IN THE MALAWI SUPREME COURT OF APPEAL

AT BLANTYRE

MSCA CIVIL APPEAL NO. 38 OF 1997

(Being High Court Civil Cause No. 132 of 1995)

BETWEEN:

JUSTIN MOSE SIMIYONI.....APPELLANT

- and -

S J KANYATULA.....RESPONDENT

BEFORE: THE HON. MR JUSTICE MTEGHA, JA

THE HON. MR JUSTICE KALAILE, JA

THE HON. MR JUSTICE TAMBALA, JA

Bazuka Mhango, Counsel for the Appellant

Mandala, Counsel for the Respondent

Ngaiyaye (Mrs), Official Interpreter/Recorder

J U D G M E N T

Kalaile, JA

In this case, the appellant claims that there was an agreement for the sale of a Mitsubishi truck, registration number MC 223**,** to the respondent. The respondent denies the existence of such a contract of sale.

According to the appellant's amended statement of claim, the respondent offered for sale

a truck to the respondent on condition that the latter pays to Stansfield Motors Limited a sum of K226,061.43 in order to redeem the said truck which had been re-possessed by Stansfield Motors Ltd. After the redemption of the truck, the appellant was to pay a sum of K140,000.00 as the full purchase price for the truck.

The appellant's pleadings also aver that he obtained a loan from SEDOM amounting to K250,000.00 and used K226,061.00 from the loan proceeds in order to redeem the truck from Stansfield Motors Ltd.

Needless to say, the respondent denies these allegations.

It is interesting to note that the unamended statement of claim stated in paragraph 2 that in accordance with the agreement, the appellant, on behalf of the respondent was to pay Stansfield Motors Ltd a sum of K226,061.43 and redeem the truck. Further to this, the appellant offered the respondent K140,000.00 as the purchase price but the respondent refused the offer.

The respondent's pleadings state that the appellant agreed with the respondent to first redeem the truck from Stansfield Motors Ltd by first paying off the loan and thereafter the parties would agree on the sale. After the appellant redeemed the vehicle, the parties failed to agree on the sale.

Going back to the evidence-in-chief of the appellant, we find that he testified that he met Mr Saguga, the Credit Controller at Stansfield Motors Ltd, who told him that the respondent had a debt with Stansfield Motors Ltd. This is what prompted the appellant to hold discussions with the respondent on the sale of the truck. At first, they agreed that after redeeming the truck, the appellant would pay the sum of K90,000.00. At the second meeting, the respondent demanded K140,000.00. But when the appellant offered the sum of K140,000.00 to the respondent, the respondent now raised the figure to K650,000.00 inclusive of the amount paid to Stansfield Motors Ltd. At this point, the appellant sought legal advice to resolve the issue.

The appellant, therefore, sought an order for specific performance to compel the respondent to comply with the terms of the agreement, or, in the alternative, the appellant claimed damages and a refund of the sum of K226,061.43 including interest at 46% per annum.

It is now timely for us to examine the judgment of the trial Court in view of the facts which we have outlined so far in this judgment.

The trial Judge observed, correctly in our view, that the respondent informed the Court that while it was true that the respondent was in default and the vehicle had indeed been impounded by Stansfield Motors Ltd, the situation had not reached a point where the vehicle was being offered for sale to the general public. This was so because the respondent had negotiated for time to arrange for payment on a future date. Although the respondent was in financial difficulties, he had managed to persuade Stansfield Motors Ltd to give him up to the end of the crop season to raise the money from the sale of his tobacco crop. The respondent had no intention of selling the vehicle until the appellant came and persuaded him to do so.

The respondent testified that the appellant made several offers including the K90,000.00 and K140,000.00 which the respondent did not accept, but that he was eventually persuaded that the appellant should redeem the vehicle on his behalf, and thereafter, negotiate the

sale. After the vehicle was redeemed, the two parties met, but could not agree on the price.

We share the conclusion arrived at by the trial Judge that the truth of the matter is that Stansfield Motors Ltd had not offered to the appellant the vehicle for sale, and this explains why the appellant was referred to the respondent. Otherwise there was no reason, and none was given in the Court below, why the appellant was negotiating the sale with the respondent rather than Stansfield Motors Ltd. The story given by the appellant in the Court below that someone was about to purchase the truck at Blantyre was obviously a figment of his imagination which is not supported by the evidence of the Credit Controller at Stansfield Motors Ltd.

