

MS J.F. Mwaungulu.

IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 601 OF 1992



BETWEEN:

M G CHITUNGU.....1ST PLAINTIFF

- and -

MISS F CHIUTSI.....2ND PLAINTIFF

- and -

NAPOLO UKANA BREWERIES LIMITED.....DEFENDANT

CORAM: MTEGHA, J.

Chagwamnjira, of Counsel, for the Plaintiffs

Kasambala, of Counsel, for the Defendant

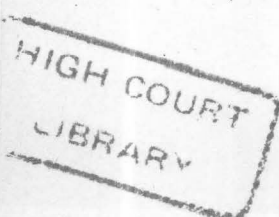
Manondo (Mrs), Official Interpreter

Maore, Court Reporter

J U D G M E N T

The plaintiffs in this case, M G Chitungu and Miss F Chiutsi, are claiming damages against the defendant for trespass to goods and conversion and loss of business. The defendant has denied liability.

It is not disputed that the first plaintiff was at one time an employee of the defendant. He was occupier of House No. CY.67 at Chinyonga which he was renting from Malawi Housing Corporation. In September 1991 he was transferred to Balaka and left his house in the care of one, Charles Banda, also an employee of the defendant. In the house there were household goods, and among such goods were pieces of furniture, belonging to the first plaintiff. There was also in the house a sewing machine which belonged to the second plaintiff which she used for the business of tailoring clothes which she sold to the public. It was the first plaintiff's evidence that he owned the house at Chinyonga and on about 20th September 1991 he left for Balaka and left one, Charles Banda in the house. While there, the Police at Soche called him and asked him about his property which the defendant, through its agents, had taken from his house because Charles Banda was found with a shortage at his place of work. The properties which were taken were one dining table, one bed and mattress, one cupboard and two coffee tables, which were valued at about K1,000.00. They also took a sewing machine which belonged to the second plaintiff, who was his sister-in-law. He told



the Police in the presence of the defendant's employees that these items belonged to him. The Police instructed him to go and collect the goods, but when he went to the defendant's premises the defendant refused to deliver the goods except on condition that Banda should go to Police to be dealt with by the Police or write a letter. Banda opted to write a letter. This letter, which was dated 6th March 1992, is reproduced hereunder:

"Dear Sir

WITHDRAW OF HOUSEHOLD ITEMS FROM HOUSE NO. CY/67

Reference is made to verbal conversation among Mr Maele, Miss Chiutsi, Mr Chitungu, Mr Kandiwo, myself, the Detective Mr Gondwe and the Officer-in-Charge of Soche Police.

As you recall you requested me to write a letter to you direct that the ceased items should be returned back to the owners. I strongly agree the suggestion since the mistakes happened just because you and your security people forced me. I am also suggesting that it could be better if you calculated all my monthly salaries from November 1991 to-date and deduct from the shortage I have. Sir, the balance remaining if possible could be deducted from my monthly salaries. I am sure you have hold my money worth K600.00 which after deductions the remaining shortage will be K297.00. Sir I am sure that since I was not suspended and that my service have not terminated the whole amount of K600.00 is due to me.

I have hope that things will go this way all will go well because the complenants will have their goods and your company will have the money back.

I am yours faithfully  
Charles Banda  
Tavern Manager

LIST OF ITEMS  
1 Sewing machine  
1 Table  
2 Coffee tables  
1 Bed and mattress  
1 Chest of drawers"

It was his evidence that after he received a copy of this letter he went back to Police, who advised him that the officer who handled the case at the Station was not present. He was further advised that if he wanted his goods he should find the money and pay back to the defendants. He then referred the matter to his lawyers.

The evidence of the second plaintiff was that she had a sewing machine which she used for tailoring clothes and selling the clothes to members of the public. She employed a tailor in this respect, and he was doing the tailoring at

the house of the first plaintiff. She used to make about K500.000 per week. It was her evidence that at one time she could not go to Chinyonga because she was at the hospital with a sick relative. When she went there after some weeks, she found that her sewing machine was not there, having been taken by the defendant's employees, because, they alleged, Banda had misappropriated the defendant's funds. She took Banda to Police at Soche, and together with the Police, they went to the defendant's offices. When the Police asked them, the defendant's employees admitted to have taken the machine and they also admitted that Banda had told them the machine did not belong to him. When she checked the machine, some parts were not there and the machine was not usable. As a result, she decided to collect the machine until it was in working order. She has not collected the machine up to now, despite the fact that she had been there on three other occasions.

