IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 710 OF 1987

BETWEEN:

WIYULE BROTHERS .....PLAINTIFF

- AND -

STANSFIELD MOTORS LTD ..... DEFENDANT

CORAM: MKANDAWIRE, J.

Chizumila of Counsel for the Plaintiff
Nakanga of Counsel for the Defendant
Chigaru, Official Court Interpreter
Gausi (Mrs), Court Reporter

J U D G M E N T

By a specially endorsed writ of summons the plaintiff seeks to recover the sum of K28,111.76 which is alleged to be in excess of the price the plaintiff paid on the purchase of a Fuso Truck then BA 2828. The plaintiff also seeks to recover K16,246.00 being special damages and general damages for the alleged wrongful taking and continued detention of the said truck by the defendant. The plaintiff also seeks a declaration that he is the owner of the said truck. Finally, he prays for a permanent injunction to restrain the defendant by itself, its servants or agents or howsoever otherwise from seizing, taking possession of or detaining the said truck.

On 10th December, 1984, Mr. B.M.K. Mhango, who is the senior partner in the plaintiff firm, went to the defendant's branch in Mzuzu with a view to purchasing a truck. He dealt with the Branch Manager, Mr. Ismail Khan. Mr. Mhango settled on a Fuso Truck whose cash price was K62,950.00, so that if he had the full cash, he would have paid K62,950 plus 5% Government Tax. Unfortunately, he did not have the full amount and so according to Mr. Mhango it was agreed that he purchase the truck under a hire purchase agreement. It was then agreed that he should pay a deposit of K20,000 plus K3,147.50 representing 5% of the price which was Government Tax. Mr. Mhango then paid K23,147.50 and this was evidenced by receipt No. 37476, Exhibit P1. It was further agreed that the balance would be paid in 24 months by equal quarterly instalments and that interest would come to K16,626. At the end of the 24 months the plaintiff would have paid a total of K82,723.50 for the truck. These details were put on invoice no. 21813 dated 11th December, 1984, Exhibit P2. There would be 8 equal quarterly instalments of K7,447.00 each commencing from March, 1985. The truck was registered as BA 2828 and the plaintiff

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took delivery of the same. The registration book was in the name of the plaintiff, but endorsed thereon was a clause prohibiting the plaintiff from selling without the written consent of the defendant. It was Mr. Mhango's evidence that he understood this to be a hire purchase agreement. Indeed, he told the Court that it was also the understanding of the seller that it was a hire purchase agreement. However, no such agreeme nt was drawn at that moment. That would be drawn later on. The important thing was that the plaintiff had the truck he wanted.

All seemed to be going on very well and the plaintiff paid seven instalments on due dates. This, I think, was highly commendable. The seven instalments were paid by cheque and these were duly receipted for. The cheques plus receipts were tendered in evidence as Exhibit P3 to Exhibit P16. Several receipts described the payments as being in payment of H.P. Lease Hire. One referred to the payment as being a deposit and one issued by the Branch Manager himself refered to the transaction as a Lease Hire. As misfortune had it, trouble started with the very last instalment. The cheque for K7,447.00 was sent under covering letter dated December, 1986, but it was returned with "Refer to Drawer". Mr. Mhango told the Court that he did not know of this state of affairs until May, 1987. When he learnt of this, he immediately made arrangements and obtained a bank certified cheque in that amount. This was to replace the dishonoured cheque. He delivered this bank certified cheque in person at Mzuzu Branch. According to the plaintiff, this marked the final payment. But before Mr. Mhango delivered this bank certified cheque, Mr. Khan had rang him that he had instructions to go and repossess the truck as the last cheque was dishonoured. It was on the basis of this phone call that arrangements were made for the replacement cheque. The truck was indeed repossessed on the afternoon of 21st May, 1987, although the bank cheque had been delivered that morning. Inspite of this payment, the truck was not releas ed until 31st August, 1987. The reason being that the proceeds of the bank cheque were appropriated to a general repairs account which the plaintiff had with the defendant's garage. On 22nd May, 1987, the plaintiff sent a telegram, Exhibit P21 to the defendant in Mzuzu. In that telegram the defendant was advised that the truck was due to load sugar at Chilumba and if the truck was not relased, alternative transport would be hired at the defendant's account. The truck was not released and Mr. Mhango was in constant touch with the Branch Manager on the subject. The plaintiff wrote again on 22nd June, 1987, but the truck was not released. The plaintiff objected to appropriating the bank cheque to the general account and warned the defendant that it would have to pay the hire charges for alternative transport. The Fuso truck was purchased to service the plaintiff's sister companies which were, among other things, engaged in the distribution of sugar and buying agricultural produce. As a result of the truck's continued detention the plaintiff did hire trucks from H. Amosi Transport, Damba Trans- port and others and hire charges came to K13,883.10. This is so because allowances were made for fuel and depreciation. The plaintiff also lost rebate for not using the truck in distri- buting sugar. In addition, the plaintiff claims general damages for wrongful detention of the truck from 21st May, 1987 to 31st August, 1987. To have the truck released, the plaintiff

