

Banda T.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.97 OF 1988

BETWEEN:

CHENDA MKANDAWIRE ENTERPRISES PLAINTIFF

AND

EVERGLO ELECTRIC COMPANY LTD. DEFENDANT

CORAM: MAKUTA, CHIEF JUSTICE

Mhango, Counsel for the Plaintiff
Chirwa, Counsel for the Defendant
Namvenya, Official Interpreter
Longwe, Court Reporter

JUDGMENT

By an amended specially endorsed writ dated 17th February, 1988 the Plaintiff claims for a refund of the sum of K11,944.00 being money had and received for the use of the Plaintiff and for interest thereon and damages.

The Plaintiff owns an Entertainment Centre in the City of Mzuzu. During the construction of the centre the Defendant's Technical Sales Executive, Mr. Steven Kassam, approached the Managing Director of the Plaintiff, Mr. Chenda Mkandawire, and mentioned that the Defendant would be able to design and build a music system suitable for the centre. Mr. Mkandawire told the Court that Mr. Kassam pointed out that the Defendant had earlier on installed a music system at Mzuzu Hotel and suggested that they go to see it. Mr. Mkandawire agreed and they actually went to Mzuzu Hotel and saw the system. This was in or about March, 1985. It would appear the Plaintiff expressed the wish to purchase the music system and a quotation, Exhibit Pl, dated 20th March, 1985 from Everglo Electric Co. (Malawi) Ltd. was sent to the Plaintiff.

Item 1 of the quotation is the main control unit consisting of stereo record deck, auto reverse cassette deck, SW/FM tuner, stereo amplifier 125/RMS/channel, monitoring panel and speaker and veneered/wooden cabinet. The total cost of item 1 was K4,500.00. Item 2 consisted of 16 units Hi-Fi speakers with individual volume control at a cost of K3,360.00. Item 3 consisted of one unit P.A. system amplifier with microphone for the main hall at a cost of K500.00. Item 4 consisted of 9 units column speakers at a cost of K1,368.00. Finally there was installation commission fee of K1,600.00. According to the quotation the total cost was K11,428.00. Then there was requirement for a deposit of K2,857.00 before the work for designing and building of the system commenced. On 10th

May, 1985 the Plaintiff wrote to the Defendant confirming the order and in the same letter, which is Exhibit P2, the Plaintiff intimated that he was asking his Bankers to send a cheque for K2,857.00 as deposit. As it turned out payment of the deposit was not made as promised in the letter. It would appear, however, that the Plaintiff had earlier on bought goods from B & C Metal Products Ltd. and he returned them. He was given a credit Note No.847, Exhibit D3, in the sum of K3,264.82 for the returned goods. He then negotiated with B & C Metal Products Ltd. that the value of the credit Note be transferred to Everglo Electric Co. (Malawi) Limited as deposit. Everglo Electric Co. (Malawi) Ltd. is a subsidiary of B & C Group of Companies. It would appear the negotiations were successful. This means therefore that a deposit far in excess that required by Exhibit P1 was paid. This is not disputed. There is another document, Exhibit D1, dated 30th October, 1985 showing the Plaintiff as the customer and it is invoice for installation of music system. It is marked "PARTLY INVOICED AS DEPOSIT WHILE WORK IS IN PROGRESS". It shows the sum of K3,000.00. This would seem to be part of the deposit.

According to Mr. Mkandawire, PW.1, the music system arrived some time in November, 1985. It was Mr. Kassam, DW.1, and another man, Mr. Chirwa, who brought it. In fact it was Mr. Chirwa who installed the music system. The music system did not work. They left, saying that they would come back in three days time. They carried away the amplifier thinking that that was the cause. They did not ask for payment although they had brought with them an invoice, Exhibit D2, in the sum of K8,428.00. If they had done the job they would have asked for payment since it was a cash deal. When installation was being carried out Mr. Godfrey Mhoni, a supervisor at the Centre, was assigned to be present so that he should be told how the system works. It was necessary to do this because the equipment was expensive and not everybody could be touching it. Furthermore, the invoice said commissioning which, according to the witness, meant training someone.

