

IN THE HIGH COURT OF MALAWI  
PRINCIPAL REGISTRY  
CIVIL CAUSE NO. 2668 OF 2000



**BETWEEN:**

A. E. MACHINJIRI t/a MAPANGA PASSENGER SERVICES.....PLAINTIFF

- and -

LEYLAND DAF (MALAWI) LIMITED.....DEFENDANT

**CORAM: CHIMASULA PHIRI J**

Mwangomba of counsel for the plaintiff

J. M. Chirwa of counsel for the defendant

L. Beni – Official Interpreter.

**JUDGMENT**

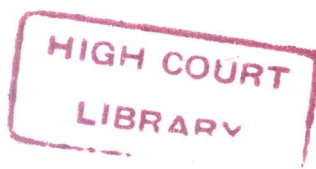
*Chimasula Phiri J,*

The plaintiff's claim is for damages for breach of contract in respect of implied warranty as to fitness and merchantability of goods; loss of income from the said breach; interest charges in respect of financing facilities and further consequential relief for causing or inducing the plaintiff to breach his contract with the Leasing and Finance Company of Malawi Limited. The defendant denies the claim made by the plaintiff and prays for the dismissal of the action.

**PLEADINGS**

The plaintiff's claim is set out in the Amended Statement of Claim as follows:-

1. *The plaintiff is and was at all material times a businessman running fleet of passenger vehicles within Malawi.*
2. *The defendant is a dealer in cars including passenger services vehicles and coaches.*
3. *By an agreement partly oral and partly in writing made in or about November 1999, the defendant agreed to sell to the plaintiff a brand new*



passenger Coach (subsequently registered as registration number BL 5155) at the price of K2,500,000.00.

### **Particulars of Coach**

*Aeolous Firebird Bus*

*Engine Number: 9801123*

*Chassis Number: LGA ADAACAWD 00004*

4. *At the time of the making of the said contract, the plaintiff expressly or by implication made known to the defendant the particular purpose for which he required the said bus, namely, to be used as a passenger carrying vehicle in the form of a Coach, so as to show, as was the fact, the plaintiff relied upon the defendant's skill and judgment and the said bus were goods which it was in the course of the defendant's business to sell.*
5. *In the premises, it was an implied condition of the said contract, and the defendants thereby warranted that the bus be reasonably fit for the said purpose.*
6. *At all material times the defendant well knew that the plaintiff required the said bus to be used as a passenger carrying vehicle in the form of a coach and thereby generating income and profits for the plaintiff.*
7. *Further the said contract, was a contract for the sale of the said bus by description. The description was contained in the defendant's letter of 23rd August 1999. In the premise, it was an implied condition of the said contract or alternatively the defendant thereby warranted, that the said bus should correspond with the said description, and should be merchantable under the said description.*
8. *In purported performance of the said contract, the defendant supplied the Aeolous bus registration number BL 5155, but in breach of the said contract and of the said conditions and warranties thereof, the said bus did not correspond with the said description; it was not merchantable under the said description and was not reasonably or at all fit for the particular purpose but on the contrary it contained faults and defects rendering it unfit for the said purpose.*

### **Particulars**

- a. *Barely within the period of a month after its delivery the bus broke down four times while passengers were on board.*
- b. *The coach had the following faults and defects:-*

- i. *Defective braking system.*
- ii. *Faulty fuel system.*
- iii. *Faulty electrical system.*
- iv. *Excessive engine oil consumption.*
- v. *Persistent oil leaks.*
- vi. *Stiff acceleration pedal.*
- vii. *Faulty transmission system.*
- viii. *Faulty gearbox.*
- ix. *Latent engine problems.*

9. *By reason of the premises the said bus was worth much less or at all than the contract price and the plaintiff has overpaid the defendant and moreover has suffered loss and has lost the income and profit he would have made had the bus been fully operational.*

**Particulars**

- i. *Cost of repairs on invoice number 104951 of K14,333.08.*
  - ii. *Cost of repairs not yet invoiced or known for the repairing of the gearbox.*
  - iii. *Loss of profits at the rate of K128,000 per month from one month of January 2000 till the date of judgment and enforcement thereof.*
  - iv. *Insurance charges paid by the plaintiff of K74,800.00.*
- 10 *Due to the breaches aforementioned the said bus can no longer be used for the intended purpose even if so repaired.*
- 11 *Furthermore, at the time of making the contract the defendant knew and was informed that the income for the purchasing of the bus was to be provided by the Leasing and Finance Company through a loan advanced to the plaintiff and repayment thereof would be obtained from the income generated from the coach business.*



