

Chaturka 7.

IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

M.S.C.A. CIVIL NO. 13 OF 1989

(Being Civil Cause No. 91 of 1986)

BETWEEN:

M MSEMWE t/a TAYAMBANAWO TRANSPORT.....APPELLANT

- and -

CITY MOTORS LIMITED.....RESPONDENT

CORAM: The Honourable Mr Justice Mkandawire, J.A.
The Honourable Mr Justice Tambala, J.A.
The Honourable Mr Justice Munlo, J.A.
Kumange, Counsel for the Appellant
Msiska, Counsel for the Respondent
Longwe, Court Reporter
Kadyakale/Chilongo, Official Interpreters

J U D G M E N T

Tambala, J.A.

The appellant brought an action in the High Court, against the respondent, claiming a sum of K223,220.60 as special damages arising principally out of damage to his Mack hose and trailer. He also claimed general damages for breach of contract and loss of use of his truck. He asked the Court to grant him costs for the proceedings.

The respondent contested the appellant's action. He counter-claimed for K26,000.00 in connection with loss of a Ford Thames truck, K500.00 for medical fees and expenses and K4,700.00 as expenses incurred when towing the damaged truck from Zambia to Lilongwe.

The learned Judge in the Court below held that the appellant greatly contributed to the negligence which resulted in the damage to both the appellant's truck and that of the respondent. He found that the appellant was 80%, while the respondent was only 20% negligent. The appellant was awarded a sum of K38,000.00 as special damages. He got 20% of costs of the proceedings. The respondent was awarded, on his counter-claim, a sum of K20,800.00 for loss of his Ford truck, and a further sum of K500.00, being medical fees and expenses.

The appellant was dissatisfied with the decision of the learned Judge in the Court below. He appealed to this Court and prays that this Court must find the respondent fully negligent and solely responsible for damage to his truck. He also prays that this Court should award him damages for funeral expenses. He asks this Court to grant the appellant only 80% of the K500.00 in the event that this Court agrees with the Court below that the respondent is entitled to damages in connection with medical fees and expenses.

We now give an outline of what we believe to be the facts of the case. The appellant seems to be a prosperous businessman. He is an owner of a number of grinding mills. He runs a transportation business, called Tayambanawo Transport. He owned, during the relevant period, a Mercedes Benz truck and a Mack hose with a trailer. The Mack hose carries the engine of the truck. It can move on its own without the trailer; but it cannot carry any load without the trailer; when the trailer is attached to the hose the truck can carry 30 tons of load. In this judgment we shall refer to the Mack hose with the trailer attached to it as a "Mack truck". The hose and the trailer may be referred to separately when it becomes convenient to do so.

The appellant bought the Mack truck from Maltraco Limited on 30th September, 1983 under the terms of a hire purchase. The price of the hose was K134,000.00, while the trailer attracted the price of K56,000.00. The total price was K190,000.00. The appellant was required to pay the total price together with interest at 15% per annum in 18 equal monthly instalments. The instalments commenced from December, 1983. Under the terms of the hire purchase agreement, he was required to insure both the hose and trailer comprehensively during the subsistence of the lease hire.

On 27th May, 1985 the appellant sent the Mack truck to Zambia to collect a load of fertilizer. It was driven by Charles Msemwe, PW2, a son of the appellant. He was accompanied by a brother called Konzani Msemwe, and a lorry assistant, called Custom Kumwamchere. When they were driving through a place called Nyimba, in Zambia, during the night, they met a truck which was driving in the opposite direction. The other truck did not dim its lights. Charles Msemwe was forced to swerve to the extreme left to avoid possible collision. Unfortunately, the truck left the road and landed in a ditch in the bush. Before the vehicle rested, it hit a tree stump, which got uprooted. The place where the truck landed was muddy and slippery. The truck sustained some damage. The grill, radiator and fan were damaged. It could not move.

On 28th May, 1985 Konzani Msemwe left Charles Msemwe and Custom Kumwamchere at the scene of the accident and returned to Lilongwe to inform his father about the accident. The appellant eventually decided that his truck should be towed back to Lilongwe. He went to the defendant's garage in Lilongwe and met Mr Mackenzie, DW1, who is the Manager of City Motors Limited in Lilongwe. He told Mr Mackenzie that his Mack truck had broken down at a place in Zambia following an accident and that he wanted City Motors to tow it back to Malawi. Mr Mackenzie agreed to tow the truck from the scene of the accident to Lilongwe. The appellant told the Court below that he gave Mr Mackenzie K1,500.00 as part payment for the task of bringing the vehicle to Malawi.

