IN THE MALAWI SUPREME COURT OF APPEAL

M.S.C.A CIVIL APPEAL NO.7 OF 1985

BETWEEN:

LUSITANIA LIMITED.....APPELLANT

- and -

GLOBE WHOLESALERS.....RESPONDENT

Before: The Honourable Mr. Justice Banda, J.A.
The Honourable Mr. Justice Mtegha, J.A.
The Honourable Mr. Justice Kalaile, J.A.

Savjani, Counsel for the appellant
Osman, Counsel for the respondent
Kadyakale, Law Clerk
Longwe/Manda, Court Reporters

JUDGMENT

Banda, J.A:

This is an appeal against the judgment of Mbalame, J., as he was then, sitting as a Judge of first instance in the High Court. The appellant in this case was the defendant in an action for breach of contract. Judgment was entered in favour of the plaintiff, now the respondent in this appeal.

The respondent is a sole proprietor of Globe Wholesalers. It was his evidence that some time in 1983 he purchased a large quantity of general merchandise comprising various items of block-boards, galvanized fittings, brass fittings and measuring tapes from a company known as Picks & Shovels which had been placed under forfeiture in Lilongwe. The stocks were apparently sold by public auction by Messrs. Trust Auctioneers and Messrs. Peat Marwick acting under the instructions of the Administrator General. He stated that a list of these items was prepared and that as the quantities were large and the sizes varied, the list was not precise as to both quantity and sizes. He stated that when he came to Blantyre he distributed the list to various prospective customers among hardware merchants like Comet, General Traders, D.J. Hardware and that of these General Traders was among those companies which responded by informing the respondent that there was a buyer who was prepared to purchase the entire stock. It was later revealed that the

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buyer who was prepared to buy the entire stock was the appellant company.

It was the evidence of the respondent that he contacted Mr. Francisco, the General Manager of the appellant company, and that he went to see him in person some time in the month of September 1983. At that time it would appear that Mr. Custodio, who is the Managing Director of the appellant company, was not in the country. He was away in Portugal. The respondent stated that at that exploratory meeting Mr. Francisco expressed keen interest to buy not only the items on the list but also other items for which the respondent would bring a list at a later date. The respondent stated that on his second meeting with Mr. Francisco he produced a list and discovered that Mr. Francisco had already had a copy of that list. He stated that he then produced another list to Mr. Francisco and this was exhibit 2. It was the respondent's evidence that Mr. Francisco was interested to buy the whole stock of plumberware except the galvanized fittings measuring 2 inches and above. It would appear that at this stage neither of the lists had prices on them but it was agreed that both parties would get prices from other dealers and that they would sit and compare them later. It was the evidence of the respondent that during these meetings Mr. Da Costa, who is one of the directors in the defendant company, used to come in and out of Mr. Francisco's office although he did not personally take an active part in the discussions. The respondent stated that at the third meeting with Mr. Francisco prices were discussed and that he gave Mr. Francisco most of the prices which Mr. Francisco noted on his own list. The respondent stated that it was at this third meeting with Mr. Francisco that the latter said he would contact Mr. Custodio in Portugal. The respondent stated that on the fourth meeting with Mr. Francisco he, the respondent, produced exhibit 3 which now had prices from Hardware and General Dealers and Comet Hardware. He stated that he then gave Mr. Francisco his own prices which were finally agreed upon. They met again for the fifth time when it was agreed that the appellant company would start taking delivery of the goods and that the actual quantities would be ascertained on delivery as all the goods were mixed up and lying in Lilongwe. The respondent stated that Mr. Francisco told him that he had talked to Mr. Da Costa, who initially expressed reluctance, and that he had now agreed to the purchase of the fittings.

