IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO 80 OF 1993

BETWEEN

S.B.D. MSOWOYA (Male) ..... PLAINTIFF

and

MALAWI ENTREPRENEURS DEVELOPMENT INSTITUTE (MEDI) ...DEFENDANT

CORAM: CHIMASULA PHIRI J.

Temwa Nyirenda of Counsel for the Plaintiff
Dzoole of Counsel for the Defendant
Ntondeza Official Interpreter
Katunga (Mrs) Recording officer

JUDGMENT

The Plaintiff's claim is for damages for conversion and loss of use of his motor vehicle registration number MZ 1223. The claim arises from the repossession of the said motor vehicle by the defendant on the 2nd September, 1992. Further or in the alternative the plaintiff's claim arises from the sale of the said motor vehicle to a third party by the defendant by 5th December, 1992. The plaintiff alleges that he was at all the material times the owner of the motor vehicle and that it was sold without his knowledge or consent. The defendant denies having converted the plaintiff's motor vehicle and states that at the material time it was the real owner of the said vehicle while the plaintiff was merely a nominal and titular owner in terms of the registration book. The defendant has further pleaded that in the alternative that if it was not the real owner, it had a lien in the vehicle. The defendant also pleads the defence of set off alleging that the plaintiff owed it a sum of K16,099.39 and that this sum remains unpaid to date and hence counter-claims the same. The parties agreed in their submissions

that the issues for determination are basically whether there was conversion of motor vehicle registration number MZ 1223 and secondly whether the defendant has proved its counterclaim.

The plaintiff was employed as an accountant by the defendant on 1st August 1990. He remained in the employment of the defendant until 31st August 1992 when he resigned. On 27th February, 1992 there was offer to sale a Peugeot registration number 45 SC 09 by tender. The plaintiff successfully bid for this tender and was offered to purchase this vehicle for K9,000.00. He applied for a motor vehicle advance from the defendant. The principal of MEDI approved the motor vehicle advance on 5th March, 1992 and an invoice number 995 dated 11th May, 1992 for K9,000.00 was raised. The defendant gave the plaintiff a letter for change of ownership. The plaintiff had ownership changed from MEDI to himself and the vehicle re-registered from 45 SC 09 to MZ 1223. Arrangement was made that the defendant would deduct from the plaintiff's monthly salary and credit such sums to the plaintiff's motor vehicle advance account. The monthly deduction was supposed to be K200.00. The plaintiff alleges that he paid for 7 months before he resigned. On his resignation the plaintiff trekked yet to another company, and this time it was Constantini and Brothers. On 2nd September, 1992 some officials from MEDI followed him there and demanded payment of balance on the motor vehicle and other loans by 4th September, 1992. These officials had instructions from the defendant to get the keys and the motor vehicle until the loan was paid. These officials took the vehicle to the defendant's premises in Mponela.

There are two pertinent letters written by the defendant dated 1st and 10th September, 1992. In the earlier letter the defendant points to the plaintiff outstanding financial issue relating to the plaintiff's duties specifically underbanked sums totalling K13,226.35. In the letter of 10th September the defendant submitted a revised claim and this is split in two portions. The first part relates to debts discovered after audit investigation and totals K1, 607.66 and the second part relates to other accounts in terms of management records of the defendant institute totalling K15,010.68. The grand total is shown as K28,237.03. On 21st September, the plaintiff went to MEDI and he paid K1,607. 66 on receipt number 2246A dated 21st September 1992. The plaintiff says this payment was in respect of all loans except the vehicle loan, which he alleges, the Vice Principal refused to accept. The plaintiff states that by then the vehicle had already been sold by the defendant to a third party and that it was sold without his consent or approval. The plaintiff has denied the counter-claim. The plaintiff's denial is based on his understanding that the total deductions on the car loan as at end of August were K1,075.65 and further that on the car insurance loan the deduction was K756.24. Therefore, the car loan could not be K8,375.00. Secondly, on repossession of the vehicle the defendant should have cancelled the comprehensive insurance policy. He denies that he owes the defendant K4,872.00

for notice pay on the ground that he had accrued leave of 3 months and this set off that claim. The plaintiff denies that there are any outstanding debts because money which was released from National Insurance Company on his pension benefits was utilised to clear these debts. It is also worth noting that on 9th November, 1992 the plaintiff wrote for the defendant indicating the salary deductions for the car loan and its insurance cover. The plaintiff admits outstanding balance of K744.56 for insurance loan. The plaintiff in that letter requested the defendant to refund K1,831.89 being car loan deduction and car insurance deductions. The plaintiff indicated that on receipt of that sum he would arrange to change ownership of the vehicle. On 2nd December, 1992 the defendant wrote the plaintiff highlighting the fact that the plaintiff had gone on leave hence, no issue of accrued leave to cover the issue of three months notice and secondly that the deductions for the car loan and insurance would be off set towards the plaintiff's use of the car for that period. Thirdly, the letter indicated hope that the pension benefits would clear the other loans. The pension refund remitted to MEDI on 11th January, 1993 was actually K1,085.56.