had to make arrangements for the payment of the general account.

The last limb of the plaintiff's evidence is on the nature of the transaction. Mr. Mhango testified that although this was a hire purchase agreement under which the minimum deposit must be thirty-three and a third percent of the cash price, the plaintiff only paid K20,000.00, which is less than thirty-three and a third percent. The effect of this was that the price was reduced by twenty-five percent and the transaction would be treated as a credit sale. This mean that the plaintiff should have paid K51,517.49, which is seventy-five percent of K62,950.00. As it were, the plaintiff paid K79,629.25 and was charged K16,626.00 interest. According to the Hire Purchase Act, he would have paid an interest of K5,726.65. As a result, the plaintiff ended up overpaying by K28,111.76, which he is now claiming. Finally, the plaintiff prays for a declaration that the vehicle belongs to him and he wants the endorsement removed from the registration book. The plaintiff also seeks a permanent injunction to restrain the defendants from seizing the vehicle.

Mr. Mhango was cross-examined at length, but he maintained that he went to the defendant's branch at Mzuzu with the express intention of buying a truck. He never went there to lease a truck. All his discussions with Mr. Khan were centred on the question of purchasing a truck. Mr. Mhango could not produce all the cash at once and so a hire purchase agreement was arranged. He emphasized that the invoice, Exhibit P2, which talks of purchase price is clear testimony that this was a sale agreement and not a lease. He denied having authorised any of his staff to sign the alleged lease hire agreement, Exhibit D1, and it was his evidence that he saw this document for the first time when it was exhibited to an affidavit in opposition to his application for interlocutory injunction.

The next witness for the plaintiff was Mr. Ranwell Piyo Kangoli Gondwe(PW2). In 1984 he was working for Sumuka Enterprises Limited as a personnel manager. He was stationed at the offices of Bazuka & Company in Blantyre. His evidence was that during lunch-hour, on a day hecould not remember, one of the defendant's employees brought some documents to the offices of Bazuka & Company. This was a lease hire agreement, Exhibit D1. The witness was asked to sign this document as it was for the release of a truck the plaintiff was buying in Mzuzu. It was Mr. Gondwe's evidence that he knew the plaintiff was buying a truck in Mzuzu and he signed the documents on the assumption that Mr. Mhango had authorised the defendant to take the documents to him. As that was lunch-hour, he could not ring Mr. Mhango to confirm. He testified further that as he worked for Sumuka Enterprises Limited he had no authority to sign documents for Wiyule Brothers. He had not read the document before signing and in cross-examination he said that he had never told Mr. Mhango that he had signed such a document.

