IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 1871 OF 1994

BETWEEN:

M. MATIASI..... PLAINTIFF

AND

D.L. MILISI.....DEFENDANT

CORAM: KUMANGE, ACTING J
Msisha, Counsel for the plaintiff
Chirwa, Counsel for the defendant
Nyirenda, Court Interpreter

RULING

By an originating summons dated 28th July 1994, the plaintiff prays for an order that the defendant do:-

(a) Immediately return in good condition a minibus seized on 14th September 1994 to the plaintiff.

(b) Pay the plaintiff K700 per day from date of seizure to date of its return, being income the minibus was making per day.

(c) Pay a sum of K59,578 being money spent on the purchase price and, expenses incurred for the repairs of the minibus before it was seized.

The action having been commenced by an originating summons, evidence was by affidavits. The facts are simple and straight forward. But the damages claimed are made under a wrong mode of commencement of action, since they fall under tort, or contract or breach of duty. As such prosecuting the case on the basis of damages as stated above will not be easy without touching matters of tort or contract. The proper procedure therefore is to commence the action by a writ.

Order 5 rule 2 of The Rules of the Supreme Court (The White Book) prescribes that matters for the claim of damages as such, have to be commenced by a writ of summons. Even Rule 4 of the

same order restricts originating summons to matters which involve the construction of an Act, deed or contract (just to mention a few) or where there is likelihood of a substantial dispute of fact. In the present case I cannot intertain the claims for damages. I therefore restrict my observation, analysis of the facts and decision to the order sought for the return of the vehicle and nothing else. The case stands or falls entirely on the basic construction of the agreement tendered, (exhibit "DM 1").

As regards the damages in issue I order that the plaintiff should commence a separate action by a writ of summons to enforce them. Turning to the relevant issue, that is for the return of the minibus, the question I have to ask myself is whether under the agreement the defendant was justified in seizing the minibus which is now in his custody and possession.

It is rather disheartening to see that the case was argued by both counsel purely on the affidavit evidence without citation of any legal authority, statutory or otherwise in support of their arguments. This is a mercantile contract which both sides could have backed up with cited authorities, be it common law or statutory. Such approach leaves the court in a rather awkward situation as the court is left with the burden of doing the work that counsel did or ought to have done soon before or soon after the action commenced. The pleadings and the evidence adduced, whether orally or by affidavits, only give guidance as to the law applicable in every situation. I would therefore wish the members of the bar, as officers of the court, exert on themselves, much effort to assist the bench by exploring the law along the principles that may appear relevant to their cases. Naturally that excise involves too much research and thinking. It cannot be denied that a judgment sounds good if it contains sound and fastidious principles in support of the ratio decidendi. Both the bar and the bench must share that responsibility and counsel occupy the frontline position in achieving that goal.

Notwithstanding such weaknesses as hereinabove pointed out, the evidence as disclosed by the filed affidavits is as follows:

On 16th April 1994, the plaintiff bought from the defendant, a motor vehicle which has been described in all the documents of process as "A minibus". Its make or model has not been revealed to the court save the Registration No. which is "CZ 67". All through this ruling therefore I shall refer to the vehicle as either "the minibus" or "the vehicle".

The vehicle was offered to the plaintiff as a buyer thereof at K65,000. Having accepted the offer, the plaintiff made a down-payment of K30,000, leaving a balance of K35,000, which

later became the subject matter of these proceedings. The parties agreed that the plaintiff should liquidate the balance within six months, that is from 16th April to 16th October 1994. Compelled by the dictates of prudence and dilligence, the parties agreed to reduce their agreement in writing. Exhibit "DM 1" is a true copy of that agreement. It was written in long hand and signed by both parties and duly witnessed. It was written in Chichewa and all the intended terms or conditions were incorporated therein. The following represents an almost literal translation of that agreement from Chichewa into English. It reads:-

> "Paid K30,000 for buying a minibus (CZ 67) as deposit. Balance K35,000, will be paid within 6 months and will start paying on 16/5/94 at a sum of K5,833.33 per month. If he fails to pay, we shall seize the vehicle".

