

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO.14 OF 1987



BETWEEN:

BESTOBELL (MALAWI) LIMITED PLAINTIFF

AND

NCHENACHENA COFFEE PLANTATION LTD. DEFENDANT

CORAM: UNYOLO, J.

Chizumila, Counsel for the Plaintiff
Banda, Counsel for the Defendant
Mkumbira, Official Interpreter
Longwe, Court Reporter

JUDGMENT

The plaintiff claims from the defendant the sum of K8,556.47 being balance due on goods sold and delivered by the plaintiff to the defendant. The defendant in its defence denies having bought any goods from the plaintiff for which it has not paid and denies owing the plaintiff the sum claimed or at all.

This was a short case. Each side called only one witness and the evidence adduced was quite brief. The plaintiff's case upon the evidence is as follows: On 22nd July, 1985 DW.1 who is the proprietor of the defendant company called at the plaintiff's place of business to buy galvanised pipes. He bought some worth K1,771.75 and paid for them. According to the plaintiff's witness, PW.1, DW.1 was not a stranger at all. The plaintiff company had transacted business with him on several occasions previously. The witness said that then and there DW.1 expressed an interest in a maize mill he had seen on display in the show-room and enquired if he could be allowed to get it on credit terms. It was PW.1's evidence that he referred the matter to the marketing manager who obligingly authorised that DW.1 could get it. A deal was then concluded and the maize mill was sold to the defendant for K6,720.00. DW.1 paid a deposit of K1,000.00 by cheque and took delivery of the maize mill on the same day. According to PW.1 the terms were that the defendant would pay the balance within 30 days of the date delivery was taken. PW.1 told the court further that the defendant got two other items on credit terms from the plaintiff company. According to him this was on 23rd April, 1986 when DW.1 collected an electric motor and a starter both valued K2,836.55. Finally PW.1 testified that DW.1 did not honour his word. No payment was made by the defendant in terms of the sale agreement herein and it was his evidence

that demands were made calling upon the defendant to pay the debt and that when no positive response was forthcoming he travelled to Nchenachena with spanners and all to retrieve the maize mill. DW.1 refused to let him take it, so he returned empty-handed. It was the witness' evidence that on that occasion he found the maize mill in operation. Lastly the witness tendered in evidence the various invoices which were issued by the plaintiff in respect of the goods sold by the plaintiff to the defendant. He also tendered a ledger card showing how the sum claimed by the plaintiff in this case was arrived at.

I now turn to the evidence adduced on the part of the defendant. DW.1 does not dispute having bought and taken delivery of the whole lot of items mentioned by PW.1 namely the maize mill, the electric motor and the starter. He does not dispute having paid only a deposit of K1,000.00 in respect of the maize mill and nothing at all in respect of the two other items. DW.1 has given two reasons why payment has not been made. First he says that the maize mill was sold to him on the understanding that he would pay for the same out of the monies he would earn from running the said maize mill. He also says that the maize mill was not complete on the day he collected it. It was his evidence that four other parts, then not in stock, were still to be procured by the plaintiff and delivered to the defendant. These, according to the witness, were a motor, a starter, a drive-belt and a pulley. It was DW.1's evidence that although he collected the motor and the starter without the two other parts namely the drive-belt and the pulley the maize mill could not work. He testified that consequently he has just kept the maize mill without using it since he bought it in 1985 except for a short time, about two weeks, when he operated it using a borrowed set of drive-belt and pulley. It is his contention that the plaintiff is in breach of the agreement such that no money is presently due to the plaintiff before the said items are supplied and the maize mill starts working and generating money.

Reverting at this point to the plaintiff's evidence PW.1, in cross-examination, denied the allegation that the maize mill was sold to the defendant subject to the parts mentioned by DW.1, or at all, being procured by the plaintiff and delivered to the defendant. It was PW.1's evidence that at the time of the sale this was a complete diesel-operated maize mill in working condition and that it was sold as such. PW.1 said that it was only later he learnt that DW.1 wanted to change things and run the maize mill using electric power. The witness stressed that such a change had nothing to do with the plaintiff. Further PW.1 denied the allegation that the maize mill was sold on the understanding that the defendant would pay for it out of monies to be earned from running the maize mill. The witness refuted DW.1's allegation that the maize mill has not been working since. As pointed out earlier it is his evidence that he found it working when he visited the defendant's farm last year. He said that again he found it working quite recently, some two weeks ago. Such is the evidence.