The appellant company is one of the largest construction companies in this country. Mr. Francisco concedes that these five meetings referred to by the respondent were held and that he had expressed interest to buy the fittings. It was disclosed in evidence at the trial that the appellant company

has subsidiary companies with interests in ceiling boards, oil, plywood, tyres and tiles. Mr. Francisco, as already indicated earlier on in this judgment, was the General Manager of the appellant company at the time of the events which have given rise to this action. Mr. Francisco described himself as a man with considerable experience in the building and construction business. It was his evidence that the appellant company has small teams of plumbers who do plumbing in small contracts undertaken by the appellants. It was his evidence that in 1983 the appellants had two major contracts, the Civic Centre in Blantyre and Malindi Secondary School in Mangochi. There were other small contracts but he stated that the Civic Centre contract was worth K3.2 million and that the value of the plumberware required was between K1,000 and K1,500 only. It was his further evidence that the major plumbing work at the Civic Centre had been sub-contracted to another contractor. The contract at Malindi was nearly K2.2 million and the plumbing fittings would cost K1,300. He stated that in 1984 the appellant company negotiated part 2 of the Civic Centre which was worth K2.2 million with K1,000 worth of plumbing fittings. It was Mr. Francisco's evidence that the appellant company never bought fittings for re-sale. He stated that the appellant company would never buy such quantities as was delivered to it by the respondent as it would take the appellant company 10 - 15 years to use them. It was his evidence that there had been no dealings between the appellant company and the respondent prior to the transaction giving rise to the present action.

Mr. Savjani has contended that because the trial took a long time to finish spreading over several months, it resulted in errors in the findings of fact by the trial Judge. He submitted that although the trial Judge had his notes these must necessarily be brief and that without the advantage of a single continuous trial the Judge's recollection of facts became blurred resulting in mistakes in the assessment of the evidence. To support this contention, Mr. Savjani referred to the passage in the record where the trial Judge was making enquiries on whether DW1 had finished giving evidence in chief. That enquiry by the trial Court could hardly, in our view, be evidence of the trial Judge's faulty memory.

It has been contended by Mr. Savjani, for the appellants, that there was no agreement for sale or purchase of fittings between the appellant and the respondent because no prices had been agreed; that quantities were not agreed; that no items were agreed. While the appellant concedes that the items were delivered at the appellant's warehouse, it has been contended that such delivery was only for the purpose of storage. Mr. Savjani has further contended that the essence of the respondent's case was that there was a contract

of sale and that the facts relied on to support that contract must come from paragraph 1 of the Statement of Claim. He has contended that the respondent did not contend that there was an implied contract or that prices had to be ascertained in terms of the Sale of Goods Act. Mr. Savjani also contends that the respondent's case was not that there was a deemed acceptance and that no part of the contract was severable. He submitted that the respondent's case was that there was a concluded contract and that no matter remained for negotiation. Mr. Savjani submitted that the trial court had engaged in some **(to use his own words)** "back-breaking gymnastics" to find a contract and that the trial court's findings destroyed the respondent's contract as pleaded in paragraphs 1 and 2 of the respondent's Statement of Claim. Mr. Savjani has contended that all the evidence disclosed was that there was an agreement to negotiate and not an agreement for sale. He submitted that an agreement to negotiate is inchoate and does not constitute a contract.

Mr. Savjani submitted that it was not open to the trial court to find a contract on the basis of section 36 of Sale of Goods Act as there was no evidence to support such a finding. It was also Mr. Savjani's submission that the sections in the Sale of Goods Act had not been pleaded and that the appellant did not anticipate it and were not prepared to meet such a case. The effect of Mr. Savjani's submission is that the defence of the appellant company was taken by surprise by the introduction of the Sale of Goods Act.

Mr. Savjani has referred to the functions of pleadings and has cited to us precedents of statement of claim in **Bullen & Leak, 12th Edition**, for "claims for price of goods sold". We are satisfied that in citing those precedents to us Mr. Savjani did not mean to suggest that they constitute the only way of framing statements of claim for prices of goods sold. To accept that submission would be going back 100 years to the time when a man's rights depended on whether his claim fitted into a prescribed form of action. That is no longer the law. They are, in our judgment, only examples and the function of pleadings is to define or to narrow issues between the parties which are to be decided by the Court. The principal rule of pleading is that each party must plead all material facts on which he relies for his claim and not evidence. And the necessary corollary of this principle is that matters of law or mere inference of law should not be stated or pleaded. We are satisfied that it was not necessary, indeed, it would have been contrary to the rules of pleadings to plead inferences of law drawn from the Sale of Goods Act. The issue of the application of section 10 of the Sale of Goods Act is tied up with the main issue of whether or not there was a contract of sale between the parties. Once it was found that there was a

contract or a bargain then section 10 became applicable. We find little merit in the submission by Mr. Savjani on the issue of pleadings.

