



IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 185 OF 1994

BETWEEN

APEX CAR SALES..... PLAINTIFF

and

M.I.F. INDUSTRIES LIMITED.....DEFENDANT

CORAM : Chatsika, J

Ng'ombe of Counsel for the Plaintiff

Kapeta of Counsel for the Defendant

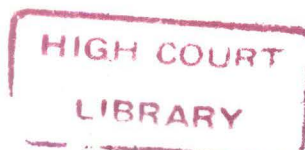
Kadyakale, Official Interpreter

Mikanda/Phiri Recording Officer



JUDGEMENT

This is a simple case of a contract of sale whereby the plaintiff company offered to sell and the defendant company agreed to purchase a Mercedes-Benz motor vehicle at a price of K450,000. It was further agreed between the parties that the defendants would pay the purchase price in 33 equal monthly instalments and to this extent the defendants gave the plaintiffs 33 post-dated cheques at the time of taking the delivery of the vehicle. After the first four cheques had been honoured by the bank, the defendants unilaterally stopped the payment of further cheques. At the time of stopping the payment of further cheques the outstanding balance on the purchase price was K395,00.00 The



defendants have refused to make further payment until and unless certain conditions which will become apparent later in the judgement are fulfilled. The plaintiffs who hold the view that the defendants's demands are unreasonable claim the balance of the purchase price or alternatively return of the vehicle and damages.

As already stated above the case is a simple one of a contract of sale. It has been made somewhat complicated by the introduction into it of certain matters which were initially not part of the contract.

This case was initially set down for hearing on the 28th and 29th June 1994. On that date Mr. Ng'ombe, Counsel for the plaintiffs, applied for an adjournment giving as his grounds for the said intended adjournment that he was taking his wife to a hospital in South Africa. Mr. Kapeta, Counsel for the defendants gracefully gave no objection to such an adjournment and the date of 26th July 1994 was fixed for the hearing of the case. On the 7th July 1994 Mr. Kapeta informed Mr. Ng'ombe, by his letter of that date that the Managing Director of the defendant Company would be away during the period around the 26th July 1994 and requested that the case be set down for hearing on any date after the 19th August 1994. On the 26th July, the day on which the case was set down for hearing, Mr. Ng'ombe on behalf of the plaintiffs strongly objected to a further adjournment and argued that the absence of a Managing-Director of a corporate personality was not sufficient reason for granting an adjournment as some other officer of the company could give evidence on behalf of the company. Mr. Ng'ombe further argued that any

adjournment would not be in the interest of the plaintiffs since the defendants had the possession of the motor vehicle which was depreciating in value as time went by and at the same time, refusing to pay the balance of the purchase price. Mr. Kapeta, however, argued that it was the managing director of the defendant company who was the key-witness in the case and that any evidence of any other member of the company would only constitute hearsay evidence.

The Court refused Mr. Ng'ombe's application made by way of a further submission to the effect that as a condition to the granting of the adjournment sought by the defendants an order should be made that the defendants should make an election on a given date either to return the motor vehicle to the plaintiffs or to accept the purchase, and be expected to pay the balance of the purchase price.

The case was adjourned to the 10th and 11th August for hearing. Before the hearing commenced, on the 10th August 1994 Mr. Ng'ombe, Counsel for the plaintiffs, informed the Court that at 16.59 hours on the previous day (the 9th August 1994) his fax signalled in response to a letter from Mr. Kapeta, Counsel for the defendant to the effect that a copy of a letter from the Fiscal Department of the Malawi Police was being transmitted and that he should receive it. At 17.01 hours on the same day, Mr. Ng'ombe went on to tell the Court that the fax recorded a letter purportedly coming from the Second-in-Command of the Fiscal Division of the Malawi Police which stated that on the 9th August, 1994 the Fiscal Department had impounded a Mercedes-Benz motor vehicle from Mr. Mahomed Farook Makani of M.F.I. Industries

on receipt of information and confirmation from the South African Vehicle Theft Unit- Sgt. KRITZINGER- that the vehicle was a stolen one . Mr. Ng'ombe expressed both deep concern and profound doubt regarding the veracity of the contents of the letter from the Fiscal Department, especially coming, as it did, on the eve of the commencement of the trial in which the subject matter, was the Mercedes-Benz motor vehicle which had just been impounded. Mr. Ng'ombe minced no words by stating that he strongly suspected that the impounding of the motor vehicle was not coincidental but was the result of some evil forces perpetrated by the defendants designed either to delay the hearing of the case or to defeat the plaintiff's claim entirely. Arising from these strong sentiments which were expressed by Mr. Ng'ombe, the Court made an order that the motor vehicle which had been impounded by the Fiscal Division of the Malawi Police, which was also the subject of the claim in the case before the Court be surrendered to the Court by 3 pm that day and that it remains in the custody of the Court until the matter was finalised or until a further order was made. The Court further ordered that the trial of the case would not commence until the motor vehicle was surrendered to the Court. The case was adjourned to the following day, the 11th August 1994.