After four days they came back bringing back the amplifier. It was re-installed but it failed again. This time they said there was a major fault because the amplifier was overheating and they had to take it back to Blantyre again. They did that and came back after five days. Again, this time, it failed and they said the tuner was faulty. They removed part of the tuner to Blantyre. They brought it back and it failed. The Entertainment Centre was then advised to use it temporarily but it continued to give problems and it was closed in January, 1986. The Defendant were informed about this and they promised that a technician would be sent to rectify the fault. Nothing happened. A letter, Exhibit P4, dated 7th March, 1986 was then written. It was suggested in the letter that since repairs had failed to correct the fault the whole equipment should be changed and a new one installed. There was no response to the letter. When some enquiry was made as to why there was no response, the Defendant replied that it was because no deposit had been paid. Subsequently the Plaintiff received a letter of demand, Exhibit P5, from Messrs Savjani & Co., the Defendant's

Legal Practitioners. The demand was in the sum of K8,679.88 and was dated 23rd October, 1986. Looking at the contract value this indicated that the deposit had in fact been paid. Although the Plaintiff tried to reason with the Legal Practitioners they, i.e. the Legal Practitioners, insisted that the money should be paid despite the fact that the equipment was not working. Eventually the whole sum demanded by Messrs Savjani & Co. was paid. It follows, therefore, that the Plaintiff paid K3,264.82 in the form of a deposit plus K8,679.88 which comes to K11,944.70. It should be mentioned that legal proceedings had actually been instituted by Messrs Savjani & Co. and judgment in default was obtained on behalf of the Defendant. Initially the Plaintiff paid K5,000.00 in satisfaction of the judgment. Then a warrant of execution was issued for the balance and execution was actually levied and balance was paid.

On 4th December, 1986 the Plaintiff wrote yet another letter of complaint, Exhibit P6, suggesting that since the system was not working the Defendant should make arrangements to have the equipment changed or alternatively to supply the Plaintiff with cookers and freezers in place of the faulty system. There was no response to the letter. On 31st May, 1987 the Plaintiff wrote again, Exhibit P7, about the faulty system and the letters of 7th March, 1986 and 4th December, 1986 were referred to. Still there was no reply. On 15th July, 1987 another letter, Exhibit P8, was written by the Plaintiff to the Defendant to which, again, there was no reply. In yet another letter, Exhibit P9, dated 30th July, 1987 the Plaintiff stated that they had selected the alternative goods from the Defendant's Mzuzu Branch in exchange for the faulty music system. The value of the selected goods came to K13,253.36 and it was suggested in the letter that the difference in price would be paid in cash. I suppose this meant the difference in the value of the selected goods and the contract price.

On 28th September, 1987 the Defendant wrote, Exhibit P10, in the following terms:

Chenda Mkandawire Enterprises,
P.O. Box 314,
Mzuzu.

Attention: Mr. Mkandawire

Dear Sir,

RE: MUSIC SYSTEM

With regard to our recent telephone discussion on the above subject we comment as follows:

Six months after installation of the system in 1985, we made a routine check on the system as part of the six months guarantee and found various faults due to mishandling of the equipment, these faults were

rectified free of charge. In addition to this we replaced a short wave tuner. After that visit, we have no knowledge of any faults being brought to our attention until your recent communications, whereby a fault was reported by yourselves regarding the amplifier. Our Technician accordingly informed you that you could either send the amplifier to us for repair or if you desire we could come up to Mzuzu provided you were prepared to pay the costs. You, however, elected to send the amplifier to our Blantyre Office, where on inspection, you were informed that the cost of repair could be K251.46. We have as yet received no L.P.O. for this work.

As to your claim that the system has never worked, we dispute this entirely, as the system has obviously been tampered with by persons unknown to ourselves.

We are prepared however to send a technician to Mzuzu to check your system out and make a report to yourselves.