The appellant company's contention at the trial was that the respondent's witnesses had cooked the evidence to support the respondent's case. It was also suggested that some of the witnesses for the respondent were threatened or paid to give evidence against the appellant company. We are unable to find evidence to support all these allegations. Mr. Savjani has contended that the respondent's change of stance and prevarications on a number of fronts destroyed his credibility and has attacked the Judge's findings on the credibility of witnesses. He contended that there was no basis for the Judge to find that DW1 was not a witness of truth. He also submitted that the Judge did not consider the contradictions between the evidence of the respondent and the evidence of PW3 and PW4 and that these contradictions destroyed the witnesses' credibility. We are satisfied that there was some basis for the trial Judge's findings that DW1 was not a witness of truth. There are many instances in the record on which the witness changed his stance and where he agreed that he had told lies. We are not prepared to accept the contention that the Judge's findings on the credibility of DW1 cannot be supported. It is true that there were apparent contradictions in the evidence of PW1 and the evidence of PW3 and PW4. We are satisfied, however, that whatever contradictions there were in the evidence of these witnesses were not material to the main issue in the case. Does it really matter whether it was PW3 or PW4 who received exhibit 1 from the respondent? Is the issue of commission to be paid by the respondent to either PW3 or PW4 important in determining whether there was a contract of sale between the respondent and the appellant company? What is important, in our judgment, is the existence of exhibit 1 and there is no contradiction or dispute about that. Mr. Savjani also attacked the manner in which the trial Judge dealt with exhibit 3. He contended that this exhibit was of crucial importance and that substantial evidence was adduced on it but that the trial Judge only made passing remarks to it. Here, again, we are unable to accept Mr. Savjani's contention. We find that the trial Judge made sufficient reference to exhibit 3 to enable him to make the findings he did.

Mr. Osman, for the respondent, has submitted that the issue before the trial Court was a very simple one, and this was whether there was an agreement of sale between the parties. He submitted that a lot of witnesses were called because of the positions which the appellant company took. Among those positions was the contention by the appellants that it was impossible to think that anyone would

buy stocks worth K80,000 of galvanized fittings. He contended that the evidence before the trial Court was that the respondent bought goods worth K450,000 from the Administrator General including galvanized fittings. He contended that it was common sense that when you negotiate it means you are keen to buy and that whether you will be able to sell is a risk which any businessman has to face. He referred to the evidence which showed that Messrs. T.N. Mahomed had in a single transaction sold K20,000 worth of stocks. He therefore submitted that it was not impossible for the appellant company, which is one of the largest construction companies in Malawi to purchase fittings worth K80,000. Mr. Osman further submitted that the appellants introduced other issues like the issue of price, quantity, appellant company's internal procedure, size of fittings and that there had been no allocations to any contract. He contended that all these matters were introduced only to cloud the issues and were red herrings. Mr. Osman contended that the respondent's case was that the agreement of sale was to sell all the fittings except those which measured 2 inches and above. He contended that that was the fundamental agreement between the parties. Mr. Osman has submitted that the parties were agreed on the prices, on some of the quantities, although others would be ascertained on delivery. He submitted that the fittings were accepted by the appellant company. Mr. Osman submitted that there was, on record, a factual basis to support the findings the trial Judge made.

It is not necessary to review the evidence in great detail as we consider that the trial Judge carefully considered the evidence before him. We will only refer to the evidence where we consider it necessary to do so. We have directed our minds to the duty of an appellate court when hearing an appeal. We must re-hear the case by re-considering the material before the trial court. We must bear in mind the advantage which the trial court has in observing the witnesses' demeanour. We have carefully considered the judgment of the court below and the issues raised. In considering the issues before the trial court we have borne in mind that the appellate court must always be slow to differ from the findings of facts of the lower court but this rule, in our judgment, does not stop this court from drawing a different inference from the facts found. An instructive distinction has been made between "the perception of facts and the evaluation of facts". An appellate court can reach a different evaluation on the facts found by a trial court, see case of **Benmax v. Austin Motor Co. Ltd.** (1955) 1 A.E.R. 326.