After this agreement, the plaintiff was given delivery of the minibus to run it. The plaintiff did actually operate the minibus and he kept his word for three months up to July 16th but failed to pay for August and September instalments of K5,833.33 each. By mid September 1994, the defendant saw the need to repossess the vehicle and he seized it, and took it home where it is kept to this day. The defendant seized the minibus under the auspices of the operative authority to seize as stipulated in the written agreement.

In his affidavit in opposition the defendant admits that over and above the K30,000 which was paid as deposit, the plaintiff made further payments in strict observance of the stipulation as to payment, and made the following cash payments.

On 17/5/94	K 5,833.33
On 16/6/94	K 6,426.66
On 16/7/94	K 6,135.00
Total paid within 3 months	K18,394.99

It is not in dispute that after 16th July 1994 the plaintiff did not pay any more money. His reason for such failure being that the minibus was grounded and it required major repairs to be carried out. He further contends that since the vehicle was the only source of income which he was using to pay off the debt to the defendant, its inactivity had automatically frustrated his source of income for the discharge of the debt. From August to mid September he had spent a sum of K11,578.00 repair costs. He further contends that the minibus was capable of making a sum of K700.00 per day. The evidence however does not show whether the plaintiff had notified the defendant about the repairs works. But in his own affidavit, the defendant concedes that by September 14th he was told about the problem. On 16th September the defendant nevertheless went and took

possession of the minibus. Although there is no agreement as to the actual date that the seizure was effected, one thing remains clear, that by 16th September the vehicle was seized and the minibus business put to a halt. By that date the defendant maintained and cherished the sentiment that it was the right time for him to seize the vehicle in conformity with the agreement signed.

I bear in mind that this whole action sparked from the term reserving the right to seize, which reads.

"If he fails to pay, we shall seize the vehicle".

The pronominal use of the word "we" is suggestive of the fact that there is plurality of persons who own the vehicle but nonetheless that is beside the res gestae in this matter.

Coming now to the substantive issue, my attention has been focussed on The Sale of Goods Act (cap 48:01), especially section 3. Section 3 (1) defines a Contract of Sale as one where the seller transfers or agrees to transfer the property in goods to the buyer for money consideration, called "price". Subsection (3) further states that such a contract may be absolute or conditional. Furthermore under subsection 4, if the property in the goods is transferred from the seller to the buyer, it is a "sale". But if transfer is to be at some future date subject to some condition thereafter to be fulfilled, it is called "an agreement to sell". The court was not told whether the blue book for the vehicle was surrendered to the buyer or not. I suppose it was not. But one thing stands out as true, that is that this is an agreement to sell, as encumbered with the condition to seize the vehicle upon the plaintiff's failure to pay that balance of K35,000. That condition amounts to a reservation right to transfer property or title in, the minibus, to the plaintiff.

Section 19 lays down rules which may determine time when the property in the goods upon sale is to pass. Section 19 (1) says that to ascertain that intention, regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. It means therefore that even in situations like the present case, if an intention different from the usual intention of sale and direct transfer of property is apparent on the face of it, the seller is justified if he exercises his right to seize as authorised by the agreement. When expounding on the meaning of "different intention", the book called Benjamin On Sale 1974 Edition, paragraph 310 has this to say:-

> "The most common situation is where the parties intend that the property in the goods shall not pass to the buyer, until the price is paid".

A similar remark is repeated under paragraph 383 of the same book. Reservation to transfer property was considered and upheld in a number of cases. What is important is the intention of the parties. In Re ANCHOR LINE (HENDERSON BROTHERS) LTD (1937) Ch. 1. Goods bought subject to a condition that payment was to be deferred, could not have property in them pass until such time that the price was paid. In fact under section 29 it makes the delivery of specific goods and payment concurrent factors without which property may pass only where the intention is clearly to that effect. (See also WARD (RV) LTD VS BIGMALL (1967) 1 QB 534). Both the statutory and the common law principles would seem to support the defendant in this action. But would it really?

