

**IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 478 OF 1998**

BETWEEN:

JOSEPH MAJEZA.....PLAINTIFF

and

FARMING AND ENGINEERING SERVICES.....DEFENDANT

CORAM: HON. JUSTICE F.E. KAPANDA

Mr Chagwamnjira, of Counsel for the Plaintiff

Mr Benard Mhango, of Counsel for the Defendant

Mrs Chaika, Official Interpreter/Recording Officer

Kapanda, J

JUDGMENT

Introduction

In this action, commenced on 18th February 1998, the Plaintiff is claiming damages for breach of contract. It is the further prayer of the Plaintiff that he be awarded the costs of, and occasioned by, this action. The Defendant is contesting the legal suit, and in its statement of defence it has denied each and every allegation of fact made by the Plaintiff. As a matter of fact, the Defendant has also made its own allegations of fact in answer to the Plaintiff's cause of action.

As a result of the said denial, the parties have joined issues on the law suit commenced by the Plaintiff. It is, therefore, necessary that the relevant parts of the pleadings that have been exchanged, between the parties herein, should be laid down in this judgment.

Pleadings

I will start with the Plaintiff's averments as appearing in the statement of claim attached to the writ of summons issued on the said 18th day of February 1998. The apposite parts of the Plaintiff's allegations of fact, in the said statement of claim, are as follows:-

“2. On or about the 4th of August 1997 the Plaintiff was informed by the Defendant’s Workshop Manager, Mr Johnstone based on Lilongwe that a motor vehicle Bedford 5 tonner lorry registration number BA 8533 was being offered for sale at K40,000.00 and the Plaintiff expressed his desire to buy.

3. Mr Johnstone further informed the Plaintiff that there was someone who had already shown the interest to buy the vehicle hence he was the first priority and advised that as soon as the failed proposed purchaser failed the Plaintiff would be contacted.

4. On or about the 24th of September 1997 the Plaintiff was informed by Mr Johnstone that the first purchaser had failed to buy the vehicle and asked the Plaintiff to proceed with the purchase arrangement.

5. On arrival at the Defendant’s offices the Plaintiff briefed the Personnel Manager, a Mr Mbawala, about the news that the first proposed purchaser had failed to buy the vehicle whereupon Mr Mbawala advised the Plaintiff to see the General Manager for his final authority on the purchase of the vehicle.

6. Upon seeing the General Manager, the Plaintiff was told that the Company was willing to sell the car to him on condition that he produced the purchase value of the car the same day of 29th September 1997.

7. The Plaintiff thereby went to see his bankers, New Building Society, who prepared a cheque to the Defendants and was delivered to the Defendant by the Plaintiff himself.

8. However after delivering the cheque the Plaintiff was advised the Motor vehicle had already been sold to another purchaser notwithstanding the fact that the contract of sale had already been entered into when the Plaintiff produced the money as asked.

9. Upon enquiry the Plaintiff discovered that the first proposed purchaser was one Mondessino of Halls had indeed failed to buy the vehicle. The Plaintiff further discovered that the Motor vehicle had been sold to one Mr Bison.

10. The Defendant’s conduct in selling the car was a breach of contract of sale between the Plaintiff and the Defendant.

Wherefore the Plaintiff prays that the Defendant do pay damages for breach of contract.”

And the Defendant, on the other hand, has made the following pertinent averments in its defence of the Plaintiff’s action:-

2. The defendant refers to paragraphs 2 and 3 inclusive of the statement of claim and denies that it through Mr Johnstone a Workshop Manager at the defendant’s

branch at Lilongwe informed the Plaintiff that motor vehicle registration number BA 8533 Bedford 5 tonner lorry was being offered for sale.

3. The defendant repeats paragraph 2 herein and avers that the Plaintiff offered to buy the said lorry but was informed by the Defendant Workshop Manager that there were already 2 (two) proposed purchasers, a Mr Mondessino and Mr Bison and that his offer could

only be considered in the event that either Mr Montessino or Mr Bison failed to proceed with the purchase of the said lorry.

4. The defendant refers to paragraph 4 of the statement of claim and denies that it through Mr Johnstone informed the Plaintiff to proceed with the alleged purchase arrangement because the first purchaser had failed and as it is apparent from the foregoing there was no purchase arrangement.

