IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.167 OF 1986

BETWEEN:

AUTOMOTIVE PRODUCTS LTD.....PLAINTIFF

- and -

ISHMAIL PANJWANI.....DEFENDANT

Coram: BANDA, J.

Savjani/Maulidi, Counsel for the plaintiff
Ng'ombe, Counsel for the defendant
Longwe, Court Reporter
Mkumbira, Official Interpreter

JUDGMENT

The plaintiffs are motor dealers based in Blantyre and specialising in particular in the sale of Mercedez Benz motor vehicles. The defendant is a prominent businessman based in Limbe with interests in the motor trade and general business.

It is not disputed that on or about the 23rd of August 1984, the plaintiffs and the defendant entered into a tourist delivery contract for the purchase of a Mercedez Benz 230E. It is alleged by the plaintiffs that it was an express term of that contract that the price of the vehicle would be K21,641.85. The plaintiffs further allege that that price was made up as follows: K18,819.00 was the purchase price and that K2,822.85 was the handling charges and commission. The parties agreed that exhibit 1 was the contract which was made between them. According to exhibit 1, the price of the motor vehicle was K21,641.85. There was a German sales tax of K3,029.86. A deposit of K5,000 was paid and a balance of K19,671.71 was to be paid later. It appears that the only dispute which arises between the parties and from the agreed contract is the 15% which the plaintiffs included in the purchase price as their handling charges and commission. The defendant has contended that there was no clause or term of the contract stipulating that the plaintiffs would charge 15% handling charges.

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Mr. Savjani who appeared for the plaintiffs has contended that the total amount due from the defendant was K9,138.38 and that after taking into account the amount of the German sales tax which was paid by the defendant, the balance due from the defendant was K6,108.52. Mr. Savjani has contended that it would have made no difference if the defendant had himself initiated action to claim the refundable German sales tax of K3,029.86 where the plaintiff would have been the defendant and would have pleaded a set off to the extent of K3,029.86 and would have counterclaimed for the balance of K6,108.52. Mr. Savjani has contended that the issue was not whether K3,029.86 should have been repaid in or about March 1985, rather the issue, according to Mr. Savjani, was the state of the account between the parties in October 1985 after the plaintiffs had remitted money to Germany. Mr. Savjani has contended that as far as the defence is concerned the only issue in terms of the defence is whether there was an agreement between the plaintiffs and the defendant, that the defendant should pay 15% handling charges and commission. The defendant has submitted that there was no such agreement. That, according to Mr. Savjani, is the only issue apart from other minor issues of the price of the car at the time of quotation.

There is no dispute between the parties on the procedure which is followed when a customer buys a car on tourist delivery. According to Mr. Kazembe for the plaintiffs, a customer who wants to purchase a vehicle on tourist delivery would go to him and ask what cars are available and the customer himself would make a choice of his own colour and any extras. The customer would say what type of car he wants, whether there would be several extras and that Mr. Kazembe would make a quotation in respect of the car price, handling charges plus German sales tax. Mr. Kazembe stated that after putting figures together he would then tell the customer how much the car would cost him and that he would then demand a deposit. The balance of the purchase price would be paid within 4 - 6 weeks before the vehicle is produced by manufacturers in Germany. It was Mr. Kazembe's further evidence that the price is never fixed and that the price quoted is the prevailing one at that time and that the price payable is the one ruling at the time remittance is made. That procedure is not disputed by the defendant.

Mr. Ng'ombe has submitted that the essence of the case is the interpretation of the contract between the parties. He has submitted that the pleadings before the Court admit that K3,029.86 is refundable to the defendant but has submitted that the plaintiff, by way of self help, decided not to refund it to the defendant. He has submitted that that is one of the issues which the Court has to decide whether the plaintiff was entitled to withhold the refundable some of money. It was Mr. Ng'ombe's submission that the plaintiff was not entitled to deal with that money unilaterally and that it was for that reason that the defendant was counterclaiming the sum and that he was entitled to it, and that the Court should award it to i

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him. Mr. Ng'ombe has urged this Court to decide this case by looking at exhibit 1 which, he has contended, was the only agreement between the parties. He has submitted that the explanation which the plaintiffs have sought to give amounts to an introduction of an oral contract which is inadmissible to contradict the written contract. Mr. Ng'ombe referred to Chishire & Fifoot, 9th Edition, at 113 and he also referred to the case of Jacobs v. Batavia & General Plantation (1924) 1 Ch.D 287. Mr. Ng'ombe has contended that paragraph 2 of the re-amended statement of claim is an attempt by the plaintiffs to circumvent the rule of law but he has argued that that attempt has failed because no witness testified to the oral agreement between the parties. It was Mr. Ng'ombe's contention that the price of K21,641.85 was wrong because it contained an element of 15%. He argued that the actual purchase price of the vehicle should have excluded the alleged oral agreement so that the amount indicated in paragraph 2 of the re-amended statement of claim should be ignored and that the effect of that would be that the price of the vehicle was K18,819.00. He further contended that what was said orally between the parties before or after the reduction of the agreement into writing is irrelevant. The Court must confine itself within the four corners of the agreement. Mr. Ng'ombe submitted that on this basis exhibit 14, which contains the calculations made by Mr. Kazembe, should be ignored in its entirety. Mr Ng'ombe concedes, as did Mr. Panjwani, that interest, as set out in exhibit 1, is payable and should have been charged but he argues whether it is equitable that the defendant should pay it in view of the fact that the plaintiffs derived some benefit from the amount of money the defendant paid towards the purchase price and which the plaintiffs put into their own account.