Perhaps I should mention that Mr. Mhango is the Managing Director of Sumuka Enterprises Limited and is the sole partner of Bazuka & Company. He is also the senior partner of the plaintiff firm. It is on this basis that Mr. Nakanga submitted that Mr. Gondwe had authority to sign on behalf of the plaintiff. On the other hand, the plaintiff submitted that this document is not

binding because Mr. Gondwe had no authority to sign it and Mr. Mhango who negotiated the transaction on behalf of the plaintiff never saw it. If it becomes necessary I shall at the appropriate time decide whether this document is binding on the plaintiff or not. There is, however, one thing that surprises me about the signing of this document. The transaction was negotiated in Mzuzu by Mr. Mhango, on behalf of the plaintiff and Mr. Khan, on behalf of the defendant. One would, therefore, have expected that any document governing the transaction should have been signed in Mzuzu and possibly by the same parties, that is Mr. Mhango and Mr. Khan. But as it happened Mr. Khan did not have the cyclostyled forms in Mzuzu and so he authorised the document to be signed in Blantyre. What is clear therefore is that Mr. Mhango had not been shown the document that was to be signed in Blantyre. Since the transaction was negotiated by Mr. Mhango, I think it was a matter of paramount importance that he should have seen the document that was to govern the transaction before it was signed. I wonderhow Mr. Mhango could have authorised the signing of a document he did not see. There is no evidence from Mr. Khan that it was agreed with Mr. Mhango that any of Mr. Mhango's staff in Blantyre would sign the document on behalf of the plaintiff. The defendant did not lead evidence relating to the manner in which the document was signed in Blantyre. The signing of this document is therefore a matter of obscurity.

Mr. Ismail Khan, DW1, was the principal witness for the defendant. It was he who dealt with the plaintiff. Of course he did that on behalf of the defendant in his capacity as Branch Manager. He was in the motor business for 12 years. His evidence was that Mr. Mhango wanted to lease a Fuso truck. Mr. Mhango then paid a deposit of K20,000.00. The deposit having been paid, Mr. Khan instructed his Blantyre office to have a Lease Hire Agreement signed. After sometime a Mr. Maciel rang him from Blantyre to say the document was signed and stamped. It was only then that the truck was released to the plaintiff. This document headed "Memorandum of Agreement of Lease of Motor Vehicle" dated 11th December, 1984, was tendered in evidence as Exhibit D1. Under this agreement the plaintiff was to lease the vehicle for a period of 24 months at 8 quarterly rentals of K7,447.00 each, the first of which was payable on 10th March, 1985. In this agreement the plaintiff is described as the "lessee", while the defendant is referred to as the "lessor". Clause 4(a) provides that during the continuance of the agreement ownership shall lie with the defendant, while the plaintiff shall only be entitled to possession, use and enjoyment. Clause 11(a) provides that at the expiration of the agreement the plaintiff, who is lessee, is to return the vehicle at its own expense to the defendant, who is the lessor. Clause 12 empowers the defendant to cancel the agreement in the event of default in the payment of rentals or other breach on the part of the plaintiff. I shall in the course of this judgement refer to certain other aspects of the agreement wherever it becomes necessary. It was Mr. Khan's evidence that this document is the sole agreement governing the transation and that there was no other collateral agreements. The witness denied categorically that this was a hire purchase agreement and

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to bring the point home he referred to the plaintiff's letter, Exhibit D11, dated 29th May, 1987, which was headed "Purchase of Fuso Truck Under a Lease Hire Agreement".

Mr. Khan further informed the Court that the plaintiff duly paid all rentals, except the last, when the cheque relating to that payment was not honoured by the bank. The plaintiff then, under his letter dated 21st May, 1987, Exhibit D3, sent a bank certified cheque. Prior to this letter the witness had by phone notified Mr. Mhango of the dishonoured cheque. Since there was default on the last instalment, Mr. Khan repossessed the truck on 20th May, 1987. There was not enough fuel in the tank to get to Mzuzu and so he bought diesel for K100.00 and he produced Exhibit D2 as evidence of this. It was Mr. Khan's evidence that the bank certified cheque was not credited to the lease hire account, but to the general repairs account. Under Clause 14(c) of the lease hire agreement, the defendant was entitled to appropriate the cheque in this manner. It was in the defendant's discretion to allocate monies at its hands the way it deemed fit. In the meanwhile, the plaintiff was pressing that the truck be released, but the witness maintained that there could be no release unless the general repairs account was fully paid. The plaintiff then issued post-dated cheques and sent them under cover of a letter written without prejudice. The truck was then released, but immediately that was done the plaintiff stopped payment of the cheques. According to the witness, this was cheating. He then threatened that he was going to repossess the truck again. Before that was done, the plaintiff obtained a court order restraining the defendant from so doing. Mr. Khan denied that the defendant was liable to pay the hire charges incurred by the plaintiff during the period the truck was under detention. He also denied that the defendant was overpaid; as a matter of fact, the plaintiff has not finished paying for the truck, which means that the vehicle still belongs to the defendant.

