

IN THE HIGH COURT OF MALAWIPRINCIPAL REGISTRYCIVIL CAUSE NO.581 OF 1985BETWEEN:A.A. JELENJE (MALE)..... PLAINTIFF

- and -

PALMA BUILDING CONTRACTORS(FIRM)..... DEFENDANTCoram: BANDA, J.

Kaliwo of counsel for the plaintiff
Msisha of counsel for the defendant
Longwe, Court Reporter
Namvenya, Official Interpreter

JUDGMENT

The plaintiff is suing the defendant for a sum of K13,740.84 for damages caused to the plaintiff's motor vehicle by the negligence of the defendants. The plaintiff was the owner of a Peugeot saloon registration No. CA 7650 and the defendant was, at the material time, the owner of a Mercedes Benz truck registration No. CA 8745.

On or about the 30th of November 1983, about 7.10 p.m., the plaintiff was driving his car along Kamuzu Procession Road from the direction of Kasungu towards Lilongwe Old Town. Somewhere near Lingadzi Bridge the plaintiff slowed down and stopped in order to allow a herd of cattle to cross the bridge. Whilst so stationary the defendant's vehicle drove into the plaintiff's car thereby damaging it. The car was extensively damaged and was, on the following day, towed to Nunes Garage. Liability in this case is admitted by the defendants. The only issue which remained concerned the quantum of damages.

At the beginning of the trial Mr. Kaliwo informed this Court that the claim in respect of repairs to the plaintiff's vehicle in the sum of K5,079.34 had been settled and that the plaintiff was no longer claiming it. The court was also told by Mr. Msisha that the claim for insurance excess was also admitted and that the only claim that was contested was that which concerned the hiring charges. The only ground on which that claim is contested, by the defendant, is that there was a failure to mitigate the loss by the plaintiff.

Mr. Msisha while conceding that the plaintiff was entitled to hire a substitute car during the period of repair, he contended that the period of repair and, therefore, the period of hire was excessive and that it was so because the plaintiff had failed to take reasonable steps which should have shortened the period of repair. Mr. Msisha gave two reasons for that contention. He submitted that on the evidence of PW2 it should have taken only 3 months to repair the plaintiff's vehicle if all parts were available. He submitted that from exhibit D2 which is a letter, he argued, written at the time when both parties were anticipating litigation, the defendants sought particulars of spares which the plaintiff had alleged were not available and which the plaintiff alleged had caused the delay to repair the vehicle. Mr. Msisha contended that according to exhibit D1, only 4 items were given by the plaintiff as spares which were not available. He submitted that the two exhibits constitute a request for particulars and answers to that request, and that the answers are binding on the plaintiff. Mr. Msisha contended that in so far as the plaintiff tried to say that a lot of spares were not available the court should reject that statement because of what exhibit D1 says. Mr. Msisha argued that if only those 4 items of spares were not available, the court will note that all those items were supplied by 26th April, 1984. He argued that by that date all critical items of spares were available.

It was also Mr. Msisha's contention that the plaintiff either by himself or through his agents did not order any items of spares by special order as required. It was Mr. Msisha's further contention that all the spares required for the plaintiff's vehicle were not ordered by 18th of January 1984 as invoices which were produced as exhibit 3 contained other orders other than those which were issued on 18th of January. He argued that in all probability the spares were requested at intervals and that the spread of supply of spares does not necessarily mean that the spares were not available. It was Mr. Msisha's further submission that all items of spares were not relevant except the 4 items of spares referred to in exhibits D1 and D2. It was therefore Mr. Msisha's submission that the court should find that the vehicle could have been repaired by April, 1984. Mr. Msisha submitted therefore that the plaintiff was only entitled to hiring a vehicle up to April 1984. He argued that the plaintiff did not put any effort in trying to hasten the repair of his vehicle. He contended that the plaintiff left all issues to the Insurance Brokers and to the garage. He submitted that the plaintiff did not take any reasonable step to have the spares procured as soon as possible.

Mr. Kaliwo has submitted, on the other hand, that there was no evidence adduced to prove that the repairs to the plaintiff's car would have been completed in 3 months. He contended that the issue whether the repairs could have been completed in 3 months was a matter of evidence requiring expert evidence of panel beaters and mechanics who are familiar in such work. Mr. Kaliwo contended that what is in issue is what period it took to restore the plaintiff's vehicle to

its original status or to a state acceptable to the plaintiff. He argued that the repairs in this case had been influenced by the type of spares required and by the availability of those spares. He submitted that the evidence showed that most of those spares were slow moving and had to be specially ordered. It was his contention that for reasons best known to Messrs Stansfield Motors spare parts were not supplied at once but over a period of time. It was Mr. Kaliwo's further submission that the plaintiff's primary concern was to see that the car was restored to its original status and that in considering that issue one must look at the totality of the evidence and not in its isolation. He contended that on the evidence of Mr. Mbandambanda it was necessary for spares that were supplied earlier to wait for other accessories which came later in order to complete the repairs to the car.