The contract between the parties stipulated that the purchase price which was quoted in the contract was payable almost immediately. That is agreed and there is no dispute about that term of the contract. If the mode of payment was therefore agreed, was there any term of the contract express or implied which related to the use to which the plaintiffs would put the money paid by the defendant? The defendant, as an experienced businessman, was aware of the requirements of the exchange control authorities relating to the externalization of funds outside Malawi. The plaintiffs concede that while they were awaiting the approval to remit those funds they put the money received from the defendant into their own account and made use of it. According to the contract on tourist delivery, as I understand it from the evidence before me, is that the factory in Humburg does not start to manufacture a motor vehicle until full payment has been made. The evidence in this case is that it was only at a later date that the plaintiffs paid money to the bank to await Reserve Bank approval to remit it. The evidence was that once the money was paid to Commercial Bank it was put into a suspense account. Furthermore, it is the evidence before me that once funds have been put into a suspense account no interest is earned. So it seems to me, therefore, that it

would have made no difference how that money was treated. If, for instance, the money had been paid immediately to the bank, it would have been placed into a suspense account where it would not have earned any interest. The defendant had agreed that he was and is liable to pay interest at the rate of 16%. It seems to me that although the issue of how the defendant's funds were used by the plaintiffs was laboured to a great extent by the defendant it is not an issue in this case, as indeed it was not raised in the pleadings.

The issue of purchase price has also been laboured laboriously. There was a suggestion at some stage that the price of K21,641.85 was paid by the defendant through some misrepresentation. That line of tact was, however, abandoned when Mr. Savjani quite properly raised objections to evidence on an issue which had not been pleaded. It is important, in my judgment, to consider the evidence of Mr. Kazembe concerning how the quoted price was arrived at. I have already referred to Mr. Kazembe's evidence but it is necessary to refer to it again in order to contrast it with the evidence of Mr. Panjwani. It was Mr. Kazembe's evidence that he told Mr. Panjwani the price of the vehicle and the price of the extras which he wanted and that after he added up the two figures, i.e. one for the vehicle and one for the extras, he told Mr. Panjwani what would be the total cost. It was Mr. Kazembe's evidence that he also told Mr. Panjwani that there would be a handling charge of 15%. Mr. Kazembe produced exhibit 14 which he said were his calculations he made at the time he was quoting the price to Mr. Panjwani. It was Mr. Kazembe's evidence that without the 15% handling charges and commission the plaintiffs would have made nothing out of the sale to the defendant. Mr. Panjwani, on the other hand, stated that it was his friend, Mr. Kharodia, who told him about the car which Mr. Kharodia himself had wanted to buy on tourist delivery. He stated that it was Mr. Kharodia who told him the price of the vehicle and that all the extras for the car had been made by Mr. Kharodia. Mr. Kharodia, however, denied what was attributed to him by Mr. Panjwani. All he agreed was about the price which was K21,641.85. He stated that he could not have agreed to any extras because he was not interested in the car and that the car was not his. If, indeed, Mr. Kharodia was telling the truth, it is curious to note why Mr. Panjwani should have said that everything was already agreed between Mr. Kharodia and Mr. Kazembe. Someone between Mr. Panjwani and Mr. Kharodia was not telling the truth.

I have carefully considered the evidence of all the witnesses on the issue of whether or not 15% handling charges and commission had been discussed between Mr. Kazembe and Mr. Panjwani. I am satisfied that Mr. Kazembe emerges as a more truthful witness than the defendant. Mr. Kharodia denied ever discussing with Mr. Kazembe the issue of extras. He said it was not his car and that he could not have discussed with Mr. Kazembe what extras the car should have had. I find it difficult to understand why Mr. Panjwani should have attributed to Mr. Kharodia things which the latter witness did not do. I am

satisfied and I find that Mr. Panjwani was being less than truthful when he stated that he was not told that there would be 15% handling charges and commission. I am satisfied and I find that Mr. Kazembe told the defendant that there would be 15% handling charges and commission. Indeed, I find the suggestion rather strange that the price quoted should have indicated separately the actual price of the vehicle and the profit or commission or handling charges, call it what you will. There was no evidence before me to show that this is how prices of motor vehicles are quoted but I would find it extremely strange that motor dealers show their profit margin separately on the prices of a vehicle. The plaintiffs conceded that the German sales tax of K3,029.86 was refundable to the defendant but they contend that they could not refund it because at the time of remittance the account between the parties showed that the defendant owed the plaintiffs K9,108.52. The plaintiffs, however, stated, and this is apparent from the pleadings and from the evidence, that they have given credit to the defendant in their claim against him thereby reducing the amount claimed to K6,108.52.

I am satisfied that the plaintiffs, on a balance of probabilities, have established their claim against the defendant. I find that there is no basis for the counterclaim by the defendant against the plaintiffs. I would, therefore, find for the plaintiffs and there will be judgment for them in the sum of K6,108.52 and costs of these proceedings.

Pronounced in open Court on this 17th day of June, 1988 at Blantyre.

R.A. Banda
JUDGE

MAULIDI: There was a payment into Court of K3,029.86 by the plaintiff because the defendant had obtained judgment in default on the counterclaim. Since this amount was taken into account when the claim was made the defendant is therefore not entitled to this amount in view of the Court's judgment today.

NG'OMBE: Nothing to say.

COURT: I order that the K3,029.86 paid into Court should be paid back to the plaintiff.

R.A. Banda
JUDGE