When cross-examined, Mr. Khan conceded that although in examination-in-chief he had said that the Lease Hire Agreement, Exhibit D1, was the only document governing the transaction, the receipt for deposit, Exhibit P1, and the invoice, Exhibit P2, form part of the transaction. He said that the transaction was evidenced by the Lease Hire Agreement, the deposit receipt and the invoice. He also conceded that in the absence of the deposit receipt and the invoice, the lease hire agreement could not be prepared. He also conceded that the invoice, Exhibit P2, gave the purchase price as K82,723.50. Asked why the lease hire agreement talks of rentals, while the invoice referred to purchase price, his explanation was that the purchase price and rental are one and the same thing. He maintained that Mr. Mhango said he wanted to lease a truck and not to buy one. Referring to the signing of the lease hire agreement, it was Mr. Khan's explanation that Mr. Mhango must have delegated someone in Blantyre to sign on his behalf. Turning to the practice of leasing trucks

like the plaintiff did, Mr. Khan explained that once a lessee has paid all the rentals under the agreement, he returns the truck to the lessor and the lessor gives him some cash discount for having used the truck. The truck could then be leased to another lessee. The lessee does not obtain ownership of the truck, although he has paid everything that is to be paid under the agreement. Mr. Khan conceded that paragraph 2 of the defence stated that if the plaintiff paid the full purchase price plus interest, ownership of the truck would pass to him. His explanation was that that was a mere goodwill gesture to Mr. Mhango, but it was not agreed that ownership would pass to the plaintiff after everything was paid. In the course of this judgment I will at the appropriate time refer to some of the things this witness said in cross-examination.

The next witness for the defendant was Mr. Saguga, DW2. He is the defendant's Credit Controller and he has served in that capacity for the past 11 years. His evidence related to the accounts the plaintiff had with the defendant and he was quite brief. In cross-examination he was asked if the defendant has any trucks on which the full lease hires were paid. He replied that the defendant had none. In sharp contrast to what Mr. Khan said, Mr. Saguga explained that the defendant sells vehicles on lease hire and if a lessee pays all the rentals, the vehicle becomes his. Turning to this very transaction, the witness told the Court that the plaintiff bought the truck on lease hire and that on full payment the truck would be his.

I now set out to consider the evidence before me. As both learned counsel have rightly submitted, the main issue for determination is what the true nature of the transaction was. The plaintiff maintains that he was purchasing a truck and this was a hire purchase agreement. On the other hand the defendant's case is that the plaintiff was not purchasing a truck but leasing a truck and this was a lease hire agreement as evidenced by Exhibit D1. Clause 14(f) of this document states:

> "This agreement constitutes the entire agreement between the parties hereto and the parties hereby declare that there are no collateral Agreements or undertakings which refer to or affect or which are in any way related to this Agreement whether directly or indirectly ....."

This clause is clearly very wrong and very misleading. As a matter of fact several other clauses are misleading. The impression created by this lease hire agreement, Exhibit D1, is that the plaintiff got this truck from the defendant on lease without paying anything whatsoever. Clause 1 states that:

> "The Lessor shall let to the Lessee and the Lessee shall take and hire from the Lessor for a period of 24 months from the 11th day of December One thousand nine hundred and eight four ....."

