



**JUDICIARY
IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO 509 OF 2013**

BETWEEN:

DISTON THOM PLAINTIFF

-VS-

SIPHISO PHEKANI 1ST DEFENDANT

STAN PHEKANI 2ND DEFENDANT

MRS. E. PHEKANI 3RD DEFENDANT

CORAM: THE HONOURABLE JUSTICE KENYATTA NYIRENDA

Mr. Gondwe, of Counsel, for the Plaintiff

Mr. Chidothe, of Counsel, for the Defendant

Ms. E. Chimang'anga, Court Clerk

ORDER

Kenyatta Nyirenda, J.

Introduction

This is the Plaintiff's action against the Defendants for breach of a sales agreement. The Defendant denies liability.

Pleadings

The case of the Plaintiff, as set out in the Statement of Claim dated 24th September 2013, is as follows. The Plaintiff is a businessman from Balaka. He trades in the processing and delivery of maize, rice and other farm products in and across Malawi. The 1st Defendant is the 1st born daughter of the 3rd Defendant and was at the material time residing in the United Kingdom (UK). The 2nd Defendant is the brother to the 1st Defendant

The Statement of Claim avers that at all material times the 2nd and 3rd Defendants acted for and on behalf of the 1st Defendant.

Paragraphs 6, 7, 8 and 9 of the Statement of Claim deal with the making of the agreement, breach thereof and loss suffered as a result:

“6. *By agreement concluded partly orally and partly in writing made between the Plaintiff and Defendants near in 2011, it was agreed:*

6.1 *That the Defendants do deliver two motor vehicle trucks to the Plaintiff;*

6.2 *That the Plaintiff do pay the purchase price in the sum of the Malawi Kwacha equivalent of £11, 825.00 inclusive of the shipping costs;*

6.3 *It was even so agreed that the Plaintiff duly advance the said purchase price for the two trucks to the building of a dwelling house for the 1st Defendant in Balaka.*

Non Performance

6.0. *The Plaintiff dully advanced the said sum to the Defendants who facilitated the building of the house.*

7.0. *The 1st Defendant was to tender the trucks for delivery to the Plaintiff at their premises at Balaka in as far as December, 2012.*

7.1. *In breach of the agreement, the 1st Defendant failed to deliver the said motor vehicle trucks to the Plaintiff.*

7.2. *In or about July, 2013, the 1st Defendant agreed to return the Purchase Price as duly advanced but up until now, the payments have not been made.*

7.3. *The Defendants now owe the Plaintiff money in the sum of the Kwacha equivalent of £11,825.00 being the purchase price for the said two motor vehicle trucks.*

8.0. *The 1st Defendant was at all material times aware that the Plaintiff would want to use the said vehicles in his supply/carriage of farm products like maize and rice across Malawi and later to resale the said trucks at a profit.*

Particulars of Loss

9.0. *By reason for the Defendant's breach of the agreement, the Plaintiff suffered loss and damage and loss of profits on resale.*

10.1. *Difference between the purchase price and the resale price;*

10.2 *Loss of business*

The Plaintiff therefore Claims:

- a) *The sum of £11,825, alternatively the Malawi Kwacha equivalent of £11,825. Interest on the sum;*
- b) *Damages for breach of contract occasioning loss;*
- c) *Interest on damages;*
- d) *Costs of this action."*

The Defendants denies each and every allegation of fact contained in the Statement of Claim, save for admitting that the 1st Defendant is the 1st born daughter of the 3rd Defendant and that the 1st Defendant was at the material time residing in UK. The Defendants specifically deny (a) breaching any agreement with the Plaintiff, (b) having received the sum of Malawi Kwacha equivalent of £11,825,00 inclusive of shipping costs, and (c) having facilitated the building of a house. The Defendants also aver, without prejudice to the foregoing, that, if at all the Plaintiff advanced to the Defendants any sums of money, the same was not in British Pounds (GBP) and thus the claim in GBP is not maintainable. Finally, the 2nd and 3rd Defendants deny that they were or are agents of the 1st Defendant.

Burden and Standard of Proof

The evidentiary rule applicable in civil matters is that the person who asserts must prove the claims and not the person who denies. The effect of this rule is that the obligation of satisfying the court on an issue rests upon the party who asserts the affirmative of the issue. The standard of proof is a preponderance of probability. This means that a plaintiff must prove a fact by showing that something is more likely so than not. In **Commercial Bank of Malawi v. Mhango [2002-2003] MLR 43 (SCA)**, the Supreme Court of Appeal observed as follows:

“Ordinarily, the law is that the burden of proof lies on a party who substantially asserts the affirmative of the issue. The principle was stated in the case of Robins v National Trust Co [1927] AC 515 that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule is Ei qui affirmat non qui negat incumbit probatio which means the burden of proof lies on him who alleges, and not him who denies. Lord Megham, again, in Constantine Line v Imperial Smelting

Corporation [1943] AC 154, 174 stated that it is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. The judge said that

the rule is adopted principally because it is but just that he who invokes the aid of the law should be the first to prove his case because in the nature of things, a negative is more difficult to establish than an affirmative. However, in a civil action the burden of proof may be varied by the agreement of the parties – see Bond Air Services Ltd v Hill [1955] 2 QB 417.”

