

HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 643 OF 1998

BETWEEN:

AHMED NASSER PLAINTIFF

t/a Ayat & Company

- and -

UNION TRANSPORT LIMITED 1ST DEFENDANT

- and -

SHIPPING MANAGEMENT SERVICES LIMITED 2ND DEFENDANT

CORAM: TEMBO, J.

Kasambara, of Counsel for the Plaintiff

Nkhoma, of Counsel for the 1st Defendant

Katundu, of Counsel for the 2nd Defendant

Katunga (Mrs), Court Clerk

JUDGMENT

TEMBO, J.: By his writ and statement of claim, the plaintiff is claiming from the 1st and 2nd defendants (a) damages for breach of contract; (b) damages for negligence or, in the alternative, recovery of the value of the container in the amount of US\$34,009.50; (c) loss of profit in the amount of US\$10,000.00; (d) recovery of an amount of US\$3,272 which the plaintiff paid to the 1st defendant in respect of port charges, agency and storage fees; (e) interest at commercial banking rate effective from the date the container ought to have been delivered to the plaintiff in Malawi to the date of the judgment in the instant case. The plaintiff is also claiming costs for the instant action.

On their part, both the 1st and 2nd defendants have denied any liability therefor. Instead, they pray for the dismissal of the plaintiff's action in its entirety with costs.

The Court has heard four witness. Two witnesses, including the plaintiff himself, have testified for the plaintiff, and the other two have done so for the defendants. The facts emerging from the testimonies of all the witnesses are quite simple and are to the following effect: The plaintiff is a business person who is based in the City of Blantyre . He is engaged in the sale of second-hand clothing. On or about 12th December, 1996, the plaintiff bought 486 bales of second-hand clothing from General Business Corporation, based IN New Jersey in the City of New York in the United States of America. The plaintiff paid US\$34,009.50 therefor to General Business Corporation. Thereafter, General Business Corporation had contracted with P & O Containers, shipping line, to transport plaintiff's 486 bales of clothing to Blantyre, Malawi, through the Port of Beira in Mozambique. A bill of lading dated December 4, 1996 therefor was issued, the original of which had been sent to the plaintiff on or about 25th February, 1997. The bill of lading is Exh. P2. A proper examination of this bill of lading, in its entirety, gives a clear impression that it was for combined transport, that is one for multimodal transport. This entailed that the plaintiff's goods were, initially, to be transported by sea transport from New York in the United States of America to the Port of Beira in Mozambique and, thereafter, by land transport to Blantyre in Malawi. Further, it is quite clear that this bill of lading was a house to house one. Thus, the goods of the plaintiff had to be transported from New York to Blantyre through Beira by P & O Containers. This fact is borne out by the type of movement expressly prescribed by and in the bill of lading in question.

Upon receipt of the bill of lading, on or about 25th Febraury, 1997, the plaintiff approached the 1st defendant to act as a clearing agent for him in respect of the goods in question and for which purpose, the plaintiff submitted the bill of lading to the 1st defendant. The 1st defendant have their agent at the Port of Beira in Mozambique, thus

Gundel Finger. The 1st Defendant did not secure or procure the clearance of the plaintiff's goods. Eventually on or about May 1997 the 1st defendant and the plaintiff approached the 2nd defendant for that purpose. The 2nd defendant are the agents of P & O Containers in Malawi. The combined effort, or lack of it, of the 1st and 2nd defendants for one reason or another could not secure the clearance of the plaintiff's goods until July, 1997. Then, the 1st defendant informed the plaintiff that in order for the plaintiff's goods to be cleared, the plaintiff ought first to have paid US\$3,272 an amount for port charges, agency fees and storage charges. The plaintiff, in fact, paid that amount to the 1st defendant as required then. Despite such payment having been made, the plaintiff's goods were seized and sold by the Mozambican Customs authorities on or about June or July on the ground that the goods had over-stayed without being cleared at the Port of Beira. It was also in evidence that the customs authorities had legal power so to do upon goods remaining uncleared at the port for a continuous period of thirty days. It is also apparent from the testimonies of the witnesses that the ship carrying plaintiff's goods had called at the Port of Beira some time in February, 1997 and that the goods were finally seized and sold in or about June or July, 1997. Upon the plaintiff being notified of that fact, and the defendants having declined to make payment, therefor, the plaintiff commenced this action.