The trial Judge sufficiently put before him the respective contentions of the parties and the issues raised in those contentions. We are satisfied that the trial Judge properly directed himself to the crucial issues before him.

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He appreciated the protracted nature of the case and it was because of this recognition that he considered it necessary to review carefully the evidence which had been adduced before him. He referred to the number of witnesses called and to the number of exhibits tendered.

It has been said that a contracting party, unlike a tortfeasor, is bound because he has agreed to be bound. But the agreement is not a mental state, rather an act and, as an act, is a matter of inference from conduct. The parties are to be judged not by what is in their minds but by what they have said or written or done. Emphasis is laid on the external appearance. Consequently, our function in this appeal is not to seek to satisfy some elusive mental element but to ensure, as far as facts can allow it, that the reasonable expectations of either party, in this action, are not disappointed. We must look at all the surrounding circumstances in order to establish the phenomena of agreement. It is from these circumstances that we must infer and find if there was an agreement to buy. It is within the jurisdiction of this court to extract the intention of the parties both from the terms of their correspondence and from the circumstances which surround and follow that correspondence. It is not the function of the court to invent contracts for the parties. It is the court's function to implement and not to defeat the reasonable expectations of parties. As Lord Wright said in the case of **S. Cammel v. Ouston** (1941) A.C. 251 at 268, "the object of the court is to do justice between the parties and the court will do its best if it is satisfied that there was ascertainable and determinate intention to contract to give effect to that intention looking at substance and not mere form. It will not be deterred by mere conditions of interpretation". As we have already stated the court must be content with the external phenomena, and in search of a contract, we have to search more widely to see if there is a basis on which to found a contract. Our task in this case, therefore, is to see whether there was indeed such phenomena upon which a contract of sale could be founded.

The grounds which have been canvassed before us by the appellant for contending that there was no contract between the parties appear to be as follows:-

(a) that no prices were agreed

(b) that no quantities were agreed

(c) that no items were agreed

(d) that the defendant company could not have bought such large quantities which would have taken them 15 years to use.

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(e) that the defendant company's internal procedure had not been followed in respect of the fittings delivered to them, and

(f) that delivery was only for storage purposes.

We find, from the evidence, that the defendant company expressed interest in the fittings which the respondent had. It is not disputed, as already found, that discussions were held over five meetings when the prices, the sizes and quantities of fittings were fully discussed. Price lists were exchanged and prices from other sources were obtained and compared. The comparisons showed that some of the respondent's prices were cheaper and others were higher. After carefully considering the surrounding circumstances and in view of the discussions and the comparisons of the prices, we are in no doubt that an agreement was reached on the prices of the items.

Mr. Savjani has submitted that the respondent had contradicted himself on the issue of when the prices had been agreed. The contradiction to which Mr. Savjani has referred relates to the question whether the prices were agreed before or after deliveries were commenced. The trial Judge found that the respondent had conceded that not all the prices were agreed at the 4th meeting but had given an explanation that this was so because some of the sizes could only be ascertained at the time of delivery and that that would be the time when the prices would be determined. We have carefully reviewed the evidence on this matter and it is clear that the respondent had explained that some of the prices were agreed during deliveries and he contended that had they not been agreed the appellant company would have sent them back. We are unable to accept that there were errors in the trial Judge's findings of fact which Mr. Savjani has attacked.

The respondent's contention was that the quantities of the fittings would be ascertained at the time of delivery. The evidence which was not disputed is to the effect that the fittings were sorted and counted when they were delivered at the appellant company's premises. This evidence, in our judgment, supports the respondent's contention that it was agreed that the quantities would be ascertained at the time of delivery. The respondent had contended that the items agreed to be sold were all fittings except those which measured 2 inches and above. The evidence which was adduced was that the fittings under 2 inches were the fast moving items. There was also the further evidence of Mr. Da Costa returning pipes which indicates, in our view, that

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these were not among the items agreed to be delivered to the appellant company. We are satisfied, therefore, that the items agreed to be purchased were all the fittings except those which measured 2 inches and above.