The party on whom lies a burden must adduce evidence of the disputed facts or fail in his or her contention. It, therefore, follows that in the present case the burden of proof is on the Plaintiff as the party who has asserted the affirmative to prove on a balance of probabilities that he entered into a sales agreement whereby the Plaintiff was to advance the Malawi Kwacha equivalent of £11,825.00 to the Defendant and the Defendant would, in return, deliver two trucks to the Plaintiff.

Evidence

Rather than reproducing all the evidence given by the witnesses, I have opted to dwell on only such parts thereof as are necessary for the determination of the issues herein, which very much relate to two trucks that the Plaintiff wanted to buy from UK.

The Plaintiff called two witnesses, namely, the Plaintiff (PW1) and Michael Namalomba (PW2).

PW1 adopted his witness statement dated 31st January 2014 and this constituted his evidence in chief. PW1 told the Court that he is a businessman based in Balaka District and that the Defendants were his family friends. The witness stated that the 1st Defendant had at all material times resided in UK and that the 2nd and 3rd Defendants have at all material times resided in Balaka District. He stated that he deals in the production, processing and delivery of maize, rice and other farm products across Malawi.

PW1 stated that in or around 2011 his business grew rapidly occasioning the need to purchase trucks. He stated that at the same time the Defendants needed to build a house in Balaka District and that the 1st Defendant was to finance the housing project. PW1 further stated that he entered into an oral agreement with the 1st Defendant whereby he agreed to pay money to the 2nd and 3rd Defendants for the building of the house and the 1st Defendant agreed to purchase a truck for him in

UK when the money paid toward the building project was equivalent to the cost of a truck. PW1 stated that he had given money to the 2nd and 3rd Defendants the equivalent of the price of a truck and the 1st Defendant purchased a truck and

delivered it to him. He further stated that thereafter he and the 1st Defendant entered into another agreement for the purchase by the 1st Defendant of two trucks for delivery to the Plaintiff. The Plaintiff agreed to pay K 3,029,650.00 as the initial deposit of the purchase price of two trucks. PW1 further stated that he paid the amount to the 2nd and 3rd Defendants for the building project and exhibited a copy of acknowledgement of receipt of the payment by the 1st and 2nd defendant (Exhibit P2).

PW1 further stated that the 1st Defendant requested to be paid the Malawian equivalent of £4000 (K 1, 200, 000.00) for shipping costs, which he paid to the Defendants. He also stated that he paid K 400,000.00 to the 2nd and 3rd Defendants as the remaining balance of the purchase price of the trucks. He further stated that the two trucks have not been purchased or delivered to him by the 1st Defendant. He stated that he had been informed by the Defendants that one truck had been purchased and was on its way to be delivered, but delivery has not been made. PW1 stated that in or about July 2013, the Defendants agreed to pay back the purchase price, but that no payment has been made.

In cross-examination, PW1 told the Court that he had not received delivery of the two trucks despite paying the purchase price. He stated that the 1st Defendant was not a truck dealer, but that the truck that he wanted to purchase was available in UK where she resided. PW1 further stated that he used to connect with the 1st Defendant through the 2nd and 3rd Defendants and that all the payments were made through them. He stated that the 1st Defendant instructed him to be making the payments to the 3rd Defendant so that she could use them for the construction of the 1st Defendant's house.

PW1 admitted that the 2nd Defendant signed Exhibit P2 as a witness. He further admitted that the 1st Defendant had told him that the shipment cost was £4000 and that he had not paid the full amount. PW1 stated that he had offered to pay the balance but that the 3rd Defendant had refused to receive the same. He further stated that he had been told that one truck had been purchased but had been stolen during transit and that he had received the shipment documents from the transporters. He stated that when he was offered the sum of K 2,000,000.00 as payment, he refused to accept it because his lawyer advised him not to accept payment since it was not in line with the agreement.

PW1 said that he gave the Defendants a total sum of K833,000 for the building project. As regards the modus operandi, PW1 stated that 2nd and 3rd Defendants would communicate that they needed such and such item, e.g., cement, iron sheets, etc., and the Plaintiff would provide the money for the items. He further stated that each time he made a payment, it would be recorded.

The next line of questions related to the currency in which the money was being paid. PW1 told the Court that he was paying in Malawi Kwacha but equivalent to GBP. When further quizzed by Counsel Chidothe that his witness statement suggests that he was paying in foreign currency, he denied paying in GBP and insisted that he was giving the money in Malawi Kwacha.