Yours faithfully,

E.J.O. Smith
General Manager

On receipt of this letter the Plaintiff felt that enough was enough and they decided to hand over the matter to Messrs Bazuka & Co., their Legal Practitioners, who in turn wrote a letter of demand, Exhibit P11, dated 31st December, 1987 to the Defendant. The Defendant replied by Exhibit P12 to the letter of demand on 27th January, 1988 as follows:

Messrs Bazuka & Company,
P.O. Box 28,
Blantyre.

Dear Sir,

RE: CHENDA MKANDAWIRE ENTERPRISES

We acknowledge receipt of your letter ref. JAB/5237/RM dated the 31st December 1987 regarding your client above. Will you kindly note the following points:

1. The music system in question was specified, designed, built and installed to suit your client's complex building requirements as per his order whose copy is attached herewith.
2. The system was finally commissioned in November 1985 and handed over to your client in working order. After a period of six months, our

The last witness for the Plaintiff was Mr. Christopher C. Nyirenda, PW.3. He works in the Sheriff's Department at the High Court. He informed the Court that in 1987 a warrant of execution was issued by Messrs Savjani & Co. in Cause No.837/86. The parties were Everglo Electric Co. Ltd. v. Chenda Mkandawire Enterprises. Execution was carried out on 30th July, 1987 and he subsequently made a report to Messrs Savjani & Co. who later advised that the file should be closed. This indicated that the debt was satisfied.

The Defendant deny the claim. They deny that there was a failure of consideration for the money paid. The first witness for the defence was Allan Amini. He is a Sales Executive for the Defendant and is stationed at Mzuzu. He informed the Court that the Defendant installed a music system in 1985 at the Plaintiff's Centre at Mzuzu but he did not participate in the installation. Some time in 1987 the Plaintiff requested that someone from Everglo Electric Company Ltd., Mzuzu, should help remove the system at the Centre because repairs were being effected. An electrician, Mr. Sweetman Lipenga, was sent to the Centre and he helped remove speakers. There has not been a request from Chenda Entertainment Centre for someone to help put the speakers back. Mr. Sweetman Lipenga, DW.2, testified in Court and confirmed that he had been directed by Mr. Allan Amini to go to the Chenda Mkandawire Entertainment Centre to help remove music equipment and he did. He also confirmed that he has not been requested to go and put it back.

The next witness was Mr. Steven Kassam, DW.3. He is a Technical Sales Executive for the Defendant and is stationed in Blantyre. He has been with the company since 1983. His work involves selling of electrical equipment, refrigeration, electronics, etc. His qualification is City and Guilds Part II in Industrial Electronics, Radio and Television. He is the one who negotiated to sell the music system with the Plaintiff. Around January, 1985 Mr. Kassam was in the town of Mzuzu. As a normal procedure he visited the B & C Ltd. in Mzuzu where he met a Mr. Peter Arden who was overall Manager of B & C Ltd. in Mzuzu. Mr. Arden informed the witness that the Plaintiff were constructing an Entertainment Centre and they would be interested in installing some music system. On enquiry Mr. Chenda Mkandawire, the Managing Director of the Plaintiff, confirmed that the Centre would need the equipment. After some discussion at Mr. Mkandawire's residence they i.e. Mr. Mkandawire and Mr. Kassam went to Mzuzu Hotel to see a music system which had earlier on been installed by the Defendant. This was to give a clear idea to Mr. Mkandawire of what they were discussing. After visiting the Hotel they drove to the Entertainment Centre and toured all the rooms which were intended for various functions. The Plaintiff intended to have bars, restaurants, wedding halls, library and games rooms. After looking round there was some discussion on the nature of music or sound which would be required as opposed to the ones in the Hotel. It was stressed that the speakers would have to be mounted about six feet above the floor or thereabouts because they would be more public and they should be installed at a place where they would not be reached easily.