The defendant by its pleadings has particularised the counter-claim as follows:-

(i)	Balance on motor vehicle advance	9,250.38
(ii)	Car Insurance advance	1,517.05
(iii)	Emergency advances	1,691.61
(iv)	Salary advance	300.00
	Less Monthly deductions	2,857.82
	Balance	9,901.22
(v)	Monies irregularly obtained	1,607.66
(vi)	Three months salary in lieu of notice..	4,590.51
		16,099.39

Exhibit D15 is an invoice raised against the plaintiff for purchase of motor vehicle at K9,000.00. It is dated 11th May, 1992. Exhibit D11 clearly states that the motor vehicle advance would be at 10% interest rate per year and repayment would be in 72 months and that the monthly repayment would be K200.00. This is the plaintiff's own letter to the defendant. In Exhibit D2 which is another letter from the plaintiff, he shows a breakdown of his repayments from March, 1992 to August 1992 some of which were K125.00 instead of K200.00. The total is put at K1,075.65. I find as a fact that the plaintiff had not paid the K9,000.00 plus interest to MEDI at the time of his resignation.

Secondly on the insurance claim of K1,517.05. I would also refer the plaintiff's own letter acknowledging indebtedness of K744.56 on the insurance loan. However, this does not take into account interest that accrued.

On the emergency advances that plaintiff in his own letter of 4th November, 1992 acknowledges that he had outstanding advances and loans although he was not sure of the extent of those debts. The plaintiff assigned his pension benefits estimated at K1,600.00 to cover those debts. As has already been seen, NICO remitted K1, 085.56 only. There is no indication that this has been deducted in the defendant's counter-claim of K1,691.61. If that is done it would leave the defendant's claim at K606.05 for emergency advances. The defendant has to prove this. Similarly the defendant claims K1,607.66 which appears to have been paid under receipt number 2246A of 21st September 1992. The receipt clearly states that it is a " payment for the outstanding account government auditors". Therefore, I find as a fact that this claim of K1,607.66 cannot be supported.

The issue of three months notice pay featured prominently in the evidence of both parties. It is not in dispute that the plaintiff or the defendant were supposed to give each other a three months notice on resignation or termination of services respectively. The plaintiff argued that he had accrued leave of three months because according to his terms of employment he was entitled to 30 days leave per annum. He contended that from 1st August 1990 up to 31st August 1992 he never went on leave because management of the defendant institute wanted him to be at work. The plaintiff submits that the days of his leave should be off set to his notice pay. The defendant denies that the plaintiff had any accrued leave days and that even if he had such accrued leave, they would only add to 60 days i.e. from August 1990 to 31st July 1991 - 30 days and from 1st August, 1991 to 31st July, 1992 -30 days. The plaintiff wrote on 8th May, 1992 to the Principal confirming the principal's verbal instructions on 7th May, 1992 that the plaintiff should go on leave from 7th May, 1992 to 18th August, 1992 i.e 72 days. This is exhibit D14. The principal in his evidence clearly stated that when the plaintiff went on leave he never resumed his duties until he resigned. He only reported for duties as and when he was required to respond to querries. I would prefer the defendant's evidence on this issue and find that the plaintiff never had any accrued leave days. As such the defendant would be entitled to notice pay equivalent to three months salary.

I would now revert to the main issue. Firstly, the claim for conversion. Conversion is 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 owner to assert a right inconsistent therewith. See - **Lancashire and Yorkshire Railways -vs- MacNicole** (1919) 88 LJKB 601. This has been put in simple terms

in the case of **Chitungu and Chiutsi -Vs- Napolo Ukana Breweries Limited**, Civil Cause No 601 of 1992 High Court (unreported) where Mtegha J said "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". On 2nd September, 1992 when the team of officials went to see the plaintiff at his new place of work they went there to demand repayment of car loan and other loans. The plaintiff was given a deadline of 4th September, 1992. The defendant seized the vehicle. The plaintiff has submitted that in the circumstances of this case the repossession of the vehicle was conversion. The plaintiff relies on the case of **Tear Vs Freebody** (1858) 4 CB(NS) 228 for the proposition that 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 the case of **Tear -Vs- Freebody** (ante) the defendant wrongfully took possession of certain goods with the intention of acquiring lien and it was held that he was guilty of conversion. Similarly, taking by duress, under a threat of certain consequences is conversion - see **Grainger -Vs- Hill** (1838) 4 Bing NC 212. The position of this current case must be understood in its own context. It differs from the position in the case of **Chitungu** (ante). In the present case the defendant demanded repayment of car loan as tabulated in the letter of 1st September, 1992 and repossession of the car until repayment. The evidence of Kanyama is very pertinent. He was in the team of officials. The letter was delivered to the plaintiff and after reading the letter and holding discussions the plaintiff surrendered the keys and the vehicle but retained the registration book. My own view is that the interference with the vehicle in a manner inconsistent with the rights of the plaintiff was with lawful justification. In the case of **Chitungu** the chattels belonged to the third party hence wrongful seizure but in this case the vehicle belonged the plaintiff. The law would fail to protect the public if each and every time a person seized another's own property as lien to force him honour his obligation, the latter succeeded in a conversion suit. I do not even find that the plaintiff was threatened to surrender this vehicle to the team of officials. It was done voluntarily by the plaintiff and I would not find any conversion on the incident of 2nd September, 1992.