The appellant had sought to show in their evidence that their requirements for fittings was very small and that stocks worth K80,000 would take them 15 years to sell. Evidence was led to show, however, that in fact for a period of 12 months the appellant company had purchased fittings worth K17,000 and that for a period of 14 months they had purchased fittings worth K21,000. Evidence was also led to show that Messrs T.N. Mahomed had sold, in one transaction, fittings worth K20,000. It must be remembered that the appellant company is one of the largest construction companies in the country. It has subsidiary companies which have interest in oil, plywood, ceiling boards, tyres and tiles. We are satisfied, on the evidence, that it was not impossible for the appellant company to buy stocks worth K80,000.

The other pillar of defence by the appellant company was that there was no contract of sale between the parties because there was no evidence to show that their internal procedures had been followed in the purchase of the fittings. It was contended that no Local Purchase Order (LPO) had been produced to support the purchase. It was also contended that since there was no evidence to show that the deliveries of the fittings had been recorded in the Goods Receiving Book, no contract of sale was possible between the parties. The evidence before the trial court reveal, however, that not all purchases the appellant had made were supported by an LPO and equally there was no evidence to show that all deliveries made to the appellant company were recorded in the Goods Receiving Book. The evidence showed that whatever internal procedure the defendant had was a very inefficient and unreliable procedure. Entries in the Goods Receiving Book were shown to be inconsistent and the dates were not recorded in chronological order and some papers or pages were missing from it. It is our view that even if it was found that the internal procedure was working efficiently and reliably, such internal procedure cannot affect or qualify a contractual relationship which must be inferred from the external phenomena which has passed between the parties. The appellant company did not dispute that the fittings were delivered to their premises. It was contended, however, that such deliveries were made only for the purpose of storage. We are satisfied that this pillar of defence must also collapse. There was, in our judgment, overwhelming evidence which the appellant company did not attempt to dispute that the respondent has sufficient storage space at its premises in Limbe. Indeed it is curious to note that, if the deliveries were for storage only, why would Mr. Da Costa refuse to accept for storage the 10 conduit pipes which he rejected as being not part of the consignment of the fittings which they had agreed to receive? We are

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satisfied that there was no evidence to support the appellant's contention that deliveries to their premises were made only for storage purposes.

We have carefully considered the evidence and the material that were before the trial court and we are satisfied that there was an agreement between the parties for the sale of the fittings. There was an offer to sell by the respondent and that offer was accepted by the appellant company. The prices were agreed and where this was not possible the parties agreed that the prices would be determined at the time of the deliveries. The goods were delivered, sorted and counted. The delivery was accepted by the appellant company. It is also important to note that one of the items of fittings delivered to the appellant company was used on the latter's contract. Equally significant, in our judgment, was the endorsement made by Mr. Francisco on exhibit D51 where he indicates that some fittings would be supplied free of charge. That, in our judgment, can only mean that the rest of the fittings would be supplied on payment of a price. We are satisfied that there was overwhelming evidence to support the respondent's contention that there was a contract of sale of fittings that were delivered to the appellant's premises. Having agreed to buy fittings from the respondent and having accepted the delivery of goods from the respondent, and having used part of that consignment on one of their contracts, the appellant company cannot be heard to say that there was no contract of sale between the parties. We find that there was direct evidence which went to prove the existence of a contract between the parties. In other words, we are satisfied that there were external phenomena before the trial court from which a contract of sale could be directly inferred. We are satisfied that the learned trial Judge was right in finding that there was a contract of sale between the parties.

We would like to make some observations on the progress of the trial. We have observed that some issues which were introduced at the trial were quite irrelevant to the crucial issue which was before the trial court. We got the distinct impression that some issues were introduced not because they were part of the **res gestae** but solely to protract the proceedings. We consider the period the case took to finish unnecessarily long and that, in our judgment, cannot be in the interests of justice nor can it be in the interests of the parties. We would like, therefore, to draw the attention of the Taxing Master to bear in mind these matters when the issue of costs comes before him.

In view of our findings in this case, the appellant's appeal must fail with costs to the respondent.

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DELIVERED at Blantyre this 12th day of May, 1989.

(Signed) _____

BANDA, J.A.

(Signed) _____

MTEGHA, J.A.

(Signed) _____

KALAILE, J.A.