- 12 *In terms of the agreement between the plaintiff and the Leasing and Finance Company of Malawi Limited, the plaintiff was required to service the said loan by monthly instalments.*

**Particulars**

Loan amount..... K2,500,000.00

Initial rental..... K 160,105.86

- 13 *The defendant knew or ought to have known that failure to pay the required instalments to the said Leasing and Finance Company of Malawi Limited would attract further interest on the advanced sums.*
- 14 *Nevertheless the defendant breached the contract as aforesaid thereby indicating the plaintiff to fail to service the said loan and consequently the plaintiff has been penalised to pay interests and the lease agreement authorising him to use the bus obtained from the money advance to him has been terminated.*

**Particulars**

- i. *Interest of K1,269,117.20 as at 26th June 2000.*
- ii. *Further accrued interest as from 26th June 2000.*

- 15 *In the premises, the plaintiff has permanently lost the chance of generating income from the said bus.*

**AND the plaintiff claims:-**

- i. *Damages*
- ii. *Sum of K74,800 paid as insurance charges.*
- iii. *Sum of K1,269,117.20 being interest payable to the Leasing and Finance Company.*
- iv. *Loss of profits at the rate of K128,000 per month from January 2000 to the date of the judgment and enforcement thereof.*
- v. *Any further interest due to the Leasing and Finance Company from the plaintiff on the loan advanced.*
- vi. *Alternative to (i) replacement of the bus by another that is fit for the purpose of a coach.*



vii *Costs of this action.*

Likewise the defendant challenged the claim in an Amended Defence as follows:-

1. *The defendant has no knowledge of the matters averred in paragraph 1 of the Amended Statement of Claim but does not dispute the same.*
2. *The defendant admits paragraph 2 of the Amended Statement of Claim.*
3. *The defendant admits the sale referred to in paragraph 3 of the Amended Statement of Claim but denies that the agreement for sale was partly in writing as alleged or at all.*
4. *If, which is not admitted, the plaintiff was purchasing the said vehicle for the purpose alleged in paragraph 4 of the Amended Statement of Claim, the defendant denies that the plaintiff communicated to the defendant the purpose either expressly or by implication and consequently denies that the contract of sale was subject to the alleged or any condition or warranty that the bus should be reasonably fit for that purpose as alleged in paragraph 5 of the Amended Statement of Claim.*
5. *The defendant denies the matters averred in paragraph 6 of the Amended Statement of Claim.*
6. *The defendant denies that the sale referred to in the Amended Statement of Claim was a sale by description either as alleged in paragraph 7 of the Amended Statement of Claim or at all.*
7. *Alternatively, if which is denied, the sale was by description, the defendant denies that the vehicle failed to conform with any description given either in the manner alleged in paragraph 8 of the Amended Statement of Claim or at all.*
8. *The defendant denies the matters averred in paragraphs 9 and 10 of the Amended Statement of Claim.*
9. *The defendant admits that it was aware that the purchase price for the vehicle was obtained from Leasing and Finance Company of Malawi Limited but denies knowledge of the fact that the repayment of the loan would be obtained from the coach business as alleged in paragraph 11 of the Amended Statement of Claim or at all.*
10. *The defendant has no knowledge of the matters averred in paragraph 12 of the Amended Statement of Claim.*

11. *The defendant repeats paragraph 10 hereof and denies the matters averred in paragraph 13 of the Amended Statement of Claim.*
12. *Further, before making the contract of sale the plaintiff carried out a thorough examination of the vehicle and having been satisfied with the condition thereof instructed Leasing and Finance Company of Malawi Limited to arrange the payment of the purchase price.*
13. *The defendant repeats paragraphs 4, 6, 7 and 13 hereof and denies that the plaintiff has suffered loss and damage as alleged at all.*

**SAVE** as hereinbefore expressly admitted the defendant denies each and every allegation contained in the Amended Statement of Claim as if the same were herein set out and traversed *seriatim*.

The plaintiff made a reply to the Amended Defence by denying the matters averred in paragraph 12 of the Amended Defence and put the defendant to strict proof thereof.

