

C.I.

R3 2/8

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 19 OF 1988

HIGH COURT  
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BETWEEN:

DAVID WHITEHEAD & SONS (MALAWI) LIMITED.....PLAINTIFF

- and -

L F T CHIPEMBERE.....DEFENDANT

CORAM: UNYOLO, J.

Kanyuka (Mrs), of Counsel, for the Plaintiff  
Kumange, of Counsel, for the Defendant  
Selemani, Official Interpreter  
Gausi, Court Reporter

J U D G M E N T

Originally, the plaintiff claimed from the defendant the sum of K23,843.57, being amount due for goods sold and delivered by the plaintiff to the defendant.

In his defence, the defendant admitted owing the sum of K15,471.02 only, thereby leaving in dispute the sum of K8,372.55. And when the trial of the action began the Court was informed that the defendant had paid the sum of K15,471.02. Consequently, the case went to trial only as regards the sum of K8,372.55.

The plaintiff is a limited company engaged in the manufacturing of textiles of divers types. The defendant is a trader. He owns a retail shop in Lilongwe and a wholesale shop in Mzimba. It is common case that the defendant began doing business with the plaintiff as far back as 1984. Initially, he could only get things on cash-on-delivery basis, but by and by he proved so reliable that he was allowed credit facilities.

What used to happen was that the defendant would place his order through the plaintiff's Regional Office in Lilongwe. The order would then be forwarded to the plaintiff's Head Office in Blantyre. After processing the order, the Head Office would then pack the items ordered in bales and forward the same to Lilongwe, normally through a private transporter. There would be an accompanying invoice detailing the goods freighted and the invoice would be in the name of the defendant, and when the goods arrived in Lilongwe, the defendant would be informed. He would then call in and collect the goods. He would at that stage sign

HIGH COURT  
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a Delivery Note, signifying he had collected the goods. Thereafter, the Regional Office would send the relevant information, called summaries, to the Head Office and statements of account were in due course sent to the defendant for his attention. Perhaps I should mention that this was the procedure followed with regard to each and every credit customer.

The plaintiff's claim in this case related to transactions during the period 26th September 1985 and 29th November 1985. It is the plaintiff's case that during that period the defendant got goods on account from the plaintiff for a total sum of K25,843.57 and only paid the sum of K2,000.00, leaving a balance of K23,843.57 and, as I have indicated above, the plaintiff says that by the time the case came to trial, the defendant had paid a further sum of K15,471.02, leaving a balance of K8,372.55. The relevant invoices raised by the plaintiff are set out in the statement of claim and also in Exhibit D1, which is a letter the plaintiff wrote to the defendant on 9th June 1987 demanding immediate payment of the amount outstanding as at that date.

The K8,372.55 is reflected in two invoices, Nos. 207301 and 207303 (Exhibits P1 and P2), both dated 4th November 1985, for K1,956.75 and K6,415.80 respectively. Both these invoices indeed bear the defendant's business name and it was in the evidence that these are copy invoices which were retrieved from the plaintiff's Head Office files. It was said that the originals and duplicates thereof accompanied the goods from Blantyre to Lilongwe. Then the originals were sent to the defendant as notification the goods had arrived.

The defendant's case is that he did not receive the goods shown in the two invoices herein. As I have earlier indicated, the defendant has all along admitted receiving other goods, represented by a total of ten invoices, ordered by him during the period 26th September 1985 and 29th November 1985, worth K17,470.02. The defendant has since paid the sum in full.

The trouble here is that the plaintiff is not able to produce any Delivery Note or Delivery Notes signed by the defendant acknowledging receipt or collection of the goods represented by the two invoices. As I have indicated earlier, the defendant, and indeed every other person, had to sign a Delivery Note raised by the Regional Office each time he collected any goods. It is the plaintiff's case that the delivery Notes which the defendant signed in this respect were mislaid in the office, in Lilongwe and cannot be found. This situation obviously places the plaintiff in a quandary, because the best evidence that the defendant collected and received the goods in question would come from the Delivery Notes themselves, duly signed by the defendant.



The person who used to be the plaintiff's Regional Sales Controller in Lilongwe at the material time was called as a witness - PW2. This witness is no longer working for the plaintiff. He left the plaintiff's employ in 1986. He was fired. It was the evidence of this witness that the defendant did actually receive the goods shown in the two invoices, Exhibits P1 and P2, and that the defendant did duly sign Delivery Notes in respect thereof. He said that copies of the Delivery Notes in question missed in the course of "change of offices". The witness said that there was no time before he ceased working for the plaintiff that the defendant disputed having received the goods.

I have given the evidence the closest of attention. The defendant is adamant he didn't receive the particular goods set out in the disputed invoices. I have already indicated that the defendant used to be a very reliable customer of the plaintiff and no reason has been shown why suddenly the defendant should have changed colours. It is not that the defendant has gone broke. Not at all. He is still in business, and as we have seen, has paid quite a substantial amount he admits owing. It was the defendant's evidence that it was when later he examined his records and the composite accounts closely that he discovered he had not got the goods indicated in the disputed invoices.

It is also to be observed that the plaintiff is a large and well-established company. The defendant dealt with the Regional Office and I am far from being convinced that only the two Delivery Notes as respects the two invoices herein, and only those, missed. It is noted from the evidence that the plaintiff was able to find Delivery Notes for goods supplied between 26th September 1985 and 15th October 1985, and also for goods supplied between 20th November 1985 and 29th November 1985. How could only the invoices of 4th November 1985 miss? Respectfully, I find it difficult to accept the explanation proffered on the part of the plaintiff.

It is also in the evidence that PW2 was fired by the plaintiff company for "irregularities" and one of the allegations is that the witness used to divert goods ordered by one customer to another customer. It is, therefore, possible, as the defendant contended, that PW2 sold the goods set out in the disputed invoices to some other person(s). All in all, I am not satisfied that the factum of delivery of the goods has been established.


It was then submitted by learned Counsel for the plaintiff that the defendant cannot be heard to complain, in that property in the goods and risk in respect thereof passed to the defendant at the time the contract was concluded with the plaintiff's Head Office in Blantyre, before the goods were even sent. This is an ingenious argument, but I don't think it can prevail in this case, since the plaintiff's case is one for goods sold and

delivered, as I have shown. The plaintiff cannot, therefore, succeed if delivery of the goods has not been proved.

It was also submitted that the defendant is estopped from denying owing the money, in that for quite sometime he gave the plaintiff the impression that he admitted the debt and that it was only much later that he brought up the issue of the Delivery Notes. The defendant, as I have shown, has given an explanation on this point. He has said that initially he was only looking at the composite accounts and that when he later examined the same closely, he discovered that he had been wrongly debited with the amounts shown in the disputed invoices, and then he raised the matter with the plaintiff's Regional office. The defendant also told the Court that he was in detention for sometime in between. With respect, I accept the defendant's explanation and the plea of estoppel must, therefore, fail. In the result, the plaintiff's claim fails and it is accordingly dismissed.

I would like to hear Counsel on the question of costs, as it would appear that, strictly speaking, the defendant has not wholly succeeded in the action. Part of the amount originally claimed in this case appears to have been paid only after the proceedings were commenced. It is, however, not clear precisely at what point in time and under what circumstances the payment was made.

DELIVERED in open Court this 30th day of December 1992, at Blantyre.

  
L. E. Unyolo  
JUDGE