Clause 2 states that there will be quarterly rent of 8 x K7,447.00; then follow various other clauses dealing with delivery of the vehicle, ownership, etc. etc. Nowhere does the agreement mention a deposit of K23,147.50 and nowhere is the invoice, Exhibit P2 referred to. It is in this respect that this document is misleading and that is particularly so when one considers the provisions of clause 14(f). When pressed in cross-examination Mr. Khan conceded that the deposit receipt, Exhibit P1, and the invoice, Exhibit P2, formed part of the transaction. He went on to say that the lease hire agreement, Exhibit D1, could not be prepared in the absence of Exhibit P1 and Exhibit P2. If, as conceded by Mr. Khan in cross-examination, these documents formed part of the transaction, why were they excluded in the agreement? I think that this goes to support the plaintiff's case that the so-called lease hire agreement does not represent the true nature of the transaction.

Let us for a moment look at what happened in Mzuzu. Mr. Mhango went to see Mr. Khan, the branch manager. I have no doubt in my mind that Mr. Mhango went there with the express intention of buying a truck. He made this quite clear to Mr. Khan who quoted the price. Mr. Mhango did not have the full amount and so he paid a deposit of K23,147.50 and a receipt, Exhibit P1, was issued. It is common knowledge that this receipt would form part of whatever transaction that would be entered into. Mr. Khan then prepared an invoice, Exhibit P2, which gave the total purchase price. Mr. Khan conceded that this document did record the purchase price. Perhaps I must set out the relevant parts of this document.

	K t
BA 2828	
New Fuso Truck No.107023	62,950.00
Chassis No.50093	
5% Government Tax	3,147.50
(Quarterly instalments)	
24 months interest	16,626.00
	K82,723.50

It is abundantly clear that at this stage of the transaction Mr. Mhango was buying a truck and this document set out what was to be paid. If Mr. Mhango had the full cash he was going to pay K62,950.00 plus government tax. Since he did not have

this money he would have to pay interest as well bringing the total to K82,723.50. Mr. Khan conceded that this was the position. What remained was to draw a formal agreement to embrace Exhibit P2. According to Mr. Mhango it was agreed that a Hire Purchase Agreement would be drawn. According to Mr. Khan this was a lease hire. What is clear however is that Mr. Khan did not have any standard form agreement to show Mr. Mhango. Mr. Khan said these were cyclostyled documents but he did not have any to show Mr. Mhango, but he authorised his office in Blantyre to have one signed. It is clear therefore that Mr. Mhango did not know what type of agreement was signed in Blantyre. In these circumstances I very much doubt if Mr. Mhango authorised Mr. Gondwe to sign this document whose terms are fundamentally different from the purport of Exhibit P1 and Exhibit P2. I am saying fundamentally different because Exhibit P2 gave the purchase price as K82,723.50 and having paid deposit of K23,147.50 the balance was K59,576.00 which, according to Exhibit P2, was to be paid in quarterly instalments in a period of 24 months and yet under Exhibit D1 the plaintiff was to pay rent. Instalment and rent are entirely different things - see Jowitt's Dictionary of English Law, second edition, volumes 1 and 2. When the plaintiffs paid the deposit of K23,147.50 they were paying towards the purchase price and yet under Exhibit D1 they ended up paying rentals. Price and rentals are not the same thing and one cannot pay both in the same transaction. I am inclined to think that either Mr. Khan was confusing matters or he was deliberately concealing the obvious when he said that price and rent are one and the same thing.

I think that I should now turn to the question of ownership. The registration book is in the name of the plaintiffs, Wiyule Brothers. There is, however, an endorsement in the following words:

> "Not to be sold without the written consent of Stansfield Motors Ltd., P.O. Box 151, Mzuzu".

