

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 2668 OF 2000



BETWEEN:

A. E. MACHINJIRI t/a MAPANGA PASSENGER SERVICES.....PLAINTIFF

- and -

LEYLAND DAF (MALAWI) LIMITED.....DEFENDANT

CORAM: CHIMASULA PHIRI J

Mwangomba of counsel for the plaintiff
J. M. Chirwa of counsel for the defendant
L. Beni – Official Interpreter.

JUDGMENT

Chimasula Phiri J,

The plaintiff's claim is for damages for breach of contract in respect of implied warranty as to fitness and merchantability of goods; loss of income from the said breach; interest charges in respect of financing facilities and further consequential relief for causing or inducing the plaintiff to breach his contract with the Leasing and Finance Company of Malawi Limited. The defendant denies the claim made by the plaintiff and prays for the dismissal of the action.

PLEADINGS

The plaintiff's claim is set out in the Amended Statement of Claim as follows:-

1. *The plaintiff is and was at all material times a businessman running fleet of passenger vehicles within Malawi.*
2. *The defendant is a dealer in cars including passenger services vehicles and coaches.*
3. *By an agreement partly oral and partly in writing made in or about November 1999, the defendant agreed to sell to the plaintiff a brand new*



passenger Coach (subsequently registered as registration number BL 5155) at the price of K2,500,000.00.

Particulars of Coach

Aeolous Firebird Bus

Engine Number: 9801123

Chassis Number: LGA ADAACAWD 00004

4. *At the time of the making of the said contract, the plaintiff expressly or by implication made known to the defendant the particular purpose for which he required the said bus, namely, to be used as a passenger carrying vehicle in the form of a Coach, so as to show, as was the fact, the plaintiff relied upon the defendant's skill and judgment and the said bus were goods which it was in the course of the defendant's business to sell.*
5. *In the premises, it was an implied condition of the said contract, and the defendants thereby warranted that the bus be reasonably fit for the said purpose.*
6. *At all material times the defendant well knew that the plaintiff required the said bus to be used as a passenger carrying vehicle in the form of a coach and thereby generating income and profits for the plaintiff.*
7. *Further the said contract, was a contract for the sale of the said bus by description. The description was contained in the defendant's letter of 23rd August 1999. In the premise, it was an implied condition of the said contract or alternatively the defendant thereby warranted, that the said bus should correspond with the said description, and should be merchantable under the said description.*
8. *In purported performance of the said contract, the defendant supplied the Aeolous bus registration number BL 5155, but in breach of the said contract and of the said conditions and warranties thereof, the said bus did not correspond with the said description; it was not merchantable under the said description and was not reasonably or at all fit for the particular purpose but on the contrary it contained faults and defects rendering it unfit for the said purpose.*

Particulars

- a. *Barely within the period of a month after its delivery the bus broke down four times while passengers were on board.*
- b. *The coach had the following faults and defects:-*

- i. *Defective braking system.*
- ii. *Faulty fuel system.*
- iii. *Faulty electrical system.*
- iv. *Excessive engine oil consumption.*
- v. *Persistent oil leaks.*
- vi. *Stiff acceleration pedal.*
- vii. *Faulty transmission system.*
- viii. *Faulty gearbox.*
- ix. *Latent engine problems.*

9. *By reason of the premises the said bus was worth much less or at all than the contract price and the plaintiff has overpaid the defendant and moreover has suffered loss and has lost the income and profit he would have made had the bus been fully operational.*

Particulars

- i. *Cost of repairs on invoice number 104951 of K14,333.08.*
 - ii. *Cost of repairs not yet invoiced or known for the repairing of the gearbox.*
 - iii. *Loss of profits at the rate of K128,000 per month from one month of January 2000 till the date of judgment and enforcement thereof.*
 - iv. *Insurance charges paid by the plaintiff of K74,800.00.*
- 10 *Due to the breaches aforementioned the said bus can no longer be used for the intended purpose even if so repaired.*
- 11 *Furthermore, at the time of making the contract the defendant knew and was informed that the income for the purchasing of the bus was to be provided by the Leasing and Finance Company through a loan advanced to the plaintiff and repayment thereof would be obtained from the income generated from the coach business.*