Regarding the purchase of the two trucks, Counsel Chidothe asked PW1 whether he paid the total purchase price. PW1 answered that the agreed price was £13,333 but he only paid £11,885. When questioned if at all the balance was paid, PW1 said that the balance remains outstanding whereupon he was asked how he expects to get the cars without paying the balance. His response was that he offered to pay the balance but the 3rd Defendant refused to receive the money on the ground that 1st Defendant had told her that she was no longer going to send the trucks.

Counsel Chidothe next asked PW1 why he was suing the 2nd and 3rd Defendants when by his own witness statement, in paragraph 30, the two persons were described as being mere facilitators. Counsel Chidothe further asked PW1 the capacity in which the 2nd and 3rd Defendants signed the Exhibits tendered by him. PW1 stated that the 2nd Defendant signed Exhibit P1 and P4 as a witness while the 3rd Defendant signed all documents a witness.

Counsel Chidothe next turned to Exhibit P5 (wherein the 2nd Defendant offered to pay back to the Plaintiff the sum of K3,547,500) and asked the PW1 why he refused to accept the money. PW1 stated that he could not accept such an arrangement because he had paid money not to get back money but to get delivery of trucks.

The last question by Counsel Chidothe hinged on the nature of business carried on by PW1. PW1 reiterated that he is a businessman who owns grinding mills and sells rice and seeds. He also said that he wanted the trucks for his business which had grown in size and that he had told the Defendants that he wanted the trucks for that purpose and not for re-selling.

In re-examination, PW1 stated that the 2nd and 3rd Defendants were parties to the contract (Exhibit P2) and that the money being owed him by the 1st Defendant was £11,825.00

PW2 was Mr. Michael Namalomba. He adopted his witness statement dated 31st January 2014 and this constituted his evidence in chief, and the material part thereof is as follows:

- “5. *I have known the Defendants since our days of youth.*
6. *I know that there was an agreement between the Plaintiff and the Defendants and that the Plaintiff would advance money to the Defendants to finance the construction of a house for the Defendants.*
7. *In return, the Defendants, especially the 1st Defendant would purchase a truck for the Plaintiff equivalent in price to the amount of money the Plaintiff would have advanced to the construction project.*
8. *The Plaintiff advanced money to the Defendant to a quantum sufficient to purchase a truck*
9. *Communication was made to the 1st Defendant*
10. *The 1st Defendant purchased a motor vehicle and sent it to Malawi and it was delivered to the Plaintiff*
11. *Subsequently, the parties entered into another agreement whereby the Plaintiff would advance more money towards the construction of the house and the Defendants would purchase another truck.*
12. *The Plaintiff duly advanced to the Defendants further sums herein totaling to the sum of the Malawi equivalent of 11,828 pounds for the purchase*
13. *The Plaintiff invited him as a family member to mediate herein*
14. *I discussed the matter with the Defendants and they did not deny liability.*
15. *I had exchanged several e-mails with the 1st Defendant*
16. *She made promises to pay the money. There are now produced and shown to me marked MN1 copies of e-mails amongst myself, the 1st Defendant and her husband Brian Chapangara.*
17. *I verily believe that the Defendants have deliberately refused ignored and/or failed to purchase the motor vehicle and to pay the consideration.”*

During cross-examination by the Counsel Chidothe, PW2 told the Court that he was acting as a representative of the Plaintiff. When asked to clarify what he meant

by being a representative of the Plaintiff, he stated that the Plaintiff had instructed him to help so that the Phekani family should delivery the two trucks that the Plaintiff had paid for. PW2 admitted that he was not present at the time the transaction was being made but that the Plaintiff told him that the purchase price was about £13,000.

PW2 further told the Court that the 1st Defendant had promised to send documents in respect of the two trucks within a period of two weeks but she did not do so until PW2 wrote her e-mails to remind her. PW2 was asked how he got the Invoice dated 11/02/2013 and he replied that it was an attachment to an e-mail from Mr. Chapangara. Having put it to PW2 that the documents identify the name of the transporter and show that the trucks were bought at the value indicated therein, Counsel Chidothe asked PW2 why he did not link-up with the transporter. PW2 responded that as he had no instructions to follow-up with the transporter, he informed the Plaintiff who said that he would wait for the delivery of the vehicles. He further stated that the Plaintiff had the duty to pay for the shipping expenses.

Counsel Chidothe turned to an e-mail dated 10th July 2013 written by PW2 to the 1st Defendant wherein it is stated that the Plaintiff had extended the period within which the first £4,000 had to be paid to 16th July 2013 and that upon receipt of the said sum, the Plaintiff would tell the 1st Defendant the way forward. Counsel Chidothe asked PW2 whether by this e-mail, the Plaintiff meant that he was no longer interested in the delivery of the trucks. PW2 stated that the Plaintiff settled for this option after noting that despite several meetings, the 1st Defendant was not interested in delivering the two trucks.