The third witness for the plaintiffs was Cecilia Binga. Her evidence was to the effect that she used to have her clothes tailored at Chinyonga using Miss Chiutsi's machine. One day she went there and found that the machine was not there and, as a result, she could not sew her clothes for sale.

The evidence of PW4, Charles Banda, was that he was employed by the defendant as a Tavern Manager, based at Bvumbwe, but staying at Bvumbwe or at Chinyonga. The house at Chinyonga belonged to his father-in-law. It was his evidence that while working as a Tavern Manager he was found with a shortage. When this shortage was discovered, the defendant's employees asked him to refund the money; but he did not have the money. As a result, Mr Mphande, a security guard, and a driver went to his house and demanded property which could be kept at the office until he paid the money. He was also told that if he did not hand over the property, they would report him to Police for criminal charges. Because of the threats, he handed the property from the Chinyonga house to them, despite the fact that he told them the properties were not his. As a result, one sewing machine, two coffee tables, one table, one cupboard and one bed and mattress were taken to the defendant's premises. It was his evidence in cross-examination that he had a shortage of K924.60. It was further his evidence that he wrote the letter (Ex.P1) after discussions with the Police.

The defendant called two witnesses. The first defence witness was Manchester Philimon Mphande, a sales co-ordinator employed by the defendant. It was his evidence that he knew Charles Banda as a Tavern Manager based at Bvumbwe. On 6th December 1991 the witness was told that Banda had a shortage at his tavern. In pursuance of this report, he asked Banda to come to the office, but Banda did not turn up. He checked at his house and left messages that Banda should report to Police; but Banda never turned up.



Neither could Banda be found at his place of work. On 14th December 1991, at 5.30 am, he went to Banda's house at Chinyonga, and found him. He took him to the office and met the Brewery Manager. When Banda was questioned about the shortage, he said that the matter should not be taken to Police as suggested, but that they should go to his house and collect property to be kept by them until he found money to redeem the property. They then went to Banda's house at Chinyonga where he took out the goods and handed them over to him in the presence of the driver and a security guard. This witness listed the goods on Exh.D2. The list is as follows:

"HANDING OVER PROPERTY BECAUSE OF A SHORTAGE OF 67 CRATES @ K13.80 : TOTAL SUM K924.60

- (1) Round Table (1)
- (2) Two Coffee Tables
- (3) One Bed and Mattress
- (4) Sewing Machine
- (5) Side Board (1)"

As far as the sewing machine is concerned, it was his evidence that after the goods were taken, nobody came to complain, but when he was on relief duties at Ndirande Tavern, a woman came with Banda and they discussed the position of the machine. It was agreed that she could collect the machine, but she never collected the machine. However, it was this witness's evidence, that after some time there was a letter of demand from the plaintiffs' lawyers. This demand letter stated:

"Dear Sir

CLAIM FOR VALUE OF GOODS, CONVERSION, LOSS  
OF USE AND TRESPASS TO PROPERTY

We act on behalf of Mr. M. G. Chitungu and Miss F. Chiutsi who have instructed us to request you to return the goods illegally collected from house Number CY/67 at Chinyonga on or around the first week of December, 1991.

We are informed that it pleased your Company to go and collect items from house No. CY/67 without any justification whatsoever after you were told expressly by your Mr. Charles Banda that the property did not belong to him. This conduct amounts to trespass to property.

We are further briefed that even after the ownership was ascertained at Soche Police, you have wilfully refused to yield possession of the goods to-date. Your denying to deliver the goods amounts to conversion which has resulted in loss of use of the items.

Unless the goods are delivered to house No. CY/67 in good and working order within SEVEN (7) DAYS from the date of this letter; and a fair compensation is agreed for loss of use of the Sewing Machine, we have instructions to issue process for trespass to property, conversion and loss of use without any further reference to yourselves whatsoever."

It was further the evidence of Mphande, that after he confronted Banda, Banda took him to his house and never told him that the property was not his. It was only when they went to Police that he was told that the property did not belong to Banda.

The second and last witness for the defence was Raphael Pitchesi. He is a security guard employed by the defendant. He informed the Court that he accompanied DW1 to Banda's house at Chinyonga. When they arrived there, he and the driver remained where the vehicle was parked; Mphande and Banda went into the house and after a few minutes, he saw goods being brought outside from the house. He was then called and assisted in loading the goods onto the motor vehicle. It was his evidence that at that time, Banda was not threatened at all. When they finished loading, they drove back to the office.