Having finished their discussion Mr. Kassam returned to Blantyre where he worked out a quotation, Exhibit P1. This was sent to the Plaintiff two months later. Mr. Mkandawire acknowledged receipt and advised the Defendant to design and manufacture the music system: see Exhibit P2. The building of the music system did not start immediately because of delay in the payment of deposit. Subsequently the then General Manager of the Defendant gave instructions to start building the system. After it was completed and tested the music system was taken to Mzuzu where it was installed. The technician, Mr. Chirwa, who did the installation came from Blantyre. He no longer works for the Defendant. According to Mr. Kassam, after installation the system was kept running for two days and everything was in order. Again according to Mr. Kassam Mr. Mkandawire was informed that the system had been installed and tested and was in working order and Mr. Mkandawire was asked if he could come for commissioning. At that point Mr. Mkandawire replied that he was not feeling well but he had been to the Centre the previous days and had seen what had taken place and was impressed. He therefore instructed that the commissioning could be done with the supervisor of the Centre and this was duly done. After they were all satisfied they gave themselves extra two days to ensure that the supervisor gets familiarised with the functions. If there were any problems they were to be contacted at the Resthouse. After two days they went back and the supervisor stated that there was no problem. Mr. Kassam and the Technician, Mr. Chirwa, then left for Blantyre and according to him there was no complaint that the system was not working. Mr. Kassam denied to have seen letters of complaint on the system.

The last Defence witness was Mr. Harry E. Sundu. He works at the B & C head office but works for Everglo as a credit controller. He was able, among other things, to tell the Court that Mr. Chenda Mkandawire had a debt with the Defendant and some money had been paid through Messrs Savjani & Co. He also informed the Court that money for the Group of Companies was one and the same and was kept into one bank account. Invoices and other papers were merely for identification of how money moved from one division to another within the Group.

It is pertinent to mention that none of the Defendant's witnesses was present when the equipment was being installed.

Mr. Chirwa submitted that the contract in this case was not for sale of goods invoking the Sale of Goods Act. It was his submission that the contract was for labour and work as the substance of the contract was that skill and labour should be exercised upon the production of the equipment. He also drew support for this argument from the statement of claim and from the quotation, Exhibit P1. He submitted that both the quotation and the statement of claim talk of "supply of music system". This, according to him, showed that it was not a contract for Sale of Goods since the music system was to be designed specially for the centre: see Robinson v. Graves (1935) 1KB 579.

Section 7(1) of the Sale of Goods Act (Cap.48:01) provides as follows:

"The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract".

In view of this section there is no doubt in my mind that the contract was for sale of goods. I do not think that it matters as to whether the goods were existing or were to be manufactured, or whether skill or labour were to be used.

In their defence the Defendant state that they received a sum of K10,967.02 only from the Plaintiff but deny that the same was received for use of Plaintiff. It is their defence that the money was part-payment for a set of music system plus installation charges as reflected in their quotation, Exhibit P1, plus invoices numbers 036845, Exhibit D1, and 038808, Exhibit D2. It is not disputed by the Defendant that the sum of K8,679.88 was paid towards satisfaction of the debt through Messrs Savjani & Co. According to Exhibit P1 this leaves the sum of K2,748.12 unsatisfied. This sum is reflected in Exhibit D4 which is a Credit Note and it states: "Being funds transferred from Metal Products on their Credit Note No.55092". The sum is also reflected in Exhibit D5, which is a Debit Note, and it states: "Being part of Credit Note No.55092 transferred to Everglo to off set for purchases". Both these documents are prepared by Brown & Clapperton Ltd. and are to Chenda Mkandawire. According to Mr. Sundu, DW.4, these cancel each other. It means that the Plaintiff does not owe the Defendant anything. In other words the debt of K11,428.00 is satisfied. But it is noted that the credit note mentioned in Exhibits D4 and D5 is Exhibit D3. This Exhibit D3 shows that it is a Metal Products Limited Credit Note to Mr. Chenda Mkandawire in the sum of K3,264.82. This is not cancelled at all. It will be recalled that this is the sum Mr. Mkandawire, PW.1, said was owed to him and was transferred to the Defendant as deposit for the music system. It therefore follows, as I already found above, that the Plaintiff paid K8,679.88 through Messrs Savjani & Co., plus K3,264.82 which totals K11,944.70. It is therefore not true that the Defendant received K10,967.02 only.