PW2 told the Court that he did not agree with Counsel Chidothe that the agreement was just between the Plaintiff and the 1st Defendant whereupon he was asked why he had referred to the 2nd and 3rd Defendants as facilitators. In this regard, the following Q & A ensued:

Q: Were the 2nd and 3rd Defendants acting as principals or agents?

A: These two were just facilitators

Q: Whom were they representing?

A: They represented the 1st Defendant

Q: Were the 2nd and 3rd Defendants sellers?

A: No! They were agents of Dickson Thom

Q: Were they agents of both the Plaintiff and the 1st Defendant?

A: Yes

Q: How did they become agents of the Plaintiff?

A: They were receiving the money. It could be both. English is not my mother tongue. We have difficulties on definition of “agent”.

In re-examination, Counsel Gondwe drew PW2’s attention to Exhibit P.5 [wherein the 2nd Defendant expresses his intention to repay the Plaintiff K3, 547,500, being the sum the Plaintiff gave to the Defendants for the purchase two trucks] and asked

him its significance and he answered that it meant that the 2nd Defendant was acting as an agent of the 1st Defendant. PW2 also told the Court that he did not have the means to verify the authenticity of the shipping documents. Counsel Gondwe asked PW2 to explain his e-mail dated 6th July 2013 and he said that the e-mail was a follow-up on Exhibit P.3 which is to the effect that the Plaintiff and the 2nd Defendant agreed that the 1st Defendant owed the Plaintiff £11,825. PW2 told the Court that the Plaintiff needed the money back in order for him to buy the trucks on his own.

Counsel Gondwe closed the Plaintiff’s case. Then Counsel Chidothe opened the Defendants’ case by indicating that the Defendant would place reliance on the testimonies of the three defendants.

The first witness for the Defendants was 2nd Defendant, Stain Phekani (DW1). He adopted his witness statement dated 31st January 2014 and this constituted his evidence in chief. The evidence in chief of DW1 can conveniently be categorized into three parts. The first part has to do with how the parties herein are related. DW1 told the Court that the Plaintiff is a family friend and that the 1st and 3rd Defendants are his sister and mother respectively. The witness stated the 1st Defendant went to UK in 2008 to further her studies and she found employment there and resides there.

Part 2 of the DW1’s evidence in chief is contained in paragraphs 7 to 16 and relates to the first agreement between the Plaintiff and the 1st Defendant. This part of the evidence is not directly relevant to the issues in dispute.

Part 3 of the testimony of DW1 pertains to the second agreement between the Plaintiff and the 1st Defendant. DW1 stated that the parties agreed that the 1st Defendant should purchase two trucks for the Plaintiff once the Plaintiff had paid the amount equivalent to the purchase price for two trucks towards the construction of the 3rd Defendant’s house. DW1 stated that after the agreement had been reached, the Plaintiff made payments towards the construction of the house and that by 25th September 2013, the Plaintiff had paid K3,547,500.00, but that this was not enough to purchase two trucks. DW1 stated that the Plaintiff and 1st Defendant further agreed that the Plaintiff should pay £4,000.00 to cover the cost of shipping

but the Plaintiff has not paid this amount. DW1 explained that the 1st Defendant had not breached the contract since the performance of the contract was subject to the full payment of the purchase price of the trucks and the cost of shipping.

DW1 stated that when the 1st Defendant visited Malawi in 2012, the total amount paid by the Defendant was not equivalent to the purchase price of two trucks and the 1st Defendant, therefore, treated the money as debt and acknowledged owing the Plaintiff K3,547,500.00. A copy of the acknowledgement was marked as Exhibit P1.

DW1 stated that the Plaintiff and the 1st Defendant confirmed that the Plaintiff had an outstanding balance of £4,000.00 to cover the cost of shipping.

DW1 further stated that he was informed by the 1st Defendant that she had purchased one truck but that it was mysteriously taken by unknown people after it had already been delivered to the shipping agents. He stated that the Plaintiff thereafter terminated the contract and requested to be refunded the sum of K 3,547,500.00. The witness stated that the 1st Defendant requested him to pay the money to the Plaintiff on her behalf and he offered to refund the Plaintiff part of the money in the sum of K2,000,000.00 which the Plaintiff accepted but told him that he would not receive the money instantly because he needed to consult his relatives. DW1 further stated that while waiting for feedback, he was astonished to receive the writ of summons from the Court wherein the Plaintiff claimed for payment in pounds and damages for breach of contract. DW1 stated that he strongly believed that the claim was made in bad faith and it was unlawful in that he paid the money in Malawi Kwacha not in GBP.