The other act complained of is that of sale of the chattel in December, 1992. The defendant admits that it sold the vehicle to a third party. The plaintiff wrote on 4th November, 1992 surrendering the vehicle to the defendant. The defendant wrote as follows:-

> "I wish to surrender MZ 1223 to you and have the money you deducted for the car loan refunded."

The response of the defendant on this issue is in the letter

dated 2nd December, 1992 - Exhibit P11 and states as follows:-

> *"Management have considered your offer to surrender the car, and agree with you that in these circumstances this is probably the best thing to do. What we do not understand however, is your request that the money deducted from your salary as loan repayment be refunded to you. Our understanding was that this money would compensate for the use of the car during the five months in which the car was in your possession. If you see otherwise, how will you pay MEDI for using the car?"*

It appears the parties never agreed on any course of action to dispose of their dispute amicably. The question to be asked is whether the defendant committed conversion through the sale of the vehicle. I find as a fact that the plaintiff did not consent or approve the sale of the vehicle. His surrender of the vehicle was made on a condition that he would be refunded the money that was deducted from his salary in respect of car loan account. Therefore, that condition having not been met by the defendant, the surrender of the vehicle failed. In the absence of a stipulation that ownership would not pass to the plaintiff until after full repayment of the car loan, the defendant would not have proprietary rights to enable it sale the vehicle or deal with the vehicle in any such manner inconsistent with the proprietary rights of the plaintiff. The sale should have been sanctioned by the plaintiff otherwise the defendant's act lacked lawful justification in the interference with the plaintiff's proprietary rights. Sale advertisement in the newspaper did not constitute notice to the plaintiff about the defendant's wish to sale the vehicle. The defendant should have specifically written to the plaintiff seeking his consent and approval to sell the vehicle. If the plaintiff had unreasonably withheld his consent and approval it would have been the duty of this Court to determine whether or not such withholding of consent and approval was reasonable or unreasonable. Thefore, I would find that the sale of the vehicle in December, 1992 amounted to conversion. The defendant is liable for conversion. The damages for conversion by sale is the market value of the thing converted at the time of conversion. See **Wickham Holdings Ltd - Vs- Brook House Motors Ltd (1967) W.L.R. 295**. The value at the date of sale was K12, 000.00 and it was sold at K12,000.00. In addition to the value of the chattel the plaintiff would be entitled to damages for loss of use. Counsel for the plaintiff has cited the case of **J.L.M. Pangani Vs Rashid Hussein Jussab,** Civil Cause No 512 of 1990 where the plaintiff was awarded K5,000.00 for loss of vehicle for 17 months. Also in the case of **P.J. Chinema Vs World Vision International,** Civil Cause No 1097 of 1991 (unreported) where the plaintiff was awarded K7,000.00 for use of his vehicle for Six and half months. In the present case the plaintiff was deprived the enjoyment of use of the vehicle. However, in reality the plaintiff contributed greatly to the occurrence. The manner in which he conducted himself in clearing the debts he had with the defendant forced the latter to opt for

the sale of the motor vehicle to a third party. I would therefore, award the plaintiff nominal damages of K2,000.00. Therefore the total award to the plaintiff becomes K14,000.00.

As for the defendant's counter-claim I find that the same has also been proved up to the requisite standard on the following items:-

(i)	Balance on motor vehicle advance	K 8,375.00
(ii)	Vehicle insurance advance.....	744.56
(iii)	Three months salary in lieu of notice..	4,590.51
	TOTAL	K13,710.07

The evidence of the defendant on the other emergency and salary advances allegedly granted to the plaintiff does not satisfy me up to the requisite mark that there is a balance due and owing. The defendant does not state how much was borrowed and how much was deducted from the plaintiff's salary. I will assume that the K1,085.56 from the National Insurance company in respect of the plaintiff's pension benefit settled his indebtedness with defendant. There would be no further claims by the defendant worth considering.

Therefore, by off setting the counter-claim from the plaintiff's award there is a balance of K289.93 due and payable by the defendant to the plaintiff. I order that the defendant shall pay this sum to the plaintiff.

The issue of costs is discretionary. Normally costs follow the event. Both parties have substantially succeeded on their claims. It would therefore be fair and just if each party paid its own costs of these proceedings and I so order.

Pronounced in open court at Blantyre this 8th Day of January, 1997.

G.M. Chimasula Phiri
Judge