I now turn to the allegation of faulty equipment. As already mentioned above both PW.1 and PW.2 stated that the music system never functioned as expected after installation. According to PW.1, verbal complaints to correct the faults were to no avail. Then on 7th March, 1986 he wrote his first letter of complaint, Exhibit P4. This was followed by Exhibits P6, P7, P8 and P9. In their reply to a letter of demand by Messrs Bazuka & Co., the Defendant acknowledged receipt of a letter dated 15th July, 1987 from the Plaintiff. The letter of 15th July, 1987 is Exhibit P8. This letter refers to a previous letter of 31st May, 1987, Exhibit P7. Exhibit P7 refers to two previous letters dated 4th December, 1986 and 7th March, 1986, Exhibits P6 and P4 respectively. The Defendant

are not a small organisation. They are well organised, experienced and I daresay efficient. In a situation like this one would expect them to enquire about the referred to letters. There is nothing of the sort. There is absolute silence in their letter, Exhibit P12, on the previous letters from the Plaintiff. I am of the view that the Defendant received the letters and they decided to ignore them. I am reinforced in this view by a letter from the Defendant to the Plaintiff dated 28th September, 1987, Exhibit P10. In this letter the Defendant refer "to our recent telephone conversation" on the music system and they deny the claim that the system has never worked. By this time they must have received the letter dated 15th July 1987, Exhibit P8, from the Plaintiff but they decided not to refer to it. What an attitude to a long outstanding customer!! In the circumstances of this case I am of the view that the Defendant were made aware of the faults in the music system soon after installation or long before the expiry of the purported guarantee period.

Where a buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill and judgment, and the goods are of a description which it is in course of the seller's business to supply, whether he be a manufacturer or not, there shall be an implied condition that the goods shall be reasonably fit for such purpose: see Section 16(a) of the Sale of Goods Act. In the instant case the Defendant knew the purpose for which the Plaintiff wanted the music system, namely entertainment of clients at the Centre. The Defendant's Sales Executive, Mr. Kassam, took the trouble to show Mr. Chenda Mkandawire the type of system the Defendant installed at Mzuzu Hotel and Mr. Kassam advised on the type that would be suitable for the complex that the Plaintiff were constructing. The Plaintiff therefore relied on the judgment of the Defendant. It was their business to supply such a system. In the circumstances the Plaintiff must naturally expect the system to be fit for the purpose intended. The fact that it did not work was, in my view, a breach of that condition. It is unfair, in my judgment, to dump a music system at a client's premises, knowing full well that it is not working, demand payment and ignore all complaints about its functioning. It is clear here that the Defendant did not care much and so long as the equipment was on the Plaintiff's premises, it was not their concern. I think the Plaintiff was treated in a very callous way. There was, in my judgment, a failure of consideration in that what the plaintiff was given was a music system which failed to work. The Defendant should have replaced it within the guarantee period. The Defendant aver that six months after installation their agent or servant made a routine check in compliance with six months guarantee when they found minor faults due to mishandling of the music system. One would expect routine check in compliance within the guarantee period and not after it, as the Defendant would wish the Court to believe. I find it incredible. The agent or servant who did the routine check should have come forward to inform the Court what faults he found and how he rectified them. No such evidence has been adduced. In fact Mr. Kassam

denied in examination in chief that various attempts were made to rectify faults. According to him, there were no faults. This contradicts the assertion by Mr. Smith, the General Manager, made in his letter, Exhibit P10.

In Rowland v. Dival (1923) 2KB 500 the plaintiff bought a motor car from the defendant and used it for several months. It then appeared that the defendant had no title to it, and the plaintiff was compelled to surrender it to the true owner. The plaintiff sued the defendant to recover the purchase money that he had paid, as on a total failure of consideration. It was held that notwithstanding that he had used the car, the consideration had totally failed and he was entitled to get the purchase money back. See also Yabu v. Nyasaland Garage Ltd. (1966-68) ALR Mal. 209. In the instant case the Plaintiff did not derive the slightest benefit from the music system. All they have are meaningless boxes and wires on their premises.