DW1 explained that his role in the whole transaction was always that of a witness and not as an agent of the 1st Defendant. He further claimed that the 1st Defendant was acting as an agent of the Plaintiff in the purchasing of the trucks and, therefore, the Plaintiff bears the risk of loss in respect of the missing truck.

In cross-examination, DW1 told the Court that £4000.00 recorded in Exhibit P1 was the cost of shipping which had not yet been paid by the Plaintiff. He further stated that the Plaintiff had only paid K125,000.00 towards this outstanding balance. He also stated that the 1st Defendant had purchased one truck but it had been stolen. He further explained that the 1st Defendant did not purchase the second truck because the Plaintiff had voluntarily terminated the contract and requested that the purchase price be returned. He stated that £11,825 recorded in

Exhibit P1 had been calculated by PW2 and that he had signed as witness to confirm that the conversion was true.

In re-examination, DW1 reiterated that £4000.00 had not been paid. He further stated that the shipping agent was to blame for the non-delivery of one truck. He stated that the Defendants were not in a position to comment on the whereabouts of the missing truck as they had provided the shipping documents to the Plaintiff. He maintained that the Plaintiff and the 1st Defendant were the parties to the transaction and that he was merely a witness.

Next to give her evidence was Elina Phekani, the 3rd Defendant (DW2). She adopted her witness statement as her evidence-in-chief and it is as follows. The 1st Defendant is her daughter and the Plaintiff is a family friend. In 2009, at the request of the Plaintiff, she linked up the Plaintiff with the 1st Defendant as the Plaintiff wanted to

buy a truck in UK. The Plaintiff gave sums of money in piecemeal to DW2 and when the total sum reached K 1,000,000.00, he instructed her to send the money to the 1st Defendant for her to purchase a truck in UK on his behalf. After the money had been sent to the 1st Defendant, it took about 8 months for the truck to be delivered to Malawi. The 1st Defendant was not a dealer in trucks but merely acted on the instruction of the Plaintiff.

Sometime in 2011, the Plaintiff entered into another agreement with the 1st Defendant whereby it was agreed that the 1st Defendant would purchase another truck for the Plaintiff. She was not involved in this agreement and only came to know about it when the 1st Defendant informed her that the Plaintiff would give her (DW2) money to be used towards the construction of her house. She did not receive any money from the Plaintiff but only saw construction materials arriving for her house: the Plaintiff was dealing with the 2nd Defendant. She denied that she acted for or on behalf of the 1st Defendant in the transaction leading to the present action.

There was no cross-examination.

DW3 was Siphiso Phekani. She resides in UK and gave her evidence by way of written evidence under oath. The evidence was admitted after Counsel agreed that her absence in Court would not prejudice the proceedings. DW3 went to UK in 2008 to pursue further studies. After completing her studies in 2013, she secured employment in the UK and has continued living there. Sometime in 2009, the Plaintiff requested her to purchase a truck on his behalf in UK. DW3 was approached not as truck dealer but as an agent for the Plaintiff. They agreed that

the Plaintiff would not pay the purchase price instantly but would give sums of money to the 3rd Defendant until the total sum was equivalent to the purchase price of a truck. When the money paid by the Plaintiff to DW2 reached K 1,000,000.00, the Plaintiff instructed DW3 to send it to the 1st Defendant. The money was not sufficient to purchase a truck whereupon they agreed that the 1st Defendant would purchase the truck with her own money and that the Plaintiff would finance the construction of DW3's house until the balance was liquidated. It took about 6 months for the truck to reach Malawi and that it took the Plaintiff eight months to liquidate the balance.

DW3 further stated that she entered into a second agreement with the Plaintiff and her evidence thereon is as follows:

“16. ...

- (i) *That Plaintiff should fund the construction of the 3rd Defendant's house until the amount equivalent to the purchase price for the two trucks is liquidated.*
 - (ii) *That consequently the 1st Defendant shall use the equivalent value of the said money to purchase the trucks herein.*
17. *On or about 3rd March 2012, when I found that the plaintiff had paid the total sum of MK 3,547,500.00 for the construction of the house herein.*
 18. *Since the money was not sufficient for me to buy and deliver the two trucks, we agreed to treat the money herein as a debt whilst waiting for the balance. To this end, I acknowledged owing the Plaintiff the said sum in writing. There is now shown and produced to me a copy of this acknowledgement marked as 'SP1'.*
 19. *In the said acknowledgement receipt, we agreed that the outstanding balance was £4000.*
 20. *Whilst waiting for the balance, I bought one truck and handed it over to shipping agents for shipment. There is now shown and produced to me copies of the shipping notes marked as SP2'.*
 21. *Subsequently, I was informed by the said agents that the truck was taken by unscrupulous persons.*
 22. *After relaying this information to the Plaintiff, he requested to be refunded the money.*
 23. *In a bid to maintain good relationship with the Plaintiff, I accepted and told him to get the money from my brother (2nd Defendant) who offered to lend me the money so as to put the matter to rest.*