#### **THE ISSUES FOR DETERMINATION**

1. Whether at the time of the contract the defendant knew the particular purpose for which the plaintiff required the bus?
2. Whether it was express or implied condition of the said contract that the bus shall be reasonably fit for the purpose it was acquired?
3. Whether or not the defendant has breached any express or implied term of the contract?
4. Whether or not the plaintiff has suffered any loss or damage and the nature and extent of any such damage or loss?
5. Whether the sale of the bus was by description.
6. Whether there was an implied condition and/or a warranty that the bus should correspond to the said description and be merchantable under the said contract?



## BURDEN AND STANDARD OF PROOF

### Burden of Proof

*The burden of proof rests upon the party (the plaintiff or the defendant), who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See Joseph Constantine Steamship Line vs Imperial Smelting Corporation Limited [1942] A.C. 154,174.*

### Standard of Proof

*The standard required in civil cases is generally expressed as proof on a balance of probabilities. "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not." Denning J in Miller vs Minister of Pensions [1947] ALL E.R. 372; 373, 374.*

## THE EVIDENCE

The plaintiff called one witness while the defendant summoned two witnesses. These witnesses adopted their witness statements and tendered in evidence documentary evidence. The evidence of the plaintiff was that on 23rd August 1999 the defendant offered to sell an Aeolous Coach Mini Bus to the plaintiff at the price of K2,500,000. The plaintiff accepted the offer. The plaintiff contacted Leasing and Finance of Malawi Company Limited(LFC) for a loan facility to be used in purchasing the said minibas. On 5th November 1999 LFC granted the plaintiff a loan of K2,500,000. The loan attracted interest of 50% per annum. The loan sum was paid to the defendant. The sole purpose of purchasing the bus was for the plaintiff to use it as passenger carrying business which fact the plaintiff claims to have made known to the defendant. Part of the money realised from the business was to be used for repayment of the loan.

The plaintiff stated that he noticed that there was demand for transport in terms of luxury travel between Lilongwe and Blantyre since the only coach service was provided by Stagecoach Malawi Ltd which had over-aged vehicles and constantly experiencing breakdowns. The plaintiff thought of buying a new bus which would serve those who desired to travel in executive class between Blantyre and Lilongwe.

He took the bus from the defendant in December 1999 and the plaintiff alleges that shortly afterwards some faults were discovered. In February 2000 the bus was returned to the defendant for repairs. Initial faults were air-locking in the fuel system, reverse gear hardness, improper adjustment to brake system and



malfunctioning of the electrical system. The bus remained in the defendant's garage until 3rd July 2000 when the plaintiff collected it for use. On 12th July 2000 the bus was again returned to the defendant's garage after developing faults relating to brakes, electrical system and excessive consumption of engine oil. The plaintiff collected the bus from the defendant's garage on 14th July 2000 after being assured by the defendant that the fault on the bus had been rectified. However, on 15th July 2000 the bus was taken back to the defendant's garage when the plaintiff discovered that the bus could not operate. When the plaintiff checked on progress on the bus on 17th July 2000 he was told that the gear box had been removed to rectify an inner problem. Further he was told that the high oil consumption could not be rectified.

On 8th August 2000 the plaintiff wrote to the defendant telling them that he was no longer interested in the bus as it had proved to be not commercially viable. On the other hand on 28th September 2000 Leasing and Finance Company terminated the lease agreement with the plaintiff on account of his failure to service his loan account for a period of 10 months which by then had accumulated to over K3,373,544.35. The plaintiff commenced this action because the defendant was not willing to compensate the plaintiff. The plaintiff stated that before taking delivery of the bus in December 1999, the defendant presented it to the Road Traffic Department for Certificate of Fitness and Registration formalities. The plaintiff applied for Road Service Permit and also took out a Comprehensive Insurance Cover.