I will deal first with the contention that the maize mill was in inoperable condition at the time it was sold to the defendant and that the plaintiff was required to procure and deliver the other parts mentioned by the defendant to put the maize mill in working condition. Coupled with this, is the allegation that the defendant has been keeping the maize mill all this time waiting for the parts in question. As already indicated the plaintiff vehemently denied these allegations. PW.1 was emphatic that this was a diesel-operated maize mill and that it was complete at the time it was sold to the defendant. The witness said that it was only much later he learnt that the defendant wanted to change things and operate the maize mill using electric power. With respect I would prefer PW.1's evidence to that given by DW.1. The first comment to be made is, if DW.1 knew full well that the maize mill was not complete and could not work without the four other parts mentioned by him one wonders why he took the maize mill in that condition when he would not be able to run it and make money. Surely he would have left it and come back later to collect it when all the parts were available. Indeed this was a Brown and Clapperton product and the suppliers were just a couple of miles or so away. Further if what DW.1 said was true I cannot imagine how he could have sat back all this long without kicking a row with the plaintiff or sue the company for breach of contract. As regards the other allegation I have no reason to doubt the evidence of PW.1 that he did find the maize mill working last year at the time he went to the defendant's farm to repossess it and also very recently, some two weeks ago. I cannot therefore accept the defendant's story that the maize mill cannot be operated and that he has just been keeping it, all folded up, as it were.

I now turn to the contention that the maize mill was sold on the footing that the defendant would pay for it out of the monies earned from its use. With great respect I am again unable to believe the defendant on this aspect. As already indicated PW.1's evidence was that DW.1 was told the balance due on the maize mill was to be paid within 30 days. The witness emerged firm in his evidence and he was confirmed on this aspect by the delivery note and the invoice, Exhibits P2 and P3, issued by the plaintiff to the defendant in respect of the maize mill herein. These two documents indicate that the terms of payment offered were 30 days net.

I am mindful of the fact that not a single statement of account has been produced as would be expected in a business transaction of this nature, the defendant having failed to pay the amount due within the stipulated time. It is however not disputed, and this is a significant point, that the plaintiff did make verbal demands upon the defendant to pay the debt and that indeed at one time PW.1 travelled to the defendant's farm to repossess the maize mill. These circumstances in my judgment tell against the defendant's contention, otherwise the plaintiff would not have reacted in that manner if the terms of payment were those suggested by the defendant.

I would also, speaking as a man of the world, venture to add that the defendant's story sounds to me improbable and out of time with the realities of the business world. I realise that extended credit terms may be and are offered by merchants to customers but repayment rates are invariably fixed. To simply say that the defendant would pay from the monies to be generated from the maize mill without agreeing on a specific figure does not seem real.

There is a further point to be made and this relates to the pleadings. As pointed out at the very outset in this judgment, the plaintiff's claim is for K8,556.47 being balance due in respect of goods sold and delivered by the plaintiff to the defendant. And the defendant then came up with a defence wherein it denies having ever bought any goods from the plaintiff for which it has not paid. The defendant's case here is to my mind at variance with what came out in the evidence where it is conceded that the defendant did buy from the plaintiff the maize mill, the electric motor and the starter i.e. the very items which form the basis of the plaintiff's claim against the defendant. If the defendant's case right from the beginning was that the plaintiff agreed to supply other items and that he was in breach, such allegation ought to have been pleaded in the defence. Similarly if the sale was subject to any condition as alleged by DW.1 such conditions and breach thereof should have been set out in the defence.

All in all I am satisfied that the plaintiff has on the balance of probability proved its case against the defendant. I accordingly enter judgment for the plaintiff for the sum claimed and costs.

PRONOUNCED in Open Court this 5th day of December, 1988 at Blantyre.


L.E. Unyolo
JUDGE