Notwithstanding the defensive principles of law observed herein above, I feel the case has to be looked at from a different angle, that is the "time factor" within the agreement itself. I take it that the agreement was drafted and presented for signature by the defendant and his co-owners by the use of the word "we". Under the Contra proferentum Rule, a document is strictly construed against the maker, unless a different intention is shown, (Burton v English(1883) 12 Q B D 218. I take it that the "agreement to sell" was drafted by the defendant. If a proper construction is placed on the reservation statement, it is brief and clear. It says "If he fails to pay the vehicle will be seized". If he fails to pay what? Is his failure of referral to each of the "six" instalments or to the whole amount of K35,000 balance?

I am afraid to say without any hesitation that the term does not say "If he fails to pay any instalment" but "If he fails to pay" - To pay what? The whole balance. Placing a strict but equitable construction on this sentence, one would not be lost if by way of construction one takes the word "pay" to refer to the amount "K35,000." The plaintiff's failure to pay could not refer to the time when he failed at least one or two instalments. He had six months, from 16/5/94 to 16/10/94 within which to pay that amount. After all the defendant knew that by 16th July a total of Ki8,394.99 had already been paid towards the reduction of that balance. Although the defendant says in his affidavit that by that date, there was a balance of K20,000 still due, I do not agree. The balance was K16,605.01. All in all the defendant got a sum of K48,394.99. Will it really be justice for the defendant to have both the vehicle and the money? Has he returned this money to the plaintiff to show his sincerity in the matter? I do not think so?

The time that would determine the plaintiff's failure to pay the balance (not of an isolated instalment but the whole K35,000 balance) was 16th October 1994. It could not be on 16th May, 16th June, 16th July, 16th August, 16th September, but 16th

October 1994. The defendant if he were a man imbued with the qualities of self control, should have restrained himself and exercise his right of seizure on 16th October. He himself chose his agreement to be drawn up in that fashion. If the document is vague, that vagueness cannot be accredited to him, not an inch as I visualise the deal, but to the plaintiff as a buyer.

If there is another agreement besides the one now under review, that is none of my concern. As far as I am concerned, supported by the evidential documentation the court has, the sale was for K65,000 out of which K48,394.99 is paid, and the balance is K16,605.01. I do not accept a balance of K20,000. May be that arises out of a separate agreement that has not been exhibited to this court.

To do equity in the matter I feel it is very difficult because by seizing the vehicle on 14th or 16th September before the final date of 16th October, the defendant is in breach of the term. By implication the final amount fell due on that date, and it is only on that date alone, that the plaintiff would constructively be said to have failed to pay the whole K35,000. In view of the defendant's constructive breach, I order that as far as the restrictive term is concerned, that term be rescinded from the agreement, and make the agreement as a mere debt. The plaintiff must pay this debt within four months from today. The vehicle is not to be sold or in any way disposed of to any third parties until the whole balance is paid. When fully paid, the plaintiff should be given authority (blue book inclusive) to change the ownership of the minibus.

May I say however that had the defendant applied to court under section 14 of the Courts Act (cap 3:02) or Order 29 Rule 2 of the Rules of Supreme Court, the construction of the agreement would perhaps have come up as a preliminary issue. But as the case stands now, the action succeeds to such extent as herein above pronounced.

Turning to the question about costs, I am of the view that the defendant acted under a wrong assumption that time had arrived for him to exercise his right under the contract. It is apparent, nonetheless that the condition to seize was there. Equity therefore compels me not to punish the defendant further. He wants his money and ordering him to pay an exorbitant amount in costs, would mean doing him much injustice. He should incur only such costs as would entitle him to return the minibus to the plaintiff in the manner it was before he seized the vehicle. But as regards the full prosecution of this case, each party is to pay own costs.

Made in Chambers at Blantyre this 1ST day of November 1994.

D. S L Kumange
ACTING JUDGE