The Fiscal Division of the Malawi Police duly complied with the Court order. Before 3 pm on the 10th August, 1994, the motor vehicle was delivered to the High Court. The trial then duly commenced on the 11th August, 1994.

Mr. Altaf Ahmed Mahomed, the managing director of Apex Car Sales, the plaintiff company, told the court that his company sold a Mercedes Benz motor vehicle to the defendants for K450,000. He elaborated the circumstances that led to the sale transaction by stating that Mr. Makani, the Managing Director of the defendant Company previously worked for him. He stated that Mr. Makani was looking for a car and he found one which is now the subject matter of this case at Globe Wholesalers. Mr. Mahomed told the Court that Globe Wholesalers were not prepared to discuss any terms of deferred payment for the price of the car with Mr. Makani. As Mr. Makani liked to motor vehicle so much, he approached to the plaintiff and asked them to assist him to purchase the motor vehicle from Globe Wholesalers. The plaintiff, by way of assisting Mr. Makani, bought the car from Globe Wholesalers for K450,000 and immediately sold it to the defendants at the same price of K450,000. Mr. Mahomed further told the Court that as a result of this arrangement, Mr. Makani arranged with the plaintiff to pay for the car by 33 equal monthly instalments. Mr. Makani presented 33 post-dated cheques to the plaintiffs when he took delivery of the car. Mr. Makani started to use the car immediately after taking its delivery before it was registered locally.

It may be pertinent at this stage to consider the evidence in defence of Mr. Makani, the managing director of the defendant company, as it will help to show the events that took place between the time of taking the delivery of the vehicle and the time when further payments were stopped. He stated that in April 1993, Mr. Nathivane of the plaintiff company approached him and

offered to sell him a Mercedes Benz car. He went to see the car and after expressing his interest in it agreed to purchase it at a price of K450,000 to be paid in 33 equal monthly instalments. He gave the plaintiffs 33 postdated cheques and took the vehicle away. Mr. Makani stated that at that time the vehicle was not registered but Mr. Nathvani assured him that as soon as the vehicle was cleared by the Customs Department he (Mr. Nathvani) would assist him (Mr. Makani) to register the vehicle. Mr. Makani stated that in August 1993, after four instalments had been paid, he asked Mr. Bashir (also of the plaintiffs company) about the registration took of the car. Since the registration book was not available, he told Mr. Bashir that if the same was not presented to him by the 25th August, 1993 he would stop the payment of further cheques. It appeared that this was not an empty threat because Mr. Makani, in fact, stopped the payment of further cheques.

Mr. Makani went on to state that on the 25th September 1993, he went to Lilongwe on the Mercedes Benz car and when he reached the Capital Hotel Customs Officers seized the vehicle and impounded it on the ground that it was not registered. Mr. Makani returned to Blantyre in a hired car. He counter claims the cost of the hire from the plaintiffs.

It would appear from the contents of a letter from the Department of Customs and Excise dated the 1st October 1993 to Mr. Makani, and marked Exhibit D.10 that the latter made some representations relating to the motor vehicle to the department. This is significant from the introduction of the letter which starts "Please refer to your letter dated 27th September 1993".

Mr. Makani denied that he wrote a letter to the department. I did not believe him. I was satisfied he wrote. In that letter the Department of Customs and Excise informed Mr. Makani that it had authorised the release of the vehicle on condition that it was re-exported under the departments supervision on or before the 15th October 1993. In the absence of the letter which Mr. Makani wrote to the Department of Customs and Excise, it is not possible to see on what information the advice from the Customs and Excise Department was based. I am, however, satisfied that the letter which, I am satisfied, Mr. Makani wrote to the Department, which Mr. Makani denies to have written, contained incorrect information about the vehicle. It was on that incorrect information that the department based their advice. It is, however, clear in my mind that, even after receiving the letter from the Department of Customs and Excise, Mr. Makani knew that what was required in order for him to lawfully retain the motor vehicle was local registration.