In his evidence Mr. Khan said that the vehicle belonged to the defendant and that is why there was that endorsement. The endorsement would only be removed when the plaintiff finished paying for the vehicle. At that stage the vehicle would belong to the plaintiff. The position, therefore, was that the plaintiff enjoyed possession and use of the vehicle, while ownership was with the defendant. Ownership would pass to the plaintiff when everything was paid for. In another breath of his evidence, Mr. Khan said that it was never intended to pass ownership to the plaintiff. The vehicle would all throughout belong to the defendant even though the plaintiff finished paying all the rentals. Mr. Khan was the type of witness who kept on changing his evidence to suit the moment. He said in lease agreements, ownership never passes to the lessee. In this instant, even if the plaintiff finished paying all the rentals, the vehicle would come back to the defendant and the

same vehicle would yet be leased to another lessee. When pressed in cross-examination, he said in this particular case the ownership in the vehicle would pass to the plaintiff merely as a goodwill gesture to Mr. Mhango. Exhibit D1 seems to be contradicting itself; while Clause 4(a) seems to suggest that ownership would pass to the plaintiff at the determination of the agreement, under Clause 11 ownership would never pass to the plaintiff even after paying all that was to be paid. Under this clause the lessee is under an obligation to return the vehicle to the lessor at his own expense. On the same subject of ownership, paragraph 2 of the defence states:

> "The defendant states that the plaintiff leased the said truck for 24 months and, in terms of the Memorandum of Agreement thereof the said truck remained the property of the defendant until the plaintiff paid off the agreed price and interest."

I find this paragraph to be very interesting, because the Memorandum of Agreement does not mention price, neither does it mention interest. The agreed price and interest appear in the invoice, Exhibit P2, which the alleged agreement sought to exclude.

What then was the true nature of the transaction? In the case of Goan Social Club vs Bobillier and G.F. Ponson Ltd. (1961-63) ALR Mal.190:

> "The plaintiffs brought an action against the defendants for the recovery of certain chattels, alternatively the value of the chattels, and for damages for the detention and conversion of the chattels.
>
> The plaintiffs, a social club, alleged that the defendants had agreed to buy a billiard table from them, payment for which was to be made on a monthly basis. A representative of the defendants took delivery of the table having signed a bill of sale and paid the first instalment. The defendants failed to pay subsequent instalments even after having been repeatedly asked to do so by the plaintiffs. The table was seized by the plaintiffs allegedly under the bill of sale. It was argued for the defendants that the transaction was in fact one of hire-purchase and not a sale and that, therefore, the plaintiffs had no right to seize the table."

These are the brief facts as given in the head note. The Court carefully considered all the evidence before it and held that it was entitled to investigate the true nature of the transaction. The Court found that the transaction was in fact an instalment sale agreement and not a bill of sale. The Court followed with approval the dictum of Maughan, L.J. in the case of the Lonegrove ex Applestone (1935) 1 Ch.464:

> "It is beyond all doubt that in a case such as this one does not look merely at the form of the document which is alleged to be a bill of sale. The true nature, not the form of the transaction, must be regarded, and if the document itself in effect is only a cloak for what is really a mortgage of chattels or a pledge of chattels, the form may be disregarded."

In an earlier case of Re Watson exp. Official Receiver (1890) 25 QBD 27 Maughan, L.J. said:

> "Whether a transaction purporting to be a sale and purchase of goods is no more than it appears to be on its fact, or whether it really is a loan or security, and therefore a document which might be hit by the Bills of Sale Acts, is a question to be determined by ascertaining the true intention of the parties. That true intention may appear either from the document itself, because although it uses the language of sale and purchase, it might very well on its mere words appear to be nothing other than a loan on security or it may appear from any collateral agreement or other document which would show that the true intention was a loan on security, or finally the fact might be ascertained by parol evidence which would suggest some fraud on the part of the person who is either the vendor or the borrower, whichever view the Court should take."