During the afternoon of 31st May, 1985 Mr Mackenzie sent a recovery vehicle from Lilongwe to the scene of the accident to collect the appellant's truck. It was a Ford Thames Trader. It could carry a maximum load of 5 tons. It was equipped with a winch, towing bar, chains, nuts and bolts. It had all the tools required for towing vehicles. It was driven by Martin Chalira. He was accompanied by Allan Njirayaduka, DW3, a mechanic employed by the respondent, and Jackson Msemwe, PW3, a son of the appellant. The vehicle reached the scene of the accident during the evening of 1st June, 1985.

During the morning of 2nd June, 1985 the persons who came with the recovery vehicle and those who were found at the scene began the task of pulling the appellant's truck from the bush. The Thames Trader was unable to pull the truck from the bush. They were able to pull the truck to the road with the assistance of two tractors which came from Nyimba prison and a truck belonging to Kanekha Transport.

During the morning of 3rd June, 1985 the respondent's employees, assisted by the two sons of the appellant and Custom Kumwamchere, connected the Mack truck to the Thames Trader, ready for towing. They used a towing bar to connect the Mack truck to the recovery vehicle. They then started their journey back to Malawi. Martin Chalira, DW2, was driving the Thames Trader. He was accompanied by Allan Njirayaduka, who sat on the passenger's seat. Custom Kumwamchere sat in the body of the Thames Trader, watching over the towing operation. Jackson Msemwe, PW3, and his brother Charles sat in the Mack hose. Jackson was sitting on the driver's seat and, obviously, held the steering wheel. The engine of the Mack truck was not in motion during the time that it was being towed.

After travelling for about 4 kilometers from the scene of the accident, they reached a depression. When they were ascending the slope of the depression, the Thames Trader suddenly swerved to the extreme left; it then came back to the road, but crossed the white line towards the right side of the road; it swerved back to the left and left the road. It pulled with it the Mack truck, which also

left the road. The Thames Trader overturned in the bush. The towed truck also overturned once. Then the Thames Trader came and mounted the cab of the Mack hose.

The Mack hose sustained serious damage. The front of the cab was smashed. The doors were badly damaged. The windscreen was shattered; the chassis was bent. The extent of the damage was such that it could not be repaired. The trailer, on the other hand, was slightly damaged on the sides. The Thames Trader was also badly damaged. The cab and chassis were twisted. The body was also damaged. The extent of the damage was also such that it could not be repaired.

During the time of the accident Customs Kumwamchere was thrown from the body of the Thames Trader. He was later found trapped under the Thames Trader. He died on the spot. The two sons of the appellant and Martin Chalira sustained minor injuries. Allan Njirayaduka was seriously injured. He had wounds on both legs. He felt pain in the ribs and head. He was admitted at Nyimba Hospital for six days. He was brought to Kamuzu Central Hospital, where he stayed for some two days. He was transferred to Likuni Hospital, where he stayed for twenty days.

The respondent later instructed Hussein Brothers, who operate transport business in Lilongwe, to go to Nyimba to recover the damaged vehicles. On 19th June, 1985 a Mack hose belonging to Hussein Brothers came to the scene of the second accident. They connected the appellant's trailer to the Mack hose; they then mounted both the damaged hose and Thames Trader on the trailer. The huge load rolled back to Lilongwe. The damaged vehicles were left at City Motors, Lilongwe.

This is an appeal from the decision of the High Court sitting as a Court of first instance. The jurisdiction of this Court is, therefore, to re-hear the case. We have borne in mind that in the course of re-hearing the case, this Court is entitled to interfere in the findings of fact made by the trial Judge in the event that such findings are disputed, provided always that the advantage which the trial Court had in seeing witnesses testifying before it and assessing their general demeanour and credibility, is fully appreciated. Pryce -v- Republic 6 ALR. (M) 65.