In cross-examination the court was asked to take judicial notice of Civil cause 3659 of 2002 – **Leyland DAF(MW) Ltd vs Mapanga Transport**; Civil Cause 2738 of 2002 – **Leyland DAF(MW) Ltd vs Mapanga Transport** and Civil Cause 86 of 2003 – **Leyland DAF(MW) Ltd vs Christobell Machinjiri**. The plaintiff agreed that Mapanga Passenger Service is not a limited liability company. The plaintiff indicated that the correct date of delivery of the bus is mid-December 1999. The plaintiff expressed his dissatisfaction in the way COF test is conducted. However, the plaintiff conceded that the Road Traffic Directorate would not issue a COF to a vehicle which is not fit to be on the road. The plaintiff further admitted that the defendant sent its Foreman with the bus to the Road Traffic Directorate for COF test. He also admitted that Exhibit D1 was a record for Mapanga Coachline registration number BL 5155. The plaintiff stated that he had employed a driver who was driving this bus and it was the same driver who was taking it to the defendant for repairs. The plaintiff stated that he had 5 passenger service vehicles and all these were generating an income. If one of the vehicles broke down, the plaintiff would still generate income with the other buses. The plaintiff explained that an air-lock happens as a result of several factors including blockage of fuel passage, clogged fuel filters and dirty fuel tank. Whenever there is an air-lock, the engine does not receive the required amount of fuel for it to perform. He denied that in January 2000 the air-lock was caused because the vehicle was run on empty fuel tank. However, the plaintiff was quick to admit that he was not in the vehicle at the material time. Similarly, when the



defendant's mechanics came to rectify the air-lock problem, the plaintiff was not present. The plaintiff indicated that he holds Grade III Motor Vehicle Mechanic Certificate as well as qualifications in general mechanical engineering. Before he took delivery of the bus it was shown to him when it was in the bonded warehouse. He was shown the interior and exterior of the bus. He stated that the defendant pressed for payment so that the bus could be redeemed from the bonded warehouse. As a result, the plaintiff asked Leasing and Finance Company to release the funds to the defendant before the plaintiff test-driven the bus. The plaintiff had the chance to test-drive it only at the time the bus was delivered to him. The plaintiff admitted that he did not specify to the defendant the type of coach that he wanted. The plaintiff stated that there was service warranty for 6 months given by the defendant. However, the bus was never delivered for such routine service because it was frequently breaking down and calling for repairs. The plaintiff denied that the bus is operating on the Mulanje-Muloza Road and he does not remember when the vehicle went off the road. The plaintiff stated that the air-lock problem was in January 2000 and the defendant gave back the vehicle to the plaintiff in February 2000 but no later than end of same month he took it back to the defendant for repair service. The plaintiff indicated that he had his own mechanics who were maintaining his fleet. The plaintiff conceded that according to the Exhibits in court it is correct that the defendant never worked on the engine of the bus because it never developed an engine fault or problem. In re-examination the plaintiff insisted that the bus had continuous problems and was always in the possession of the defendant for repairs. The plaintiff indicated that he abandoned the LL – BT route and opted for the BT – Mulanje route when the bus proved that it could not stand a long journey without inconveniencing passengers.

The first witness for the defendant was Henry Jentala Nthukwa. He works for the defendant as an Auto-Electrician and Workshop Foreman. He joined in March 1976. He stated that the plaintiff bought an Aeolous bus registration BL 5155. Preparation Delivery Inspection (PDI) was done by the defendant in October 1999. The bus was then later delivered to the plaintiff. The bus came back to the defendant's workshop in January 2000 after a breakdown on the road. One of the mechanics was assigned to go to the breakdown recovery near Kamuzu Stadium. The mechanic came back and reported that the bus had run out of fuel. The mechanic came back to the workshop, collected fuel and went back to fill the tank and did bleeding of the air filled fuel system and the vehicle was back on the road. The vehicle came again in May 2000 for replacement of bumper stop rubbers. The bus came again in July 2000 with problem of oils showing on the engine. The oil sump guard bolts were tightened by a mechanic. Since July 2000 the vehicle came back in June 2002 with brake failure problem. This was rectified and the plaintiff collected it. Later the plaintiff came with the bus again with a slave cylinder problem. It was removed and replaced. Since June 2002 the bus has never been taken back to the defendant's workshop but it is seen plying its trade. He stated that the faults which the plaintiff pointed out were serviceable or rectifiable and were actually rectified. Every time the faults were



rectified the plaintiff took delivery of the bus. He stated that he has relatives in Mulanje and when he went to visit them in 2002 and mid-2004 he saw the bus carrying passengers. Further, the plaintiff still goes to the defendant to buy spare parts.