24. *Subsequently, I was surprised to learn that the Plaintiff had taken the matter to this court wherein he claims payment in pounds.*
25. *I strongly believe that the Plaintiff's claim for payment in pounds is in bad faith and unlawful in that the payment was made in Kwacha not in pounds and thus the claim for dollars is misplaced.*
26. *I further strongly believe that I did not breach the contract herein in that the Plaintiff did not complete paying for the trucks to entitle him receive the same.*
27. *That the Plaintiff entered into the second agreement while fully aware that that it takes more than eight months for the truck to reach Malawi and that the delays are beyond my control.*
28. *The Plaintiff failed to mitigate the loss when he failed to collect the payment in time and thus the issue of interest does not arise in this case."*

This marked the closure of the case for the Defendants.

Issues for Determination

There are five main issues in this matter for the determination of the Court, namely, whether or not:

- (a) the Plaintiff entered a sale agreement with the 1st, 2nd and 3rd Defendants respectively?
- (b) the 1st, 2nd and 3rd Defendants breached the sale agreement?
- (c) the Plaintiff is entitled to receive the sum equivalent to £11,825.00
- (d) the Plaintiff is entitled to damages occasioned by non-delivery of the two trucks?
- (e) the Plaintiff is entitled to interest on damages?

Submissions of the Parties

The Plaintiff submits that the Defendants breached the contract of sale by failing to deliver the two trucks after the Plaintiff had paid the purchase price. The Plaintiff further submits that the Defendants' breach of contract occasioned the Plaintiff loss.

The Defendants submit that there was no sale agreement between the Plaintiff and the Defendants. The Defendants also submit that the 1st Defendant merely acted as an agent on behalf of the Plaintiff and that the 2nd and 3rd Defendants were not privy to the agreement between the Plaintiff and the 1st Defendant. The Defendants further submit that there could be no breach of contract since no sale agreement existed. In the alternative, the Defendants submit that the failure to deliver the two trucks was caused by the Plaintiff himself since he failed to pay the balance which was outstanding. The Defendants further submit that the plaintiff carries the risk for the truck which they allege to be missing. The Defendants furthermore submit that the damages claimed by the Plaintiff are too remote.

Analysis and determination

As already mentioned, the dispute herein pertains to the two trucks that the Plaintiff wanted to buy from UK. It is commonplace that the 1st Defendant received money, through the 2nd Defendant, from the Plaintiff in connection with the two trucks. This is evidenced by Exhibit P1, a memo dated 3rd March 2012, which reads as follows:

*“DEPOSIT FOR TRUCKS PAID BY DISTON THOM
RATE K300 = 1 POUND
K1778 750
+ 400 000

3 429 650*

*I write to certify that I am going to send two trucks in payment for the money I owe Mr. Diston Thom
Signed SIPHISO PHEKANI
03/03/2012
WITNESS Stan Phekani Signed*

However, £4000 payment for shipping was an estimated figure.”

Proceeding on the basis that the Plaintiff and the 1st Defendant had agreed on an exchange rate of £1 to K300, the 1st Defendant “owed” the Plaintiff £11432.17.

Fast forward to 23rd June 2013, the Plaintiff and the 2nd Defendant drew up Exhibit P.2 which is in the following terms:

“23/06/2013

Total costs for 2 trucks

£13,333.00

Less(K452,450) £1,508.00

£11,825.00

*Mr. Diston Thomu and
Mr. Stain Phekani have
agreed that the money
owing to Mr. D. Thomu
by Siphiso Phekani is
£11,825.00”*

Exhibit P.2 is signed by the Plaintiff and the 2nd Defendant and witnessed by PW2 and 3rd Defendant. It is noteworthy that, assuming that the agreed exchange rate in respect of Exhibit P.2 was still £1 to K300, the Malawi Kwacha equivalent of £11432.17 was K3,547,500. This is confirmed by Exhibit P5 (handwritten) and Exhibit P.6 which is typed version of Exhibit P.5. In these two exhibits, written by the 2nd Defendant and signed by the 3rd Defendant as a witness, the 2nd Defendant states that he offered to refund the Plaintiff the sum of K3,547,5000 starting with a payment of MK 2,000,000.00 which would leave a balance of K1,547,500.