I have very carefully examined the circumstances of this case and on the balance of probabilities the Plaintiff are entitled to claim back the money paid.

I now turn to mitigation of damages. While waiting for some response from the Defendant the Plaintiff acquired substitute music equipment. On 15th June, 1986 he bought a Panasonic Stereo at K3,600.00; see Exhibit P14. On 22nd June, 1987 he bought 4 radio cassettes at K1,980.00 as shown on Exhibit P16. Another purchase was made on 17th January, 1989 as shown in Exhibit P15. I am of the view that the January, 1989 purchase cannot be justified. It is too remote in time. The 1987 purchase cannot be said to be remote considering the fact that the Plaintiff was, at that time, still paying for the music system through Savjani & Co. I am therefore of the view that the Plaintiff should recover K3,600.00 plus K1,980.00 which comes to K5,580.00. If the Defendant had sold a working music system I do not think that the Plaintiff would have gone into the expense of purchasing substitute equipment.

On interest, Section 54 of Sale of Goods Act provides that nothing in the Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for payment of it has failed. In London, Chathan and Dover Railway Co. v. South Eastern Railway Co. (1983) AC 429 it was said that the overriding principle is that interest should be awarded to the plaintiff not as a compensation for the damages done but for being kept out of the money which ought to have been paid to him. In commercial transactions, as was the position in the instant case, commercial rate applies. This is the rate the Plaintiff would have had to pay if he had to borrow the money. It would appear the commercial rate at the moment is 18%.

Interest at the rate of 18% on K3,264.82 will be as follows:

From 17th December, 1985 to 31st December, 1985:
14 days

$$= \frac{18 \times 3264.82 \times 14}{100 \times 365} = \text{K}22.54$$

From 1st January, 1986 to 31st December, 1988:
3 years

$$= \frac{18 \times 3264.82 \times 3}{100} = \text{K}1763.00$$

From 1st January, 1989 to 31st July, 1989:
7 months

$$= \frac{18 \times 3264.82 \times 7}{100 \times 12} = \text{K}342.81$$

From 1st August, 1989 to 30th August, 1989:
30 days

$$= \frac{18 \times 3264.82 \times 30}{100 \times 365} = \text{K}48.30$$

Total = K2176.65

Interest at the rate of 18% on K8,679 will be as follows:

From 30th July, 1987 to 30th July, 1989: 2 years

$$= \frac{18 \times 8679.88 \times 2}{100} = \text{K}3124.76$$

From 31st July, 1989 to 30th August, 1989:
1 month

$$= \frac{18 \times 8679.88 \times 31}{100 \times 365} = \text{K}132.69$$

Total = K3257.45

Total Interest will be:

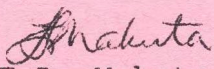
$$\text{K}2,176.65 + \text{K}3,257.45 = \text{K}5,434.10.$$

The interest is calculated up to the day of judgment, i.e. 30th August, 1989. The total amount to be recovered by the Plaintiff in this action is K11,944.70 plus K5,580.00 plus K5,434.10 which comes to K22,958.80.

On the counterclaim it is alleged that K460.98 of the K712.44 being claimed is based on invoices 036835 and 038808 which invoices are for the contract price. I have already found above that the whole contract price was paid. It is indeed pertinent to point out here that the contract price, as shown in Exhibit P1, was overstated by K100.00. The total on it comes to K11,328.00 and not K11,428.00. The balance on the K721.44 i.e. K251.46 is said to be costs of repairs to the amplifier which is lying at the Defendant's place in Blantyre. This is part of the music system which failed to function. I therefore reject it. Consequently the counterclaim fails.

The Plaintiff will have costs of this action.

PRONOUNCED in open Court this 30th day of August, 1989
at Blantyre.


F.L. Makuta
CHIEF JUSTICE