Regard being had to the evidence in the case, it is abundantly clear that the plaintiff on his part had acted diligently upon receipt of the bill of lading in question, on or about 25th February, 1997. He had promptly handed it over to the 1st defendant, so as for the 1st defendant to secure or procure the clearance and the transportation of the goods out of Beira to Blantyre in Malawi. This was by way of an oral contract which has not been disputed by the 1st defendant. The 1st defendant had sufficient time within which to have done what it was required to do by and under the oral contract. Thus from about 25th February 1997 to July 1997, the 1st defendant had utterly failed to discharge its obligation under the oral contract with the plaintiff. Hence the sad result that, by June or July, the plaintiff's goods had been seized and sold by the Mozambican Customs authorities. The 1st defendant had its agent at the Port of Beira, whom it could have diligently used, had it sought to have done so, in order for the 1st defendant to have ably managed to clear the goods in question in time, thus prior to their seizure and sale by the Customs authorities. In the circumstances and due regard being had to the evidence, the claim of the plaintiff against the 1st defendant must succeed in its entirety with costs. It is so ordered.

Reverting to the plaintiff's case against the 2nd defendant, the position is as follows: To begin with, it must be noted that in the main, in its defence the 2nd defendant has contended that Exh. P2 is a bill of lading for port to port shipment; thus denying that it was a bill for combined transport. On its part, the Court has already found as a fact that this was a bill of lading for combined transport, thus one for multimodal transport.

Reading the bill of lading as a whole, it is quite clear to the Court that plaintiff's goods were to be carried, initially, by sea transport from New York in the United States of America to the Port of Beira in Mozambique and, thereafter, by land transport out of Beira to Blantyre in Malawi; thus in Beira, the goods were in transit to Blantyre, Malawi.

Besides that, the 2nd defendant has contended that the bill of lading was, therefore, not one for house to house type of movement. The bill of lading must be read as a whole and, when so read, it ought to be taken to be what it says it is, unless if a contrary position or meaning may be had on the basis of other compelling facts to the contrary. The Court, on its part, holds the view that there are no such facts with respect to Exh. P2 in that regard: Paragraphs 18-006 and 18-012 (at pages 922 and 926-7) of **Benjamin's Sale of Goods** 4th Ed are quite relevant in that regard—

“A bill of lading is a document issued by or on behalf of a carrier of goods by sea to the person with whom he has contracted for the carriage of goods. Such a document has three functions. It is evidence that the goods described in it have been received by the carrier, or actually shipped. ; it is evidence of, or contains, a contract of carriage ; and it is a document of title to goods both in the common law and in the statutory sense... A bill of lading is evidence of the facts stated in it, so that a shipped bill is evidence that goods described in it have been shipped, and of the date of shipment as stated in the bill.... A statement in the bill that the goods were shipped, or received, in apparent good order and condition is likewise evidence of the external condition of the goods at the time of shipment or receipt. Similar effect is given to a statement as to the quantity, weight or number of the goods ... At common law, a bill of lading is only **prima facie** evidence of these matters.”.

It is, therefore, the view of the Court that a statement in a bill of lading, as there was and is in Exh. P2, clearly stating the type of movement, ought to be **prima facie** evidence of that fact. Exh. P2 clearly states that the type of movement herein was that for **house to house** shipment.

Under or by a house to house bill, the carrier's obligation is to carry the goods from the port of export to the warehouse of the importer. For instance, in the instant case the carrier, that is the principal of the 2nd defendant, had the obligation to transport the plaintiff's goods from New York to the plaintiff's warehouse in Blantyre. That was the obligation of the 2nd defendant in the instant case. Acting on behalf of their principal, P & O containers, the 2nd defendant ought to have seen to it that the goods were delivered at the plaintiff's warehouse in Blantyre, Malawi. Such a position, in that regard, is clearly and only consistent with the view of the Court that Exh. P2 was a bill for multimodal transport.

Such being the position, the fact that on his part the plaintiff had, along the way, also

sought the services of the 1st defendant for that purpose does not, of itself alone, operate so as to absorb the 2nd defendant of their obligation and liability in that regard. The 2nd defendant have utterly failed to deliver those goods at the warehouse of the plaintiff due to no fault of the plaintiff whatsoever. They must, therefore, be held liable for the seizure and sale of the plaintiff's goods by Customs authorities at the Port of Beira. In the circumstances, the plaintiff's claim against the 2nd defendant must succeed in its entirety with costs. It is so ordered.

PRONOUNCED in Open Court this Wednesday, 9th day of October, 2002, at Blantyre.

A. K. Tembo

JUDGE

STAY OF EXECUTION

Court: On the application of both defendants, the Court has hereby ordered that execution be stayed for 7 days effective from 10th October, 2002. This will enable counsel to communicate with their respective clients before the plaintiff may levy execution.

A. K. Tembo

JUDGE

09.10.02