Similarly, this Court is entitled to go beyond Exhibit D1 and investigate the true nature of the transaction. This I intend to do by carefully examining the parol evidence, learned counsel's submissions and all the documents that were tendered. Mr. Khan agreed that the purchase price was K82,728.50 as evidenced by Exhibit P2. He told the Court that if Mr. Mhango had sufficient money he would have bought the truck at K62,950.00 plus Government Tax. Having paid a deposit of K23,147.50, the balance of K59,576.00 was to be paid in eight quarterly instalments in 24 months. It is significant that total rentals to be paid under Exhibit D1 came to the same total of K59,576.00. It appears clear to me that from the word 'go' the plaintiff's express intention was to buy a truck and the defendant's intention was to sell a truck. This is further evidenced by the letters the plaintiff wrote when sending the instalment cheques. In these letters, and there are more than eight of them, the transaction is described as "Purchase of Fuso Truck by Wiyule Brothers" and the defendant raised no objection at all. Most of the payments were receipted as "H.P. Lease Hire". Even after Exhibit D1 was signed, Mr. Khan continued to offer to sell the truck to the plaintiff outright and a discount of 2½%. The plaintiff reacted to this offer and made an immediate payment of K7,500.25, leaving a balance of K33,876.00, but money was not easy to come by and so instalments continued. If there was no intention to sell from the very beginning, then surely Mr. Khan would not have made an offer of outright sale in the

middle of instalments after Exhibit D1 had been signed. As for the question of ownership, it is again clear from the evidence that the intention was that ownership would pass to the plaintiff when all the monies were paid. Mr. Khan kept on changing his evidence at will to suit the moment, but he finally conceded that after making all payments ownership would pass to the plaintiff. Mr. Saguga was quite clear on the point.

On a very carefull consideration of the documents before me, including the alleged Memorandum of Agreement to Lease a Motor Vehicle, as well as parol evidence and learned counsel's submissions, I come to the conclusion that this was not a lease hire. It was in effect a hire purchase agreement coming within the Hire Purchase Act as defined under Section 2. The plaintiff referred to the case of Snook vs London and West Riding Investments Ltd. (1967) 2 QB 786 in which Diplock, L.J. defines "sham". I do not want to go that far for I do not think that the defendant's intention was to deceive or defraud the plaintiff. Indeed, the defendant is a motor vehicle dealer of high repute. All I can say is that the most unfortunate part of this transaction is that while it was negotiated and agreed in Mzuzu, Exhibit D1 was signed in Blantyre. The circumstances in which this document was signed are, to say the least, obscure. As it happened, this document did not record the true nature of the transaction and did not represent the real intention of the parties. Exhibit P1 and Exhibit P2 formed the very basis of the transaction agreed by the parties in Mzuzu and yet Exhibit D1 sought to exclude these vital documents.

Having found that in reality this was a hire purchase agreement, I must now look at the consequences that follow. It is in evidence that this truck, BA 2828, was seized by the defendant. However, the date of such repossession is in dispute. According to the plaintiff, it was on 21st May, 1987, while the defendant says it was on 20th May, 1987. On the evidence before me, I prefer the plaintiff's evidence. Paragraph 11 of the statement of claim clearly pleads that the vehicle was repossessed on 21st May, 1987. This is not disputed in the defence. Paragraph 9 of the defence does refer to paragraph 11 of the statement of claim, but merely explains why the truck was repossessed. Exhibit D2 is indeed suspicious and I disregard it. I, therefore, find it as a fact that this truck was repossessed on 21st May, 1987. It is common knowledge that despite pressure from the plaintiff to have the truck released, the same was not released until 31st August, 1987, which means that the defendant detained the truck from 21st May to 31st August, 1987.

The immediate question that follows is whether the defendant was entitled to repossess the truck and detain it. It is clear from the evidence of Mr. Khan that the defendant repossessed the truck because the last instalment of K7,447.00 was not honoured by the bank. Repossession went ahead even

though the plaintiff replaced the dishonoured cheque with a bank certified cheque. By the time the repossession took place, the plaintiff had paid well over fifty per cent of the agreed purchase price. In repossessing the truck the defendant did not comply with the provisions of section 19(1) of the Hire Purchase Act. The repossession and continued detention were, therefore, wrongful. The defendant well knew that this was a profit-making vehicle and that it was involved in the distribution of sugar in the North among other duties. The plaintiff made it quite clear that if the truck was not released, then they would hire alternative transport and carry sugar and other commodities. The defendant must certainly be liable for these hire charges. The plaintiff sufficiently proved the hire charges in the sum of K13,883.10; however, an allowance was made for fuel and depreciation and so a sum of K10,640.00 was claimed. As indicated earlier in this judgment the plaintiff hired from H. Amosi Transport, Damba Transport and various other transporters. Various documents running from Exhibit P28 to Exhibit P47 were tendered in support of the hire charges. I find this to be a proper claim and so I enter judgment for the plaintiff in the sum of K10,640.00. In addition to this, the plaintiff suffered loss of profits by way of loss of rebate for not using the truck in June and July, 1987. This totals to K5,606.00 and I enter judgment for the plaintiff in that amount.