It is observed that there was some delay from April 1993 when the car was sold in registering it. It is further observed from the evidence that there was a mistake in its first registration because it was registered, not in the name of the defendants, but rather in somebody else's name. However, according to the information on Exhibit D3 (Original Blue Book) the vehicle was registered in the defendant's name on the 23rd November 1993 as NS 224. On this document, the figures in respect of the chassis number were superimposed but could, all the same, be read. When this book was given to Mr. Makani he returned it to the plaintiffs and demanded a clean book. The

plaintiff obtained a duplicate registration book in which the engine number and chassis number were clearly shown but the defendant again refused it and made further demands that, because the car was imported into Malawi it should have such information as name of the person who imported the car into Malawi as first owner, name of Globe Wholesalers who bought the car from the first owner as second owner; name of Apex Car Sales Ltd who bought the car from Globe Wholesalers as third owner and lastly name of the defendants who finally bought the car from Apex Car Sales Ltd as fourth owner. The plaintiffs who considered the defendants demands to be unreasonable refused to comply and the defendant, on his part paid no further instalment although he continued to use the car. Although officially, the car had been registered as NS 224, this number was not fixed to the car and the defendant continued to use it without any number.

The sale of this vehicle which started as a simple contract of sale continued with a saga of many events. There was tendered in evidence two fax printouts Exhibit P12 and Exhibit P13 ostensibly coming from the South African Police. Exhibit P12 was also tendered in evidence by the defence as Exhibit D5. I must say at the outset that the contents of these documents in so far as they tend to prove that the contents thereof are true constitute inadmission hearsay evidence. Also tendered by the defence is a letter from the Second in Command of the Fiscal Section of the Malawi Police dated the 9th August 1994. The contents of this letter constitute inadmission hearsay evidence but since the Second in Command of the Fiscal Section gave evidence the letter was admitted in evidence merely to prove that

the officer testified that he received such information from the South Africa police.

The story behind the fax printouts and the letter from the Fiscal Section of the Malawi Police and other letters from the Department of Customs and Excise is obtained from the evidence of Mr. Altaf Ahmen Mahomed (P.W.1) and also from the evidence of Mr. Mahomed Farook Makani (D.W.1). It will be observed that the defendant stopped the payment of further instalments in August 1993 ostensibly on the ground that the plaintiffs had failed to register the car and by implication failed to transfer title to him. It will further be observed that by the 23rd November 1993, the plaintiffs had registered the car in the defendants' name and presented the defendants with the car's registration book and that for the reasons which have already been stated above, the defendants refused the book and continued to enforce his instructions to the bank not to honour any of the cheques which he had presented to the plaintiffs. In February 1994 the defendant is alleged to have received a fax message from the South African Police alleging that the documents relating to the car which is the subject matter of this case were false. As I have already stated this information is hearsay. No witness from the South African Police testified before this court as to the veracity of that information. There is no evidence either to prove that the fax, in fact, came from the South African Police. I disregard the contents of this document.

On the 10th August 1994, the day on which the hearing of this case was to commence, the Court was shown Exhibit D.7, a

letter from the Second in Command of the Fiscal Section of the Malawi Police. The letter states that the Officer received information from the South African Vehicle Theft Unit that the Vehicle in question was a stolen one. The officer, Mr. Alex Chisiano, gave evidence in this court. He stated that the information was given to him by telephone on the 9th August, 1994. His evidence was given on the 30th August, 1994, some 21 days after the alleged telephone message was received. It was surprising that during all those 21 days no written confirmation of such a serious allegation was received from his South African counterpart. There is no evidence that the telephone message, in fact, came from the South African Police. Any person, not excluding an agent of the defendant, could have telephoned the Fiscal Section. I disregard that evidence entirely.

What has come out clearly from the evidence is that up to March 1992 Mr. Makani used to work for the plaintiffs. During the course of his work he was involved in certain fraudulent activities. When these fraudulent activities were discovered by the plaintiffs, Mr. Makani was summarily dismissed. Naturally he did not take his dismissal kindly. He therefore took advantage of the car transaction to express his anger by giving the plaintiff a bad deal. With the intention of either delaying the payment for the car or avoiding it the Mr. Makani was trying to gather information from the Department of Customs and Excise, ostensibly from the South African Police and even from the Fiscal Section of the Malawi Police that the vehicle was a stolen one. It is regretted and most reprehensible that a senior officer of the Fiscal Section of the Malawi Police allowed himself to be

used in these bizzare and heinous activities.