5. The defendant repeats paragraph 4 herein and avers that it informed the Plaintiff, after he had made inquiries, that the first proposed purchaser had failed to buy the vehicle but that priority would still be given to the second proposed purchaser Mr Bison and that the Plaintiff would only be considered if Mr Bison failed.

6. The defendant avers the said lorry was sold to the second proposed purchaser, Mr Bison on 27th September 1998 and this fact was within the Plaintiff's knowledge and was expressly made known to the Plaintiff on the same day.

7. The defendant refers to paragraph 5 of the statement of claim and avers that the Plaintiff was aware of the fact that the vehicle had already been sold to Mr Bison on 27th September 1997 when he approached the Personnel Manager and the General Manager on 29th September 1997.

8. The defendant refers to paragraph 6 of the statement of claim and avers that the General Manager told the Plaintiff to produce the purchase value of the lorry upon acting on the faith of the representations by the Plaintiff that the lorry was still not sold and accepted the cheque in the belief that the lorry had not been sold.

9. The defendant repeats paragraph 8 herein and avers that upon discovering that the said representation of the Plaintiff was in fact untrue and that the vehicle had already been sold, the Defendant paid back to the Plaintiff the money which was meant as the purchase price of the said lorry.

10. The Defendant denies that he was guilty of the alleged or any breaches of contract as alleged in paragraph 10 of the statement of claim as there was no concluded contract between the Defendant and the Plaintiff or at all.

11. The Defendant denies that the Plaintiff is entitled to any damages and prays to this Honourable Court that the Plaintiff's action be dismissed with costs.

12. Save as admitted herein the Defendant denies each and every allegation of fact contained in the Plaintiff's statement of claim as if the same were set forth and traversed seriatim."

In the light of the denial, by the Defendant, of the Plaintiff's action it became necessary for the parties to call evidence in support of the allegations of fact made in their pleadings. It is on record that, on the one hand, the Plaintiff testified on his own behalf and also called one other witness to testify on his behalf, whilst on the other hand, the Defendant called three witnesses to testify on its behalf. I shall now proceed to analyse,

in a narrative form, the said evidence that was offered by the parties herein to substantiate the averments in the said pleadings.

Evidence

The Plaintiff, PW1, told this court that he was at all material times working for the Defendant Company until when he retired in 1997. It was his further testimony that before he actually retired he offered to buy the Defendant's motor vehicle which was being offered for sale at the purchase price of K40,000.00. The Plaintiff further testified that he was told by the Defendant's Branch Manager that there was another person, a Mr Montesino, who also wanted to buy the same vehicle thus the sale of the motor vehicle to the Plaintiff was subject to the condition that the Defendant would only dispose of the vehicle to the Plaintiff if the said Mr Montesino failed to buy same. It was his further sworn testimony, during cross-examination, that he would not know if there was anybody else apart from the said Mr Montesino who was also interested in the said motor vehicle the subject matter of this action.

It was further given in evidence by the Plaintiff that he was later told by the Defendant's said Branch Manager, a Mr Johnstone, that the said Mr Montesino had failed to buy the said motor vehicle and that same was then available for sale to the Plaintiff. The claimant continued to testify that he then went to see the General Manager of the Defendant Company about his wish to buy the said motor vehicle. It was the further testimony of the Plaintiff that the General Manager told him that the purchase price for the motor vehicle had been reduced to K35,000.00 whereupon he went to his bankers, the New Building Society, to organise the funds with which to buy the motor vehicle.

The Plaintiff further testified that his bankers issued a bank certified cheque for the said sum of K35,000.00 in favour of the Defendant Company which he took to the Personnel Manager of the Defendant Company, DW1, but that he was not given any document to acknowledge receipt of the cheque. It was moreover given in evidence by the Plaintiff that the motor vehicle was not given to him after payment of the purchase price in the said sum of K35,000.00.

I must note that there is some aspect of the testimony of the Plaintiff which I found difficult to believe viz that he does not know what happened to the cheque. This is so having regard to the letter, from the New Building Society, which the Plaintiff's lawyers acknowledged receiving on 22nd June 1998. In the said letter, marked as exh. P2B, the Plaintiff's lawyers were advised that the Defendant Company paid back, to the Plaintiff's account, the sum of K35,000.00 and that same was done on 16th October 1997.