Furthermore, we share the views of the trial Judge that what must have happened was that the appellant must have learnt from an employee of Stansfield Motors Ltd that the respondent was having difficulties in paying for the vehicle and that it might be sold at some future point, whereupon the appellant went to persuade the respondent to sell the vehicle to him before Stansfield Motors Ltd offered it for sale on the open market.

The trial Judge, quite properly, summed-up the position by stating that at best, the two parties merely agreed to agree without reaching a binding agreement. The Judge cited as authority on this point the case of **Sudbrook Trading Estate Ltd v. Eggleton & Others (1983) AC 444 at 459**, where **Templeman, LJ** reading the judgment of the court said that:

“The principles which emerge from the authorities may be summarised thus: first, in ascertaining the essential terms of a contract, the court will not substitute machinery of its

own for machinery provided by the parties, however defective that machinery may prove to be. Secondly, where machinery is agreed for the ascertainment of an essential term, then until the agreed machinery has operated successfully, the court will not decree specific performance, since there is not yet any contract to perform. Thirdly, where the operation of the machinery is stultified by the refusal of one of the parties to appoint a valuer or an arbitrator, the court will not, by way of partial specific performance, compel him to make an appointment.

All three of these principles stem from one central proposition, that where the agreement on the fact of it is incomplete until something else has been done, whether by further agreement between the parties or by the decision of an arbitrator or valuer, the court is powerless, because there is no complete agreement to enforce it: see **Kay, J** in **Hart v. Hart (1881) 18 Ch. D. 670, at 689."**

Another pertinent case cited in the **Sudbrook** case is that of **Milnes v. Gery (1807) 14 Ves. Jun. 400**. In that case, there was a contract for sale at a price to be determined by two valuers or an umpire chosen by the valuers. The valuers were appointed but were unable to agree on the choice of an umpire. The vendors sued for specific performance and asked the court to appoint a valuer or to make a valuation. **Sir William Grant, MR** dismissed the action, saying, at p.406:

"The only agreement, into which the defendant entered, was to purchase at a price, to be ascertained in a specified mode. No price ever having been fixed in that mode, the parties have not agreed upon any price...."

And **Grant, MR** continued at page 409 by saying:

"If you go into a court of law for damages, you must be able to state some valid legal contract, which the other party wrongfully refuses to perform; if you come to a court of equity for a specific performance, you must also be able to state some contract, legal or equitable, concluded between the parties; which one refuses to execute. In this case, the plaintiff seeks to compel the defendant to take this estate at such price as a master of this court shall find it to be worth; admitting, that the defendant never made that agreement; and my opinion is, that the agreement he has made is not substantially, or in any fair sense, the same with that; and it could only be by an arbitrary discretion that the court could substitute the one in the place of the other."

Coming back to the facts of the present case, we find that it is the appellant who took the initiative to persuade the respondent to have the vehicle redeemed from Stansfield Motors Ltd before the sale price was agreed. It would appear that the appellant hoped that whatever offer he made to the respondent would be acceptable to the respondent, since the respondent was having financial difficulties in meeting his loan obligations with Stansfield Motors Ltd.

The appellant was offering the respondent a total of K366,061.43 (which comprised the sum of K266.061.43 paid to Stansfield Motors Ltd plus the additional sum of K140,000.00). The appellant claimed in re-examination that when he went to Stansfield Motors Ltd at Blantyre with the respondent, they were told that the vehicle was on sale at a price of K375,000.00. To start with, this was hearsay evidence, because no one from Stansfield Motors Ltd testified to that effect. Secondly, if the vehicle was being sold by Stansfield Motors Ltd at K375,000.00, why did the appellant not pay that amount so that the respondent would receive the balance after Stansfield Motors Ltd deducted what was owed to them? All this leads to the conclusion that no purchase price was agreed upon between the parties. The respondent consistently denied agreeing on the purchase price with the appellant. We do not find any reason for disagreeing with the trial Judge's findings on this point.

Now, specific performance is an equitable remedy, and "he who comes to equity must come with clean hands". "The conduct of the party applying for relief is always an important element to be considered" [**I Chitty on Contracts, 24th Edn, para. 1652, at 785 1977**)]. In this case, we find that it was the appellant who was trying to stampede the respondent into selling the vehicle at a price determined by the appellant.