The defence have made much play on the Customs Clearance Certificate, Exhibit P11. This document shows that the vehicle was manufactured in Germany and was exported to Malawi from England when according to the defence, the vehicle was manufactured in South Africa and exported to Malawi from that country. It is conceded that if, and I emphasize the word "if", it is true that the vehicle in question was manufactured in South Africa and that it was imported into Malawi from that country, then there is a discrepancy between the particulars of the vehicle which was cleared by the Department of Customs and Excise and the vehicle in question. There was, however, no direct evidence that the vehicle was manufactured in South Africa. According to the document and from the information obtained from the Department of Customs and Excise, the vehicle was imported into Malawi by a Mr. Maning. We have no evidence of what information Mr. Maning gave to the Customs and Excise Department when clearing the car. It could well be that Mr. Maning brought the car from England through South Africa to Malawi. It could also be possible that since Mercedes-Benz cars are generally manufactured in Germany, Mr. Maning, in good faith, told the Customs officials that the car was manufactured in Germany. All this is pure conjecture. What is true is that the car was cleared by the Customs officials and duly registered in Malawi and further that nobody, so far as this court is concerned, has complained that the car is his and that it was stolen from him.

In conclusion I find that the car was bought by the plaintiffs from Globe Wholesalers. It was sold by the plaintiffs to the defendants. It was duly cleared by the Department of Customs and Excise and was registered by the Department of Road Traffic Commissioner and given the registration number NS 224. Mr. Makani demands that the registration book should show the names of Maning, Globe Wholesalers, Apex Car Sales Ltd and lastly the defendants' name were unreasonable and having no legal basis whatsoever. I also find from the evidence as a fact that Mr. Makani deliberately abused the plaintiffs kindness in according him soft conditions to acquire the vehicle by attacking the vehicles' title with a view to either delay or avoid paying for it.

The defendant has counterclaimed a total sum of K95,615.02. This sum is made up of K18,000 in respect of the insurance cover for the car; K5,615.02 as cost of hiring a car from Lilongwe to Blantyre when the car, the subject matter of this case, was impounded by the customs authorities when Mr. Makani drove the same to Lilongwe; K17,000 legal costs and return of K55,000 which the defendant has paid as part of the purchase price of the car.

With regard to the claim for the insurance cover, it is to be observed that the sale of the car was completed when the defendant gave the plaintiff 33 post-dated cheques and took delivery of the car. It was the defendants' responsibility to insure the car. It was not the responsibility of the plaintiff. This part of the claim was a complete misconception of the principle of insurance. It is therefore dismissed.

As for the claim for the cost of hiring a car from Lilongwe, it became abundantly clear from the evidence that the defendant did not press for the registration of the car as soon as he took possession of it. He was happy to drive it around before it was registered. No doubt he was having financial benefit by avoiding tax for a good part of the year. It was his own conduct that led to the impounding of the car. Even if I had found this claim in favour of the defendants, I would not have awarded them the amount which they claim because the defendants could have returned to Blantyre by air at a cost of about one twentieth of what they claim or by luxury coach at a cost of less than 2% of the amount which is claimed. This claim cannot succeed and is accordingly dismissed.

The claim for legal fees is another misconception and cannot succeed as is the claim for return of the K55,000 which was paid as part of the purchase price of the car. These two heads of the counterclaim are therefore dismissed. The defendants entire counterclaim fails and is hereby dismissed.

I therefore give judgement to plaintiff in the form of a sellers remedy for breach of a contract of sale for the sum of K395,000 which was the balance of the purchase price of the car.

The conduct of Mr. Makani, the Managing Director of the defendants company, throughout the transaction has been very reprehensible. He has not only delayed the payment of the purchase price but wrongfully accused the plaintiff of dishonesty. He has wrongfully and deliberately accused the plaintiff of selling him a stolen car and also gone to such

length to manufacture evidence to achieve that end. This, he was doing with full knowledge that there was a good title to the car and that the title had passed to him. Such conduct has caused the plaintiff considerable inconvenience and loss of money. It would be idle if the Court did not compensate the plaintiff for such inconvenience especially as it was caused deliberately. I therefore award the plaintiff general damages in the sum of K75,000

Mr. Ng'ombe for the plaintiff in his final submissions asked for interest on the balance of the purchase price. It is trite that interest can only be awarded where it has been specifically pleaded. It was not specifically pleaded in the instant case. For that reason the claim for interest fails. I must say, however, that had the claim for interest been specifically pleaded, it would have been given favourable consideration.

By an order of this Court made on the 10th August 1994, the car, the subject matter of the case, is under the custody of the Court. Because of the special circumstances of the case, especially the conduct of Mr. Makani, it is ordered that the car, registration NS 224, shall continue to be under the custody of the Court until such time as the Court will be satisfied that the defendant has paid the judgement debt in full or until the Court makes another order.

Made in open Court this..16th... day of September 1994 at
Blantyre.


L.A. Chatsika

JUDGE