the evidence.

It was the evidence of the plaintiff, Brown Amosi Mponda, that he is a businessman dealing in exports of agricultural produce to neighbouring countries. He told the court that on or about the 10th April 1985 he saw an advert in the newspaper advertising salt for sale. The advertisement was tendered in court marked Exhibit P1. As a result of this advertisement he entered into negotiations with the defendant, and as he had an order for 50 metric tons from the Bishop of Tete, it was agreed that he should buy 1,000 bags (50 metric tons) at K13.00 per bag. He paid K13,000 for the 1,000 bags. He then made arrangements with Press Transport to collect the salt from the defendant's warehouse at Desai Building, Limbe. After a week, Press Transport collected only 13 metric tons, and when they went back to collect the remaining salt, it was found that there was no salt at the warehouse for the plaintiff. When he phoned the warehouse manager, he was told that he should speak to the defendant. The plaintiff went to the warehouse where he found two Indians loading salt on trucks. When the defendant was asked the defendant said that some more salt was on the way and that the remaining 37 tons could be obtained from that consignment. The plaintiff waited for three weeks, no salt arrived. Meanwhile there were telephone calls between them and as the defendant later could not be located, the plaintiff reported to police, and after the police got him, he promised to refund the money. Indeed the balance of the money K9,620.00 was refunded, under a covering letter marked Exhibit P2. The defendant then repudiated the contract on or about the 24th of May 1985.

During all this time the plaintiff was making arrangements to clear the salt with customs so that it could be dispatched to Mozambique at the earliest convenience. Clearance was given, Exhibit P3. He then decided to bring this action to recover loss of profits because there was no salt.

It is clear that on or about the 10th of April 1985 a valid oral contract was entered into by the parties herein. It is clear that the plaintiff performed his part of the obligation by paying K13,000.00 for the salt. It is also clear, from the evidence, that the defendant knew or should have known that the salt was for resale. It is clear that the defendant failed to deliver the goods. He was clearly in breach of his obligation under the contract. The plaintiff therefore is entitled to damages.

The only question I have to determine is remedies since the defendant failed to deliver the goods.

Section 51(1) of the Sale of Goods Act (Cap. 48:01) provides that

"Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non delivery."

Subsection 2 states that

"the measure of damages shall be the estimated loss directly and naturally resulting, in the ordinary course of events, from the sellers breach of contract."

On the evidence before me the loss directly and naturally resulting from the defendant's breach of contract is the plaintiff's loss of profit of K5,214.00 which he would have made on resale of the salt to the Bishop of Tete. That, in my view is the correct measure of damages.

The learned counsel for the plaintiff has submitted that the defendant ought to enter into an indemnity against possible damages which the plaintiff may be ordered to pay to his clients - in particular, the Bishop of Tete in Mozambique. He has cited to me the case of Re R and H Hall Ltd. and Wit. Pi (Junior) and Co. Arbitration 1928 AER 763. This is a useful case. The House of Lords held in that case that if there are circumstances in which the original buyer was entitled to the loss of profit on resale for failure by the seller to deliver contract goods, he was also entitled to recover the loss which he incurred as a result of being made liable in damages to his sub-buyers for breach of the term of contract. Applying this principle in the instant case, the plaintiff is entitled to indemnity.

All in all I therefore give judgment for the plaintiff in the sum of K5,214.00 as loss of profit and I order that the defendant herein enter into a declaration indemnifying the plaintiff in the event of being liable to his sub-buyers. I also award costs for this action.

PRONOUNCED in open Court this 28th day of January, 1987 at Blantyre.


H.M. Mtegha
JUDGE