It is trite that the existence of a contract is dependent on the existence of six elements, namely, offer, acceptance, consideration, intention to create legal relation, legal capacity of the parties and legality of the object or subject matter of the contract: See **Martin & Economic Resources Limited v. Phiri and Gada Co. Ltd [1998] MLR 225** at 228. I have read and re-read the evidence in the present case and I have searched in vain for evidence showing the above elements as between the Plaintiff and the 2nd and 3rd defendants respectively. The 2nd and 3rd Defendants were, at the most, merely acting as witnesses to the arrangement that the Plaintiff and the 1st Defendant entered into. Being not privy to the said arrangement, the 2nd and 3rd Defendants cannot be liable in contract in respect of the said arrangement: see **Dunlop Pneumatic Tyre Co. Ltd v. Selfridge Ltd [1915] AC 847** and **Hashmi v. DHL Express [2001-2007] MLR (Com) 319**. In the premises, the Plaintiff’s action against the 2nd and 3rd Defendants respectively has to fail.

I now turn to examine the dealings between the Plaintiff and the 1st Defendant. It is commonplace that the two were family friends who had known each other from their days as youth. I have great doubts that the two intended to create a legal relationship between themselves when the Plaintiff presented a proposal to the 1st

Defendant to purchase trucks in UK on his behalf. I am fortified in my view by the vagueness of the terms of the arrangement. In the hallowed words of Viscount Maugham in **Scammell (G) and Nephew, LD. V. Ouston [1941] A.C. 251** at 255:

“In order to constitute a valid contract the parties must so express themselves that their meaning can be determined with a reasonable degree of certainty. It is plain that unless this can be done it would be impossible to hold that the contracting parties had the same intention; in other words the consensus ad idem would be a matter of mere conjecture. This general rule, however, applies somewhat differently in different cases. In commercial documents connected with dealings in a trade in which the parties are perfectly familiar the court is very willing, if satisfied that the parties thought that they made a binding contract, to imply terms and in particular terms as to the method of carrying out the contract which it would be impossible to supply in other kinds of contract.”

The same point was emphatically made in the same case by Lord Wright at 268:

“The object of the court is to do justice between the parties, and the court will do its best, if satisfied that there was an 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 difficulties of interpretation. Difficulty is not synonymous with ambiguity so long as any definite meaning can be extracted. But the test of intention is to be found in the words used. If these words, considered however broadly and untechnically and with due regard to all the just implications, fail to evince any definite meaning on which the court can safely act, the court has no choice but to say that there is no contract. Such a position is not often found. But I think that it is found in this case. ... There are many cases in the books of what are called illusory contracts, that is, where the parties may have thought they were making

a contract but failed to arrive at a definite bargain. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement of the parties, that the promises and performances to be rendered by each party are reasonably certain.”

The principle to be deduced from the reported cases is that if there is an essential term which has yet to be agreed and there is no express or implied provision for its solution, the result in point of law is that there is no binding contract. If parties to a contract have left unsettled some question which can only be settled by further agreement between them and in no other way and there has been no such agreement, then there is no contract which is enforceable at law: see **British Bank for Foreign Trade, LD v. Novinwx, LD [1949] 1 K.B. 623**

I have taken the occasion to examine the whole of the negotiations between the Plaintiff and the 1st Defendant for the purpose of seeing whether they were truly

agreed on all material points. In my opinion, that requirement was not satisfied in this case. That being the case, there is no binding sales agreement.

In any case, if at all a legal relationship was intended, it is imperative that the nature of the legal relationship that the Plaintiff and the 1st Defendant had in mind be determined. It is not in dispute that the Plaintiff wanted to have trucks bought in UK on his behalf. He approached the 1st Defendant to help him in this regard, well knowing that the 1st Defendant was not a motor vehicle dealer. There is nothing in the evidence that the Plaintiff desired or intended to purchase a motor vehicle directly from the 1st Defendant. The evidence points to the Plaintiff wishing that the 1st Defendant act on his behalf as an agent.

According to Chitty on Contracts, 27th Edition, Sweet & Maxwell, London 1994 at 31-00:

“The word ‘agency’ represents a body of rules under which one person, the agent, has the power to change the legal relations of another, the principal.”

In **Car Hire Limited v. D & S Gel Fuel Company Limited**, Manyungwa, J. said:

“An agent is a person who is employed for the purpose of bringing his principal into contractual relations with third parties. The agent does not make contracts on his own behalf.”

On the basis of the foregoing, it appears to me that an agency agreement is one by which the agent is authorised to establish privity of contract between his employer called the principal and a third party. In determining whether an agency relationship exists, the substance of the matter prevails over the form. In **Garnac Grain Co Inc**

v. H.M.F. Faure & Fairclough Ltd [1968] AC 1130 at 1137, Lord Pearson explained:

“The relationship of principal and agent can only be established by the consent of the principal and the agent. They will be held to have consented if they have agreed to what amounts in law to such a relationship, even if they do not recognise it themselves and even if they have professed to disclaim it. ... But the consent must have been given by each of them, either expressly or by implication from their words and conduct. Primarily one looks to what they said and did at the time of the alleged creation of the agency. Earlier words and conduct may afford evidence of a course of dealing in existence at that time and may be taken into account more generally as historical background. ...”