At page 5 of his judgment, the learned Judge in the Court below said that the respondent's employees who were sent to recover the damaged vehicle were instructed to pull the Mack hose only. The evidence of the appellant before the trial Court was that he asked Mr Mackenzie, DW1, to salvage the entire truck, and not the hose only, and that Mr Mackenzie agreed. PW2 and PW3 told the trial Court that DW2 and DW3 did not suggest that they should tow only the Mack hose. Mr Mackenzie produced in the trial Court a local

purchase order from Maltraco, which instructed the respondent as follows:

"Please recover Mack truck for Tayambanawo Transport from Nyimba in Zambia to Lilongwe Maltraco Workshop."

The evidence of Mr Mackenzie was that he agreed to tow the hose only. DW2 and DW3 told the trial Court that their instructions were to tow the hose only. They further said that they were persuaded by the appellant's sons to tow both the hose and trailer.

After carefully considering the evidence on record and the judgment of the trial Judge, we take the view that it does not make much sense that the respondent could have travelled to Zambia to recover only the Mack hose, leaving the trailer at the scene of the accident. We find the evidence that Mr Mackenzie agreed to tow the whole truck more credible and persuasive. The trial Judge was unable to show why he took the contrary view. It is our finding that Mr Mackenzie agreed to tow the entire Mack truck from Nyimba in Zambia to Lilongwe. It is also our finding that when DW2 and DW3 reached the scene, they did not tell PW2 and PW3 that they were instructed to collect the hose only.

We further take the view that, even if the sons of the appellant pleaded and persuaded DW2 and DW3 to tow both the hose and trailer, such pleading and persuasion would be of no consequence. The respondent was in the business of towing vehicles which had broken down. They were experts in their job. Their servants were in a position to appreciate the hazard of engaging their Thames Trader in towing both the hose and trailer at the same time. The appellant's sons could not be expected to appreciate such danger.

DW2 told the Court below that during the towing operation the towed vehicle must follow slowly, because if it can swerve a bit, that could lead to an accident. He went on to say that when they approached the scene of the accident he saw an on-coming vehicle. He said he kept to his side, but the persons in the Mack truck saw the vehicle late; they panicked and swerved their vehicle. This appears to be the basis of the learned Judge's finding that PW3 was not stable on the steering wheel and that he contributed to the cause of the accident. We found this part of DW2's evidence unreliable. The engine of the Mack truck was not in motion during the towing exercise. There is undisputed evidence that the brakes of the Mack truck could not function, since the engine was not in motion. Then the Mack truck was connected to the Thames Trader by a solid bar. The speed of the Mack truck was totally dependent upon the speed of the towing vehicle.

We do not believe that DW2 and DW3, who were in the Thames Trader, could see that PW3, who was in the Mack truck, saw an on-coming vehicle late and that he panicked.

PW2 and PW3 told the trial Judge that they did not meet an on-coming vehicle before the accident occurred. We take the view that the evidence of the appellant's witnesses was probably true. We do not believe that PW3 panicked at the steering wheel during the time of the accident. We are satisfied that there was very little, or nothing, that PW3 could do to stop the Thames Trader once it began sliding towards the left and into the bush. The Mack truck was controlled by the towing vehicle.

The learned Judge in the Court below found contributory negligence on the part of PW3, on the ground that he failed to sound his horn to warn the driver of the Thames Trader to stop just before the accident occurred. This witness told the learned Judge that since the engine of the Mack truck was not running, the brakes and hooter of the truck could not function. This piece of evidence was not challenged by the respondent. DW3 conceded that the brakes of the Mack truck could not function during the process of towing. None of the witnesses for the respondent testified that the driver of the Mack truck failed to sound the horn. There was no evidence showing what effect the sounding of the horn would have upon the person driving the Thames Trader. The accident might have happened so suddenly that PW3 could not have a chance of sounding his horn before he found himself in the bush. Then the sounding of the horn could have the effect of distracting the attention of the driver of the Thames Trader. For instance, he could have looked back and lose concentration. This could contribute greatly to the accident.

We, therefore, take the view that there was no factual basis for the learned Judge's finding that PW3 failed to sound his horn at the scene of the accident. We further take the view that, even if PW3 failed to sound his horn, it would not follow that his conduct would contribute to the accident.