I now turn to the price and interest and the plaintiff is claiming a refund of K28,111.76 as an overpayment. I must confess that the calculations are a little complicated, but I am much indebted to the plaintiff who made detailed calculations in his written submissions. The plaintiff's contention is that the provisions of section 24(1)(a) of the Hire Purchase Act were contravened, in that a deposit of K20,000.00, representing 31.77% of the cash price, was paid. According to the plaintiff, the Fuso truck comes under category "G" of the Schedule and the initial deposit to be paid should have been thirty-three and a third per cent of the cash price. As a result of this alleged violation of the Act, the transaction became a credit sale and the cash price reduced by twenty-five per cent in terms of section 24(3). In so far as the price is concerned, the plaintiff has got his figures wrong. To begin with, the Fuso truck cannot be classified under "G" as any other goods. The truck should appropriately come under category "C" and the initial deposit to be paid must be twenty per cent of the cash price. What was paid represented 31.77%, so that section 24(1)(a) was not violated. Even if the truck were to be classified under "G", again there would be no violation, as the initial deposit payable must be 30%. This is less than what was paid. It follows, therefore, that section 24(3) would not apply since there was no violation.

As for interest or finance charge, the plaintiff was indeed overcharged. However, violation of interest or finance charge does not render a transaction a credit sale. The

plaintiff was charged an interest of K16,626.00. Mr. Khan made no attempt whatsoever to explain how this figure was arrived at. Under the Hire Purchase (Finance Charge) Notice the interest payable is 15.69% and this is on a reducing balance. The total interest payable is calculated at K5,726.65 as follows:

"Cash price	K62,950
Less Deposit	20,000
Balance of purchase price after payment of deposit	42,950
Rate of per centum allowed by the Act	3
Instalment	7,447

Interest on 42,950 March 1985 = $\frac{15.69 \times 42,950 \times 3}{100 \times 12}$

= K1,684.71

Hence on reducing basis

42950	Interest on 42950	=	1684.71
-7447			
35503	Interest on 35503	=	1392.60
-7447			
28056	Interest on 28056	=	1100.60
-7447			
20609	Interest on 20609	=	808.39
-7447			
13162	Interest on 13162	=	516.28
-7447			
5715	Interest on 5715	=	224.17
			5726.65

The total purchase price was, therefore, K62,950.00 + K5,726.65 = K68,676.65. The plaintiff has paid a total of K79,629.25 including Government Tax against a purchase price of K68,676.65. The plaintiff is, therefore, entitled to a refund of the excess payment which is K10,952.60. I, therefore, enter judgment for the plaintiff in that amount. I award the plaintiff a further K1,000.00 as general damages. This means that the truck is fully paid for and ownership, therefore, passes to the plaintiff and the restrictive endorsement must be removed from the registration book forthwith. The end result is that the defendant cannot lawfully seize the truck.

In all, I enter judgment for the plaintiff in the total sum of K28,198.60. The defendant is to pay the costs of these proceedings.

PRONOUNCED in open Court this 4th day of July, 1991, at Blantyre.

M.P. Mkandawire
JUDGE

NAKANGA: I apply for a stay of execution as I have instructions to appeal. My learned friend to make an undertaking to refund costs.

MHANGO: I would suggest that separate application be made.

COURT: Application is to be separate.

NAKANGA: A decision for the interim.

COURT: In that case I stay execution till another application is made. In the meantime the money to be paid is to be lodged with the Court within 7 days from today.

M.P. Mkandawire
JUDGE