Mr Mhango, who appeared for the appellant, cited a number of authorities in an effort to establish that there was a binding contract between the parties. The first of such authorities is **Lowe v. Lombank Ltd [1960] 1 WLR 196**. This case is about a hire purchase agreement and the court held that the plaintiff was not estopped by signing the delivery receipt from relying on the breach of the implied condition that the car was reasonably fit for use as a means of transport, since the defendants had failed to prove the three requirements necessary to establish estoppel, namely, that the statement in the receipt was clear and unambiguous; that the plaintiff had intended that the defendants should act upon it; and lastly, that the defendants had believed the representation in the receipt to be true and had acted upon it. With respect, we cannot see how this case has any bearing on the facts of the case under consideration. The respondent made no representations on which the appellant acted upon. Next, Mr Mhango cited the case of **Reigate v. Union Manufacturing Company [1918] 1 KB 592**. Again, he seemed to have gone off at a tangent from the point for determination in this appeal. This appeal is about whether or not there was in existence a valid contract between the appellant and the respondent to sell a vehicle, whereas the **Reigate** case is about a contract by a company to employ an agent for a fixed period of time and the consequences of terminating such an agency by a voluntary winding up of the company before the fixed time of employment of the agent had expired. Clearly, this case does not advance the appellant's argument at all. A similarly unhelpful case is that of **Ajayi v. Briscoe (Nigeria) Ltd.** This case held that the principle of promissory estoppel as defined by **Bowen, LJ** in the **Birmingham and District Land Co's** case and confirmed in **Tool Metal Manufacturing Co Ltd v. Tungstein Electric Co Ltd [1955] 1 WLR 761; [1955] 2 All ER 657, HL (E)** was that when one party to a contract in the absence of fresh

consideration agreed not to enforce his rights an equity would be raised in favour of the other party. That equity was, however, subject to the qualifications: (1) that the other party had altered his position, (2) that the promisor could resile from his promise on giving reasonable notice, which need not be a formal notice, giving the promisee a reasonable opportunity of resuming his position; and (3) the promise only became final and irrevocable if the promisee could not resume his position. On the same grounds for rejecting the relevance of the **Lowe** case, we also see no relevance of this authority on the issues which we are required to determine in this appeal.

Counsel followed by citing the following passage from a dictum of **Scrutton, LJ** in **Rose and Frank Co v. J R Crompton and Bros. Ltd**:

"Now it is quite possible for parties to come to an agreement by accepting a proposal with the result that the agreement concluded does not give rise to legal relations. The reason of this is that the parties do not intend that their agreement shall give rise to legal relations. This intention may be implied from the subject matter of the agreement, but it may also be expressed by the parties. In social and family relations, such an intention is readily implied, while in business matters, the opposite result would ordinarily follow. But I can see no reason why, even in business matters, the parties should not intend to rely on each other's good faith and honour and to exclude all ideas of settling disputes by any outside intervention, with the accompanying necessity of expressing themselves so precisely that outsiders may have no difficulty in understanding what they mean. If they clearly express such an intention, I can see no reason in public policy why effect should not be given to their intention."

Counsel cited this passage, but omitted certain sentences from the middle of the passage, which we have included, because the omitted sentences make the passage even clearer in its import. Our reading of this complete passage is that it supports our conclusions which we have already expressed in this judgment.

Another authority cited by Counsel for the appellant is **Sinclair v. Brougham & Another [1914] AC 398 at p.415**. This case does not support the appellant's appeal because it is authority, amongst others, for the proposition that depositors to a building society were not entitled to recover moneys paid by them on an **ultra vires** contract of a loan on the footing of money had and received by the society to their use. At page 415 of the **Sinclair** case, to which we were referred by Counsel for the appellant, is the following dictum of **Viscount Haldane, LC**:

"Consideration of the authorities has led me to the conclusion that the action was in principle one which rested on a promise to pay, either actual or imputed by law. **Moses v. Macferlan(1760) 2 Burr. 1005** is the leading cased on this point. It was an action on the case for money had and received under circumstances where any notion of an actual

contract was excluded. But **Lord Mansfield** explained how in such circumstances the law treated the defendant as being in the same position as if he had incurred a debt: 'If the defendant be under an obligation, from the ties of natural justice, to refund; the law implies a debt, and gives this action, founded on the equity of the plaintiff's case, as it were upon a contract.'"