The other witness to testify on behalf of the Plaintiff was a Mr Cedrick Kasito, PW2, who told this court that he is, and was at all material times, working for the Plaintiff's legal practitioners. It was his further testimony that he was given instructions from his boss to take instructions from the Plaintiff regarding the Plaintiff's complaint against the Defendant but that he does not have personal knowledge of this matter apart from what he was told by the Plaintiff at the time he was getting a statement from the Plaintiff. I wish to observe that, in view of the fact that PW2 could not testify on the matters in issue from his own personal knowledge, the testimony of PW2 is not relevant to the

determination of the pertinent issues in this matter. It is, therefore, not necessary that his testimony should be narrated more than what I have already done above.

I will now move on to consider the testimony that was offered by the Defendant in defence of the action commenced by the Plaintiff. As alluded to earlier in this judgment, the Defendant called three witnesses to testify on its behalf. The first to be called was Mr Hastings Abson Mbawala, DW1, who is the Defendant Company's Human Resources Manager. It was his testimony that sometime in September 1997, on a date which he has since forgotten, the Plaintiff approached him in connection with the purchase of a motor vehicle from the Defendant Company. DW1 continued to testify that, since he did not know anything about the sale of the said motor vehicle and that he did not receive any instructions to advertise the sale of the said motor vehicle, he referred the Plaintiff to the General Manager (DW3) of the Defendant Company.

It was further given in evidence, by DW1, that the Plaintiff came back to him to tell him that he (the Plaintiff) had met the General Manager and that they had agreed that the Plaintiff would be offered to buy the said motor vehicle after the first two other persons had failed to purchase the said motor vehicle. DW1 further testified that after three days, on 29th September 1997, the Plaintiff brought a cheque to pay for the said motor vehicle whereupon DW1 took same to the General Manager who asked DW1 to call the Plaintiff into the office of the General Manager. DW1 proceeded to testify that, in his presence, the General Manager told the Plaintiff that the motor vehicle was already sold and that same had been sold to a Mr Bessone. DW1 was emphatic in his testimony, and maintained, that the vehicle had already been sold at the time the Plaintiff brought the cheque.

It was also the testimony of DW1 that the Plaintiff, upon being told that the motor vehicle had already been sold, refused to get his cheque. Thus the Defendant Company decided to deposit the cheque in its bank account. After its account was debited with the amount on the cheque, the Defendant issued a cheque for the same amount payable to the Plaintiff's account being maintained by the New Building Society.

I found DW1 to be a truthful witness. He remained calm during the time he was giving his testimony and he came out unscathed during cross-examination.

Mrs Eggrey Chakhoma, DW2, also gave evidence on behalf of the Defendant. It was her testimony that she works as a Cashier for the Defendant Company and that she is based in Lilongwe. DW2 further testified that on the 30th day of September 1997 she was given two cheques by the Branch Manager of the Defendant Company to deposit at the bank. The cheques were issued by a Mr Bessone and were dated 27th September 1997 and 30th September 1997. It was further given in evidence, by DW2, that the cheques were in respect of the purchase of a motor vehicle.

DW2 was not cross-examined on her testimony. It will, therefore, be no exaggeration to put it here that her testimony is uncontradicted.

The third, and final, witness to be called by the Defendant was Mr Michael Paul Mathias, DW3, the General Manager of the Defendant Company. The testimony of DW3 was

basically the same as that of DW1 and was to the effect that the Plaintiff had shown an interest in buying the Defendant's motor vehicle. It was his further testimony that he had advised the Plaintiff that there were two other people who had offered to purchase the same vehicle and that if the said two people failed the Plaintiff would, then, be allowed to buy the said vehicle. DW3 further told this court that the Plaintiff was later advised, in the presence of DW1, when he brought a cheque as payment for the purchase of the said motor vehicle, that the truck had already been sold. It was further given in evidence, by DW3, that the Plaintiff refused to get his cheque back. Consequently, the Defendant had to issue a cheque, in the name of the New Building Society, but to credit the Plaintiff's account which was being maintained by the said New Building Society.

DW3 was again not cross-examined. His testimony is not disputed. It will, therefore, be accepted as correct for the purposes of this judgment.

The above is summary of the evidence that was offered by the parties in this action. I shall now move on to isolate the issues that require this court's determination in this matter.