Mr. Kaliwo denied that exhibit D1 was written in contemplation of any litigation. He suggested that Mr. Msisha's attempt to construe exhibits D1 and D2 as a request for further and better particulars was not correct. He submitted that further and better particulars can only be sought in proceedings which had been commenced and those particulars can only be sought under Order 18, r.12 of the Supreme Court Practice. It was Mr. Kaliwo's contention that as soon as the accident occurred the plaintiff took his vehicle to a reputable garage in Lilongwe. He submitted that the plaintiff had reason to believe that that garage would do the necessary repairs. He argued that the plaintiff, as a layman, could have done no more than take the vehicle to a reputable garage. The matter had been left in the hands of the garage and his Insurance Brokers. He therefore submitted that the plaintiff had acted reasonably and that he was entitled to recover the whole claim.

The evidence in this case is that the repairs to the vehicle were started sometime in January 1984. No specific date is mentioned although it is important to note that the orders for spare parts are dated 18th of January, 1984. The orders are marked exhibit 2 in this case. The orders are three, namely order numbers 6356, 6357 and 6358. All of them are dated 18th of January, 1984. Those orders contain a long list of spare parts for a peugeot 505 saloon and gives its engine, chassis and model numbers. According to the invoices the spare parts on these orders were not supplied at once but over a period of time and it would appear that according to the invoices the spare parts ordered in exhibit 2 were last supplied on invoice number 20352 dated 19th of July 1984. According to Mr. Msisha's submission the dates shown on the invoices which are exhibit 3 should not be taken as the dates on which the spare parts were supplied but rather as the dates on which the garage went to ask for spare parts. That submission is in contradiction with the evidence of a defence witness who stated that the dates on the invoices should be taken as the dates when the spare parts were supplied. That was the evidence of Mr. Mbandambanda and it was in re-examination. He in fact said, "Invoices do not show when parts were received from France but it shows dates when parts were issued to customer". Mr. Msisha had referred to the

fact that the plaintiff or the garage did not make or did not request a special order for any spares. Mr. Mbandambanda who gave evidence for the defendant did not give any special procedure for a special order. All he said was that when a spare part ordered by a customer is not available the spare part was ordered if the customer confirms that the spare part should be ordered. I cannot think of any better way for a customer to indicate that he needs a spare part than by presenting a written order for it. Accordingly, I do not think that the plaintiff's garage could have done any more than submit a detailed order of spares which they did on 18th of January 1984. Those orders surely must have told Stansfield Motors that the plaintiff's garage required those spares and if they did not have them in stock they should have asked the garage if an order should be made for such spares as they did not have in stock. It is true, as Mr. Msisha contended, that there are five additional orders which appear on the invoices. Three of them are dated in September 1984, one is dated in October and one is dated in April. But what is important, in my judgment, is that the spares which were ordered in January 1984 were not all supplied until the 19th of July 1984. The hiring period for which the plaintiff is claiming hiring charges is only up to July 1984.

The fundamental basis for damages is compensation for pecuniary loss which has naturally flowed from a breach. This principle is qualified by another principle which imposes a duty on the plaintiff to take all reasonable steps to mitigate a loss consequent on the breach and it prevents the plaintiff from claiming any part of the damage which is due to his failure to mitigate. It is, however, important to emphasize that the latter principle only imposes a duty to take such steps as a reasonable and prudent man would ordinarily take in the course of his business. I am satisfied and I find that the plaintiff took his motor vehicle to a reputable garage soon after it was damaged. He left the matter in the hands of his Insurance Brokers and his garage. On 18th of January 1984, his garage ordered spare parts which they considered would be necessary, at that time, to restore the plaintiff's vehicle to its original state. Those spare parts were not fully supplied until the third week of July 1984. I find it difficult to accept Mr. Msisha's submission that all the other spare parts ordered should be disregarded and that only those 4 items of spares which are referred to in exhibits D1 and D2 should be considered. Perhaps it is important to point out that at the time exhibits D1 and D2 were being written, the orders in exhibit 2 had already been presented to Stansfield Motors. So it is difficult, in my judgment, to say that those spare parts which had already been ordered and which had already been found to be necessary for the repair of the plaintiff's car should be disregarded. I am unable to accept that submission. As Mr. Kaliwo rightly submitted the evidence should not be looked at in isolation but in totality to see what spare parts were necessary to restore the plaintiff's car to its original state.

I am further satisfied and I find that the plaintiff had taken all reasonable steps which a prudent and reasonable man in his own business would have taken. He had taken the car to a reputable garage a day after it was involved in the accident. He left the whole matter in the hands of a reputable garage and his Insurance Brokers. The garage, two weeks later, ordered what they thought, at that time, were the spares required to restore the plaintiff's car to its original state. Those spares were not supplied at once but over a period of time. I am unable to find, on the evidence before me, that the plaintiff did not take all reasonable steps to mitigate his loss. I find, on the contrary, that the plaintiff had taken all reasonable steps and therefore that there was no failure to mitigate loss on the part of the plaintiff. Consequently, I find that the plaintiff is entitled to recover the hire charges for the whole period claimed. There will, therefore, be judgment for the plaintiff in the sum of K8,311.40 and costs of this action.

Pronounced in open Court on this 25th day of February, 1988 at Blantyre.

A handwritten signature in dark ink, appearing to be 'R.A. Banda', written in a cursive style.

R.A. Banda
JUDGE