Mr Mhango, Counsel for the appellant, further cited cases such as **Pfizer Corporation v. Ministry of Health [1965] AC 512, Carlill v. Carbolic Smoke Ball Company [1893] 1 QB 256**. In both cases, the defendant made a promise to the plaintiff and the plaintiff acted on the basis of that promise. This is not what happened on the facts before us. In the **Pfizer** case, **Lord Reid** was referring to a patient having a statutory right to demand a drug from the Ministry of Health on payment of the sum of 2 shillings. **Lord Reid** goes further, at page 536, to state that:

"The hospital has a statutory obligation to supply it on such payment. And if the prescription is presented to a chemist he appears to be bound by his contract with the appropriate authority to supply the drug on receipt of such payment."

Now, what relevance has this passage to the issues for determination before us? Counsel referred us to this page in his skeleton arguments and we are at a loss to appreciate what that page has to do with the case before us.

Other cases, which we shall not even bother to distinguish, which were referred to us in argument are the cases of **Yabu v. Nyasaland Garage Ltd 4 ALR (Mal.) 209** and **Chupa v. Malawi Hotels Ltd 12 MLR 226**.

What, then, are the remedies left to the appellant? The appellant is entitled to the amount of K226,061.43 which was paid into court in July 1995 (see page 41 of Court Record). Although the amended statement of claim shows that the appellant obtained a loan to pay off Stansfield Motors Ltd, it appears the loan was obtained in April 1995, when the debt with Stansfield Motors Ltd was paid off between February and March 1995, long before April 1995. We cannot,

therefore, accept 46% as the appropriate interest rate, because that was the SEDOM interest rate, which cannot apply on the facts before us.

The relevant interest rate which we will apply from the date the amount owing was paid to Stansfield Motors Ltd will, therefore, be that which is prescribed by s.65 of the Courts Act. That section states that:

“Every judgment in civil proceedings shall carry interest at the rate of five percentum per annum or such other rate as may be prescribed.”

Any other rate of interest would have to be specifically pleaded: see O.18, r.8 of the Rules of the Supreme Court. Although the appellant’s pleadings specifically pleaded for interest at 46% per annum, we cannot allow this rate which was stated in the SEDOM

loan, because the loan was obtained a month after the payments were made to Stansfield Motors Ltd.

In granting the statutory interest rate, we have exercised our discretion pursuant to the provisions of s.11(a)(v) of the Courts Act as read with s.65 of the said Act. Section 11(a)(v) provides that without prejudice to any other written law the High Court shall have jurisdiction to direct interest to be paid on debts. We have applied the provisions of s.11(a)(v) in consonance with the decision of this Court in **John Bryan Tabord v. David Whitehead & Sons (Malawi) Ltd, MSCA Civil Appeal No. 11 of 1988**, wherein **Chatsika, JA** summed up the position by stating that:

“Finally, the appellant claims interest on the damages we have awarded in this matter. It is to be observed on this aspect that section 11 of the Courts Act confers jurisdiction on the High Court to award interest, but as was stated by this Court in **Gwembere v. Malawi Railways Ltd, 9 MLR 369**, this jurisdiction is confined to cases of debts, as distinct from damages.”

As was the case in the Court below, we decline to award damages and interest thereon, but award interest of 5% per annum on the amount of K226,061.43 calculated from the date when the money was paid to Stansfield Motors Ltd up to the date when the money was paid into Court. We also award all the accrued interest which had been earned since then up to the date of payment. The 5% interest rate is usually applied for judgment debts, however, this is a simple debt and we have used our discretion in applying the 5% statutory interest rate, otherwise the appellant would not have earned any interest, since contractual interest rates must be pleaded: see **Practice Direction**

issued by the **Queen's Bench Division [1982] 3 All ER, page 1151**, which states:

"Contractual interest

The statement of claim must give sufficient particulars of the contract relied on, and, in particular, must show (i) the date from which interest is payable, (ii) the rate of interest fixed by the contract, (iii) the amount of interest due at the issue of the writ."

Each party shall pay its own costs since the appellant has failed in his main appeal on damages and succeeded with regard to the matter of interest on the debt only.

DELIVERED in open Court this 23rd day of February 1999, at Blantyre.

Sgd .....

H M MTEGHA, JA

Sgd .....

J B KALAILE, JA

Sgd .....

D G TAMBALA, JA