This then is the evidence before me, and I must examine it. I am also aware that this is a civil case; as such, the plaintiffs should prove their case on a preponderous of probabilities.

What comes out clearly from the evidence is that Banda was an employee of the defendant. He had a shortage and in order to compel him to make good of the shortage, which amounted to K924.60, the defendant decided to get his property. Indeed, the defendant did get the property, but as it transpired, the property belonged to the plaintiffs.

Perhaps it would be prudent to briefly describe the tort of trespass to property and the tort of conversion upon which the plaintiffs are relying.

The tort of trespass to chattels consists in committing without lawful justification, any act of direct physical interference with the chattel in the possession of another person. Trespass to property is essentially an injury to possession. On the other hand, conversion is an act of wilful interference with any chattel in a manner inconsistent with the right of another without lawful justification, whereby that other is deprived of the use and possession of the chattel.

In the present case, it is quite clear that the defendant took the plaintiffs' goods in order to force Banda to find money to cover the shortage which he, Banda, had. It

was Banda's evidence that he was forced to hand over the goods despite the fact that he told them that the goods were not his. On the other hand, Mr Mphande told the Court that Banda freely and voluntarily handed the goods to them. It should be noted that at the time the goods were taken, neither of the plaintiffs were in actual possession of the goods. The person who was in actual possession was Banda. In an action of trespass to goods, the plaintiff must be in actual possession at the time of the interference complained of, because trespass to goods is essentially injury to possession, and not to ownership - Ward -v- Macauley (1791) 4 TR 489.

It is, therefore, clear that the plaintiffs cannot maintain a claim for trespass to these goods against the defendant.

I will now turn to the claim for conversion. I have pointed out earlier, that conversion is the dealing with goods in a manner inconsistent with the right of the true owner, provided there is an intention on the part of the person so dealing with the goods to negative the right of the true owner or to assert a right inconsistent therewith - Lancashire and Yorkshire Railway -v- MacNicole (1919) 88 LJ. KB.601.

Furthermore, the taking need not be with the intention of acquiring full ownership, suffice it to say that any interest claimed is inconsistent with the right of the person truly entitled. In Tear -v- Freebody (1858) 4 CB (NS) 228:

"the defendant wrongfully took possession of certain goods with the intention of acquiring a lien, and it was held that he was guilty of conversion."

Similarly, taking by duress, under a threat of certain consequences is conversion - Grainger -v- Hill (1838) 4 Bing NC 212.

It appears that in the present case, the defendant took the goods with a view to exercise a lien over them - to force Banda to pay back the money termed as shortage. It was the defendant's evidence that Banda freely allowed them to get the goods and that the defendant never used force or duress. As has been seen earlier on, this cannot be a defence to a charge of conversion. The truth is that the defendant dealt with the property inconsistent with the rights of the plaintiffs

"He who so interferes with a chattel acts at his own risk and if the loss of the chattel does in fact (whether intended or not) result from this act, he is liable for the value of it in an action of trover" - Salmond on Tort, Thirteenth Edition, Page 262.



It is, therefore, quite clear that whether Banda represented that the goods were his or not, that does not afford a defence to the defendant.

As was pointed out by Diplock, LJ, in *Marfair & Co Ltd -v- Midland Bank* (1968) 1 WLR:

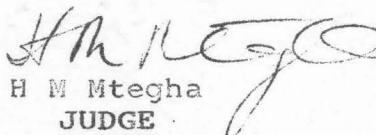
"At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions...it matters not that the doer of the act of usurpation did not know, and could not by exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril."

It is, therefore, irrelevant whether Banda told the defendant's servants that the goods were his or not. The liability is strict. I, therefore, find the defendant liable in conversion.

I will now revert to the question of damages. As far as the second plaintiff is concerned, she testified that she used to make K500.00 per week with the sewing machine. These are special damages and special damages must be specifically pleaded and strictly proved. She cannot, therefore, claim these damages. She also testified that the machine was damaged by the defendant and, therefore, it is now useless to her. The proper thing for this Court to do is to award her damages equivalent to the value of the machine at the time of conversion. The amount to be agreed upon, and in case of dispute, to be assessed by the Registrar. I also award her the sum of K500.00 for loss of use of the machine.

As far as the first plaintiff is concerned, I award him the sum of K700.00 for loss of use and the return of the furniture or its value, to be agreed upon by the parties, and if not, to be assessed by the Registrar. Costs are awarded to the plaintiffs.

PRONOUNCED in open Court this 19th day of January 1993, at Blantyre.

  
H M Mtegha  
JUDGE