IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 59 OF 1987

BETWEEN:

S. KHANUNDU ..... PLAINTIFF

- and -

CENTRAL AFRICAN TRANSPORT COMPANY LIMITED ..... DEFENDANT

CORAM: MKANDAWIRE, J.

Nakanga, Counsel for the Plaintiff
Saidi, Counsel for the Defendant
Chigaru, Official Court Interpreter
Longwe, Court Reporter

JUDGMENT

The plaintiff is claiming general damages for the alleged conversion of his truck. Alternatively, he is claiming the sum of K5,651.58 as money had and received by the defendant to the use of the plaintiff. It is pleaded in the re-amended statement of claim that the plaintiff was the owner and entitled to a Bedford truck, Registration Number BG 229, which he used for hire and reward. It is further pleaded that in about April, 1986 he took the said vehicle to the defendant for repairs, but the defendant converted it to their own use and sold it at an undervalue of K30,000.00. The plaintiff put the value at K50,000.00.

The defendant denies that the plaintiff was the owner of the truck. It is pleaded in the defence that the plaintiff was indebted to the defendant under a Hire Purchase Agreement of which the plaintiff was in breach. It is further pleaded that in exercise of its rights the defendant terminated the Hire Purchase Agreement and sold the said truck in order to recover the balance and repair charges.

The plaintiff is a businessman, while the defendant is a motor vehicle dealer. The facts of this case are not seriously in dispute. By a Hire Purchase Agreement dated 28th February, 1985 the plaintiff hired a Bedford Truck, BG 229. The purchase price was K50,369.88 and he paid a deposit of K1,006.40. The balance was to be paid in 18 monthly instalments of K2,243.00, commencing from 1st April, 1985. TThe vehicle was registered in the plaintiff's name, but ownership remained with the defendant. It was a term of the Agreement that ownership would pass to the plaintiff when all the purchase price was paid. By the time the vehicle was sold, the plaintiff had not finished paying, so that he had never become owner of the truck. Had the plaintiff paid all the instalments in accordance with the Agreement, the truck would have been fully paid for on 1st September, 1986.

The plaintiff took delivery of the truck in February, 1985. But he failed

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to comply with the terms of the Agreement insofar as instalments were concerned. He did not pay the first instalment on 1st April, 1985. The next instalment was due on 1st May, 1985, but he only paid K1,040.00. His next payment on 1st June, 1985 was in the sum of K1,823.19. It is clear, therefore, that the plaintiff was in breach of the Agreement from the very beginning. Between March and April, 1986 the truck had some mechanical problems. During that period the plaintiff was carrying agricultural produce for ADMARC. The problem first occured in Mzuzu and then Chitipa. On both occasions, the defendant's branch in Mzuzu attended to the problems. The Mzuzu branch did not do a satisfactory job and so the truck was brought to the defendant's garage in Blantyre. According to Mr. Farook Laheria, the defendant's Group Sales Manager, the truck was brought to the defendant's garage in April, 1986. At that time the plaintiff was in arrears to the extent of K12,310.99. The repair charges came to K4,000.33 and the plaintiff did not have this kind of money. The defendant told the plaintiff that the truck could not be released unless he brought his hire purchase account up-to-date by clearing the arrears. He was only able to pay K500.00 towards repair charges and that was on 20th May, 1986.

From April, 1986 when the plaintiff left the truck at the defendant's garage, he only paid K500.00 towards repair charges. Nothing was paid towards the hire purchase account, although the defendant, through Mr. Laheria, told him to bring the account up-to-date. As a matter of fact, the plaintiff made the last payment towards the hire purchase account on 1st January, 1986 and no other payment came. According to the Agreement, the purchase price was to have been fully paid by 1st September, 1986, but by that date the plaintiff was in arrears to the tune of K22,769.89. Having kept the truck in its garage from April, 1986 to 1st September, 1986, the defendant decided to sell the truck. A Court Order was obtained to that effect and the truck was sold on public auction by Messrs Trust Auctioneers on 27th September, 1986 at K30,000.00. Out of this money, K3,000.00 went towards the auctioneers commission and K54.60 for advertisement. Then there was a bill of costs from Messrs Said and Company who had been instructed to obtain the Court Order to have the vehicle sold. The bill was in the sum of K1,205.66. The defendant received a cheque of K27,282.48 from Messrs Trust Auctioneers. At the end of the day there was a shortfall of K336.48, but this was absolved by the auctioneers.