In **Ireland v. Livingston (1871) L.R. 5 H.L. 395**, the respondent wrote to the appellants, merchants and commission agents at Mauritius, asking them to ship him 500 tons of sugar at 26/9 to cover freight and insurance. The appellant could

only procure, at the price mentioned, nearly 400 tons, which they purchased from several different persons, and shipped in one vessel. The respondent refused the cargo, and wrote to cancel the order. One issue before the House of Lords was whether the contract was to be regarded as a contract between principal and agent, or between vendor and vendee. The House of Lords opined that the contract might be regarded in both aspects. Justice Blackburn stated:

“It is quite true that the agent who in thus executing an order, ships goods to his principal, is in contemplation of law a vendor to him. The persons who supply goods to a commission merchant sell them to him, and not to his unknown foreign correspondent, and the commission merchant has no authority to pledge the credit of his correspondent for them. There is no more privity between the person supplying the goods to the commission agent and the foreign correspondent than there is between the brickmaker who supplies bricks to a person building a house, and the owner of that house. The property in the bricks passes from the brickmaker to the builder, and when they are built into the wall, to the owner of that wall; and just so does the property in the goods pass from the country producer to the commission merchant; and then, when the goods are shipped, from the commission merchant to his consignee. And the legal effect of the transaction between the commission merchant and the consignee, who has given him the order, is a contract of sale passing the property from the one to the other; and consequently the commission merchant is a vendor, and has the right of one as to stoppage in transitu.

I therefore perfectly agree with the opinion expressed by Baron Martin in the Court below, that the present is a contract between vendor and vendee; but I think he falls into a fallacy when he concludes therefrom that it is not a contract as between principal and agent. My opinion is, for the reasons I have indicated, that when the order was accepted by the Plaintiffs there was a contract of agency by which the Plaintiffs undertook to use reasonable skill and diligence to procure the goods ordered at or below the limit given, to be followed up by a transfer of the property at the actual cost, with the addition of the commission; but that this super-added sale is not in any way inconsistent with the contract of agency existing between the parties, by virtue of which the Plaintiffs were under the

obligation to make reasonable exertions to procure the goods ordered as much below the limit as they could.”

On the evidence available in this case, I can only say this much: the 1st Defendant was engaged as an agent. The fact that there is no evidence that she was to earn any commission on the transaction is neither here nor there. All circumstances point to the 1st Defendant being entrusted with the task of purchasing trucks in UK on behalf of the Plaintiff.

Furthermore, there is another ground that militates against the claim by the Plaintiff. It is trite that where parties to a contract mutually vary the terms of their contract they are stopped from resiling from implementing or enforcing the

contract as varied. As was aptly observed by Lord Cairns, L.C in **Hughes v. Metropolitan Rail Co. [1874 – 80] All ER 187, 191:**

“.....it is the first principle upon which all courts of equity proceeds if parties, who have entered into a definite and distinct terms involving certain legal resultsafterwards by their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, that the person who otherwise might have to enforce those rights will not be allowed to enforce them where it would be inequitable, having regard to the dealings which have taken place between the parties.....”

The above-quoted proposition of the law was also unanimously approved by the Supreme Court of Appeal in **Loga v. Durand & Another [2004] MLR 170, 176.** There is unchallenged evidence in the present case that the Plaintiff, upon realizing that there were problems in getting delivery of the two trucks, voluntarily requested that K3,547,5000 be returned to him. The 1st Defendant agreed to do so having earlier on already acknowledged by way of Exhibit P1 that he owed the Plaintiff K3,547,500.00. Accordingly, the 1st Defendant instructed the 2nd Defendant to give the said sum to the Plaintiff on her behalf. This, in my view, entails that the Plaintiff waived his right to enforce the terms of the original agreement, if any.

Conclusion

In these circumstances and by virtue of the foregoing, the Plaintiff has failed to satisfy the Court on balance of probabilities that there was a sales agreement between him and the Defendants. As I have found that there was no sales agreement, there was consequently no breach thereof by the Defendants. In the premises, the Plaintiff is only entitled to be paid by the 1st Defendant the sum of K3,547,500 which is correctly acknowledged as a debt owed by the 1st Defendant to the Plaintiff. I so order.

The issue of costs has exercised my mind a great deal. As already observed, the parties herein were (if not still) family friends who knew each other from an early age. This fact was very much evident in the manner the parties conducted themselves in prosecuting the present case. In the premises and having regard to the fact that costs are always in the discretion of the Court, I am of the view that it would be fair in the circumstances of this case if each party were to pay his or her own costs. I so order.

Pronounced in Court this 12th day of January 2016 at Blantyre in the Republic of Malawi.

Kenyatta Nyirenda
JUDGE