Issues for Determination

In my judgment, after going through the pleadings and the evidence adduced by both parties, the issues that arise and fall to be decided in this action are as follows:-

(a) Whether or not there was a definite offer of sale of the vehicle made by the Defendant, which was accepted by the Plaintiff.

(b) Whether or not, if there was such an offer made and accepted, as stated in (a) above, and therefore an agreement allegedly entered into, there was a breach of the supposed contract by the Defendant; and

(c) If there was such an agreement what damage, if any, was suffered by the Defendant as a result of the alleged agreement; alternatively.

(d) If the Plaintiff's case is made out what damage, if any, was suffered by him.

I will now move on to decide on the issues for determination in this action. I wish to observe though that, although I have spelt out the questions for adjudication in this matter, I will not be specifically referring to them when I am making my findings of fact in this action.

Law and Findings of fact

The burden and standard of proof

It is settled law, and I need not cite an authority for it, that he or she who alleges must bear the burden of proving what is being alleged. Further, it is trite law that in civil actions, like the instant case, the standard of proof is on a balance of probabilities. I will, therefore, bear these maxims in mind when I am deciding on the facts in dispute in this action.

Was there a definite offer of sale of the motor vehicle, made by the Defendant to the Plaintiff?

I wish to observe that the position at law, which is common knowledge, is that an offer may be conditional and not absolute and, if an offer is made subject to the happening of an event such offer will not be capable of being accepted where the condition is not satisfied and/or does not arise - Cheshire, Fifoot and Furmston's Law of Contract Butterworths 13th ed. Pg. 63.

It is an undeniable fact that the offer to sale the motor vehicle to the Plaintiff was conditional. This is revealed by the evidence of both the Plaintiff and the Defendant. It was the testimony of the Plaintiff that the offer was contingent upon a Mr Montessino failing to buy the said motor vehicle. Defendant, on the other hand, has averred that the said offer was made subject to two people, viz Messrs Montesino and Bessone, failing to purchase the said motor vehicle. On the totality of the evidence before me I am inclined to believe the story of the Defendant and not that of the Plaintiff. I am of this view because the testimony of the Defendant's witnesses was largely undisputed in so far as it relates to the number of the other people that were offered the vehicle the subject matter of this action. As a matter of fact the Plaintiff failed to discredit the evidence of DW1 and DW2. Now, having found that the offer to sell this vehicle was conditional, it therefore follows that the said offer was only capable of being accepted, by the Plaintiff, upon the failure, on the part of the other two people to purchase the said motor vehicle. As the condition, subject to which the Plaintiff was to buy the vehicle, had not arisen the offer to sell the said motor vehicle, to the Plaintiff, could not arise. This is the case because the offer was not absolute.

Was there an agreement entered into, between the parties, after the surrender of the cheque?

Considering the finding above, on the issue of whether there was a definite offer made to the Plaintiff, the answer to the above question is in the negative. There is an uncontroverted evidence that at the time the Plaintiff brought a cheque to the Defendant's General Manager and/or Human Resources Manager the car had already been sold to another person a Mr Bessone. Indeed, the subject matter for which consideration was being paid was not available. Consequently, there was no agreement that could be entered into in respect of a motor vehicle that had already been sold to another person.

Did the Plaintiff suffer any damage?

For the reasons given above, it naturally follows that there was no breach of any contract purportedly entered into between the Plaintiff and the Defendant. In point of fact, there was no contract that could be, and/or was capable of being, breached. Moreover, following from the foregoing finding the issue of whether or not the Plaintiff suffered any damage has now become a moot question. In the circumstances, it is not necessary to make a specific finding on this question suffice to say that the Plaintiff has failed to prove, on a balance of probability, his claim against the Defendant. The claimant's action is therefore dismissed.

Costs

The Plaintiff has totally failed to substantiate his claim against the Defendant. I see no reason why he should not be condemned to pay the costs of, and occasioned by, the action he commenced against the Plaintiff for it is trite law that costs follow the event so as to ensure that the assets of a successful party are not depleted by reason of having to go to court to meet a claim by an unsuccessful party. It is therefore ordered that the Plaintiff should, and is hereby condemned, to pay the costs suffered by the Defendant in defending this action.

Pronounced in open Court this 30th day of July 2001 at the Principal Registry, Blantyre.

F.E. Kapanda

JUDGE