On these facts, I have to decide whether the defendant was entitled to sell the truck. I must hasten to point out that the plaintiff was not the owner of the truck, as ownership had not passed to him since he had not paid off the purchase price. Even then, Mr. Nakanga submitted that the plaintiff was entitled to the truck since he had paid more than 50% of the purchase price. It is submitted that in selling the vehicle, the defendant was in breach of section 19(2) of the Hire Purchase Act. Under that section the plaintiff was to be informed that a seller had been appointed. It is common case that although the defendant went to Court to have a seller appointed, it did not notify the plaintiff of such appointment. Mr. Nakanga submits that this was a breach which must result in damages. On the other hand, Mr. Saidi submitted that the defendant was under no obligation to notify the plaintiff, since section 3 of the Act excludes the application of section 19 to the Agreement. Section 3 deals with the application of Part 1 and provides:

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"Except for sections 4, 22 and 23 which shall apply to every agreement or as the case may be, to the parties to every agreement, this Part shall not apply to an agreement under which the purchase price exceeds the sum of fifteen hundred pounds".

Mr. Saidi's contention is that since the purchase price of the vehicle was in excess of fifteen hundred pounds, section 19 which comes within Part 1 of the Act would not apply. I think that Mr. Saidi's observation is well placed. Section 3 is very clear and it excludes the application of the whole of Part 1 to an agreement such as this, except sections 4, 22 and 23. Mr. Nakanga submitted that section 19 was expressly incorporated in the agreement signed by the parties. That may be so, but that incorporation was conditional upon section 19 being applicable to the transaction and as it happens, that section does not apply. But, even assuming that the section did apply, I would say that the plaintiff had been personally informed of the defendant's intention to exercise its rights under the Agreement. He was told this when he was negotiating for the release of the truck. It must be remembered that the defendant had kept the truck for about 6 months from April to September, 1986. It is true that the plaintiff was not informed of the appointment of the seller, but it appears to me that in terms of section 19(3), the purpose of such notification is that the purchaser should deliver the vehicle within 14 days of such notification. In the instant case, the vehicle was already in the possession of the defendant. I, therefore, find that the defendant was quite entitled to sell the vehicle.

Turning to the value of the vehicle, I find that the plaintiff had failed to substantiate his claim that it was worth K50,000.00 and that it was sold at an undervalue. It was up to the plaintiff to prove that the vehicle was indeed worth K50,000.00, but no evidence was led to this effect. This vehicle was purchased on 28th February, 1985 at a purchase price of K50,369.48 and was sold 18 months later after extensive use. Taking into account the element of depreciation, it is highly unlikely that the vehicle would be worth K50,000.00 at the time of sale. The plaintiff did raise the question of appreciation; but if the vehicle had appreciated in value, it was up to him to lead such evidence and he failed to do so. According to the defendant's estimation, the vehicle was worth only about K15,000.00 to K17,000.00 and it was mere luck that it fetched K30,000.00 at the auction. I, therefore, dismiss the plaintiff's claim that the vehicle was sold at an undervalue.

In the alternative, the plaintiff claims K5,651.58 as money had and received by the defendant to the use of the plaintiff. He did not quite explain how he arrived at this figure, but it is said that this amount represents the balance which the defendant had at his hands after clearing the hire purchase account. It is claimed that such money is payable to the purchaser under section 18(4). As I have already found, this section does not apply and since the Agreement contains a forteiture clause, the defendant would be well entitled to forfeit any excess. But even if the section were to apply, there was no excess that would be paid over to the plaintiff. Instead, there was a deficit and the plaintiff is only lucky that the defendant did not counter-claim for such shortfall. Mr. Nakanga submitted that there is no evidence that the seller made deductions and that only a sum of K27,282.88 was received from the auctioneers. I think the evidence of Mr. Laheria was quite clear that the

seller had made certain deductions and I, therefore, find it as a fact that the defendant received only K27,282.88 from the seller. Mr. Laheria clearly explained how this was used. Arrears on the hire purchase account were K22,769.89 and some of the money went to repair charges, bill of costs and interest. At the end of the day there was no excess to be paid over. Mr. Nakanga submitted that interest had not been proved. I do not agree. There is a schedule which clearly shows what interest was to be paid and this interest is based on 15.69% allowed under the Act. I, therefore, find that there was no excess to be paid over tothe plaintiff.

The plaintiff's claim is, therefore, dismissed in its entirety with costs.

PRONOUNCED in open Court this 26th day of July, 1991, at Blantyre.

M.R. Mkandawire
JUDGE