In cross-examination he stated that he holds a Form 4 MSCE certificate, Grade I Auto-Electrical Certificate, Advanced Certificate in Electrical Technology and Grade III Motor Vehicle Mechanic Certificate. Between 1999 and 2000 he was not the Workshop Foreman but was Workshop Chargehand. He was looking after mechanics and auto-electricians and before any matter was referred to the Workshop Foreman, it was routed through the Workshop Chargehand. He could not remember meeting the plaintiff at all. He does not know why the plaintiff bought the bus. He explained that Exhibit D1 which is a record for this bus was filled by a receptionist whenever the bus was delivered to the defendant's workshop.

In re-examination he insisted that he has seen the bus plying its trade twice since 2002 and that the owner is the plaintiff.

The second witness for the defendant was Tobias Kapasule. He is employed by the defendant as a Grade I Mechanic. He joined as Assistant Mechanic in 1971. He stated that in October 1999 he did PDI of BL 5155 for the plaintiff. He corroborated the evidence of Mr Nthukwa.

In cross-examination he confessed that he was not aware of the contractual terms of sale of the bus between the plaintiff and the defendant. He does not know why the plaintiff bought the bus. He stated by doing PDI the defendant ensures that when a vehicle is bought and before it is delivered to the buyer, everything must be inspected and be in good working condition. He says that he was satisfied with the PDI which was done to the bus. About the January 2000 incident of air-lock he was not the one who rectified it but he was present when the Foreman was being briefed of the problem. He stated that after the air-lock problem had been rectified the bus was driven to the workshop for rectification of other faults.

He referred to the job card and stated that the bus was out on 15th February 2000 i.e. after 22 days. It came again in May 2000 and this time he was involved. It then came again in July 2000 for rectification of oil leaks. In June 2002 the vehicle was attended to in respect of brake failure. He admitted that he would not know much as the Foreman did. In re-examination the witness stated that his statement contains all the relevant material information.



## LEGAL ANALYSIS AND FINDINGS OF THE COURT

According to Section 16 of the Sale of Goods Act – Cap 48:01 there shall be no implied warranty as to fitness except in certain cases. It provides as follows:-

16. *Subject to this Act and any written law in that behalf, there shall be no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows -*

- (a) *where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there shall be an implied condition that the goods shall be reasonably fit for such purpose;*
- (b) *where the goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there shall be an implied condition that the goods shall be of merchantable quality;*

*Provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;*

- (c) *an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;*
- (d) *an express warranty or condition shall not negative a warranty or condition implied by this Act unless inconsistent therewith.*

The remedies for breach of warranty are set out in Section 53 of the Act as follows:-

53. (1) *Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer shall not by reason only of such breach of warranty be entitled to reject the goods; but he may –*

- (a) *set up against the seller the breach of warranty in diminution or extinction of the price; or*

- (b) *maintain an action against the seller for damages for the breach of warranty.*
2. *The measure of damages for breach of warranty shall be the estimated loss directly and naturally resulting, in the ordinary course of events from the breach of warranty.*
  3. *In the case of breach of warranty of quality, such loss shall **prima facie** be the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty.*
  4. *The fact that the buyer has set up the breach of warranty in diminution or extinction of the price shall not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.*

According to Section 16 of the Sale of Goods Act, no warranty as to the quality or fitness for any particular purpose of goods supplied under a contract of sale can be implied except in the instances provided under sub-sections (a) and (b). Notwithstanding existence of exceptions aforesaid, it is apparent from the proviso to sub-section (a) that the condition as to fitness for any particular purpose cannot be implied in the case of a sale of a specified article under its patent or trade name.

The defendant in its Amended Defence has denied that the contract for the sale of the bus was subject to any condition or warranty. The sale of a bus was under its trade name AEOLIOUS and it follows that there was no implied condition as to its fitness for the alleged purpose or any purpose. The plaintiff stated in his evidence that it was his intention to use the bus as a luxury coach between Lilongwe and Blantyre but there is nothing more than that by way of documental evidence. I do not believe that the plaintiff told the defendant that he wanted to use his bus in direct competition with Stagecoach Coachline. It is possible and I would not doubt it that the plaintiff indicated to the defendant that he wanted to use the bus for passenger service without specifying the route. The court will at a later stage determine whether or not the bus was fit for passenger service.