The evidence of PW2 and PW3, in the Court below, was that when they approached a depression the Thames Trader was speeding. It did not slow down immediately before it entered the depression. They both said that the Thames Trader was travelling at a speed of 30 mph. We do not believe that these witnesses could know the speed at which the towing vehicle was moving, since they were in a different vehicle whose engine was not in motion. We are, however, inclined to believe that DW2 was speeding when he drove the Thames Trader into the depression and he lost control of it as it began the ascent.

We are satisfied that the accident occurred due to the fault of DW2. He was negligent. We do not find any conduct on the part of the driver of the towed vehicle which can form the basis of contributory negligence. We consequently set aside the judgment of the learned Judge in the Court below, in which he found the appellant 80% and the respondent 20% negligent. We find the respondent liable in

negligence and accordingly enter judgment in favour of the appellant. We also set aside the trial Judge's judgment in favour of the respondent on the counter-claim and, in particular, the order requiring the appellant to pay to the respondent the total sum of K21,300.00, is set aside.

We shall now consider the issue of damages. The learned Judge in the Court below awarded K33,000.00, which was 20% of K190,000.00. It will be seen that K190,000.00 was the price of both hose and trailer at the time when the appellant bought them. This was obviously not their value at the time of the accident. The accident occurred 21 months after the Mack truck was purchased. Both the hose and trailer must have depreciated during the period between the time of purchase and the time of the accident. The learned Judge was wrong when he based his computation on the value of the Mack truck at the time of purchase. Then the trailer was only slightly damaged. It was subsequently sold for K22,000.00. It is quite probable that the appellant obtained the full value of the trailer as at the time of the accident when he sold it.

As regards the trailer, we take the view that the appellant is entitled to the difference between its value at the time of the accident and K22,000.00, being the proceeds of the sale. The appellant never led evidence to show the value of the trailer as at the time of the accident. He has probably suffered no loss. We decline to award him any damages in connection with damage to the trailer.

We come to compensation for damage to the Mack hose. Again, the appellant failed to lead evidence, in the Court below, showing the value of this vehicle at the time of the accident. He, however, received K88,000.00 from his insurers. We are prepared to take this sum to represent the value of the Mack hose at the time of the accident. The question whether a person who has received full compensation from his insurers can still claim compensation from the tortfeasor was answered in the affirmative in the case of Parry -v- Cleaver (1970) A.C.1, where Lord Reid said at p.14:

As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the tortfeasor."

The cases of Browning -v- War Office (1963) 1 Q.B.750, Sharma -v- National Bank of Malawi, Civil Cause No. 874 of 1980 (unreported) and C. E. Mkwende -v- Mototech, Civil Cause No. 29 of 1990 (also unreported), are to the same effect. We are, consequently, of the view that the appellant is entitled to the sum of K88,000.00 as compensation for damage to the Mack hose.

The appellant seeks compensation in connection with funeral expenses. He told the Court below that he made four trips to Zambia for the purpose of collecting the body of Kumwamchere. He said that he spent a total of K800.00. He was unable to produce any documentary evidence in support of this expenditure. He could not say whether this sum was the equivalent of the cost of hiring a vehicle to make the four trips to Nyimba in Zambia, or the cost of fuel which was filled in his own vehicle. Then in the pleadings there is only a claim of K485.00 for funeral expenses. The appellant did not establish sufficient factual basis for this claim. We take the view that he is not entitled to compensation in connection with funeral expenses.

The appellant claimed before the Judge in the Court below damages for loss of use. It should be appreciated that he deliberately sold the trailer. It would be unreasonable for him to claim loss of use of the thing which he deliberately put out of his use. Perhaps these damages were claimed in respect of the Mack hose only. What other use, it may be asked, was the Mack hose put, apart from pulling a trailer containing goods? It cannot be said that the appellant would take his family to church or marketplace in the Mack hose. We think that the appellant failed to establish the factual and legal basis for his entitlement to damages for loss of use. The trial Judge was right in refusing this claim.

In the event, the appellant is awarded K88,000.00 as damages for the loss of the Mack hose. The learned Judge's order granting 20% of the costs of the proceedings in the Court below is set aside. We instead grant the appellant full costs, both in the Court below and in this Court.

The appeal is allowed.

DELIVERED at Blantyre this day of 18th day of April 1992, at Blantyre.

(Signed).....

M. P. MKANDAWIRE, J.A.

(Signed).....

D. G. TAMBALA, J.A.

(Signed).....

L. G. MUNLO, J.A.