The plaintiff has alleged that the defendant was in breach of an implied term in relation to fitness for purpose or merchantability of the goods. It seems to be the plaintiff's contention the defendant was in breach of the alleged implied terms because barely within the period of a month after delivery the bus broke down four times with passengers on board and due to the fault and defects particularised under paragraph 8 of the Amended Statement of Claim. The burden of proof is on the plaintiff. The plaintiff merely made a statement. He did not even specify the dates of those breakdowns. The plaintiff who claims to have own mechanics for maintenance and service of his fleet did not even call any one such mechanic. Even as a wildest dream, no passenger was called to confirm



the unfitness of the bus for passenger service. The plaintiff has alleged that the bus had faults or defects. In a way, he has challenged the roadworthiness of the bus as certified by the Road Traffic Directorate. On the other hand, the witnesses for the defendant pointed out that some of the faults were rectifiable and were indeed rectified. For example, air-locking, electrical system faults and oil leaks just to mention a few. In fact, Exhibit D1 clearly records the faults for which the bus was taken to the defendant for repairs and the dates of such occurrence. The plaintiff did not challenge this exhibit. I believe the evidence of the defendant that air-lock to the bus was caused by running on empty fuel tank. The defendant cannot be blamed for the plaintiff's own shortcomings. In fact, from Exhibit D1 this was the entry point of problems for this bus. I find as a fact that the bus was on the road for a month without breakdowns confirms that the bus was fit for its passenger service. The service card for the bus shows long intervals between one fault that developed on the bus to another fault development. This is contrary to the plaintiff's claim.

The plaintiff has contended that this was sale of goods by description and that the plaintiff relied on the skills and judgment of the defendant as to merchantability of the goods. The plaintiff argues that the quotation which the defendant made to the plaintiff dated 23rd August 1999 described the AEOLUS MINIBUS and the plaintiff relied on it.

*The question which calls for consideration in the present case is whether or not the bus sold to the plaintiff by the defendant was sold by description. **Chanell J in Varley vs Whipp** [1990] 1QB 513 at page 516 said:*

*"The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods but is relying on the description alone. The most usual application of that section, no doubt, is to unascertained goods, but I think it must also be applied to cases such as this where there is no identification otherwise than by description."*

In the head note to the case of **Varley vs Whipp** cited above it is stated thus:

*"The expression 'contract for the sale of goods by description,' in the Sale of Goods Act, 1893, Section 13, applies to all cases where the buyer has not seen the goods, but relies solely on the description given by the supplier."*

*This section is the same as Section 16 of the Sale of Goods Act which is now under consideration.*

Further **Robert Lowe** on **Commercial Law**, 5th Edition at page 175 in the footnote emphasises that for there to be a sale by description there must be reliance on the descriptive words i.e. the buyer must buy the goods because their identity is as described



The foregoing being the legal position, the question which the court should consider is whether from the available facts it can be fairly concluded that there was a sale of the bus by description.

The plaintiff in cross-examination stated as follows:-

*The coach was first shown to me when it was in the bonded warehouse. It had not been cleared. I was only shown the inside looks and the external beauty of it. The authorities could not allow us to test drive it. After looking at the bus, Leyland DAF pressed me to push for the payment with Leasing and Finance Company of Malawi Limited so that they could have funds to redeem it from the bonded warehouse. I went ahead and asked Leasing and Finance Company of Malawi Limited to release funds to the Leyland DAF before the vehicle was tested."*

The foregoing evidence clearly shows that the sale of the bus in this action was not a sale by description. The plaintiff had first seen or ascertained the bus and had even gone inside it. It is in fact after this ascertainment that the bus was sold to the plaintiff.

Further the plaintiff in examination-in-chief which was in addition to the written statement said as follows:-

*"I do not adopt Exhibit P1 as part of my evidence because it does not mention 'coach'.....it reads 'a minibus' when it should be reading Coach".*

This evidence fortifies the defendant's contention that the plaintiff did not rely on the description of the bus in Exhibit P1, but had physically seen or ascertained the bus.

Therefore, the plaintiff has failed to prove that the sale of the bus to him was a sale by description. The implied condition that the bus ought to have been of merchantable quality under Section 16(b) of the Sale of Goods Act could not be applicable to the sale in this action.

**CONCLUSION**

I am not satisfied that the plaintiff has proved his claim against the defendant and I dismiss it with costs.

**PRONOUNCED** in open court this 14th day of February 2006 at Blantyre.

A handwritten signature in purple ink, appearing to read 'Chimasula Phiri', with a stylized flourish at the end.

Chimasula Phiri  
**JUDGE**