- 12 *In terms of the agreement between the plaintiff and the Leasing and Finance Company of Malawi Limited, the plaintiff was required to service the said loan by monthly instalments.*

Particulars

Loan amount..... K2,500,000.00

Initial rental..... K 160,105.86

- 13 *The defendant knew or ought to have known that failure to pay the required instalments to the said Leasing and Finance Company of Malawi Limited would attract further interest on the advanced sums.*
- 14 *Nevertheless the defendant breached the contract as aforesaid thereby indicating the plaintiff to fail to service the said loan and consequently the plaintiff has been penalised to pay interests and the lease agreement authorising him to use the bus obtained from the money advance to him has been terminated.*

Particulars

- i. *Interest of K1,269,117.20 as at 26th June 2000.*
- ii. *Further accrued interest as from 26th June 2000.*

- 15 *In the premises, the plaintiff has permanently lost the chance of generating income from the said bus.*

AND the plaintiff claims:-

- i. *Damages*
- ii. *Sum of K74,800 paid as insurance charges.*
- iii. *Sum of K1,269,117.20 being interest payable to the Leasing and Finance Company.*
- iv. *Loss of profits at the rate of K128,000 per month from January 2000 to the date of the judgment and enforcement thereof.*
- v. *Any further interest due to the Leasing and Finance Company from the plaintiff on the loan advanced.*
- vi. *Alternative to (i) replacement of the bus by another that is fit for the purpose of a coach.*

vii *Costs of this action.*

Likewise the defendant challenged the claim in an Amended Defence as follows:-

1. *The defendant has no knowledge of the matters averred in paragraph 1 of the Amended Statement of Claim but does not dispute the same.*
2. *The defendant admits paragraph 2 of the Amended Statement of Claim.*
3. *The defendant admits the sale referred to in paragraph 3 of the Amended Statement of Claim but denies that the agreement for sale was partly in writing as alleged or at all.*
4. *If, which is not admitted, the plaintiff was purchasing the said vehicle for the purpose alleged in paragraph 4 of the Amended Statement of Claim, the defendant denies that the plaintiff communicated to the defendant the purpose either expressly or by implication and consequently denies that the contract of sale was subject to the alleged or any condition or warranty that the bus should be reasonably fit for that purpose as alleged in paragraph 5 of the Amended Statement of Claim.*
5. *The defendant denies the matters averred in paragraph 6 of the Amended Statement of Claim.*
6. *The defendant denies that the sale referred to in the Amended Statement of Claim was a sale by description either as alleged in paragraph 7 of the Amended Statement of Claim or at all.*
7. *Alternatively, if which is denied, the sale was by description, the defendant denies that the vehicle failed to conform with any description given either in the manner alleged in paragraph 8 of the Amended Statement of Claim or at all.*
8. *The defendant denies the matters averred in paragraphs 9 and 10 of the Amended Statement of Claim.*
9. *The defendant admits that it was aware that the purchase price for the vehicle was obtained from Leasing and Finance Company of Malawi Limited but denies knowledge of the fact that the repayment of the loan would be obtained from the coach business as alleged in paragraph 11 of the Amended Statement of Claim or at all.*
10. *The defendant has no knowledge of the matters averred in paragraph 12 of the Amended Statement of Claim.*

11. *The defendant repeats paragraph 10 hereof and denies the matters averred in paragraph 13 of the Amended Statement of Claim.*
12. *Further, before making the contract of sale the plaintiff carried out a thorough examination of the vehicle and having been satisfied with the condition thereof instructed Leasing and Finance Company of Malawi Limited to arrange the payment of the purchase price.*
13. *The defendant repeats paragraphs 4, 6, 7 and 13 hereof and denies that the plaintiff has suffered loss and damage as alleged at all.*

SAVE as hereinbefore expressly admitted the defendant denies each and every allegation contained in the Amended Statement of Claim as if the same were herein set out and traversed *seriatim*.

The plaintiff made a reply to the Amended Defence by denying the matters averred in paragraph 12 of the Amended Defence and put the defendant to strict proof thereof.

THE ISSUES FOR DETERMINATION

1. Whether at the time of the contract the defendant knew the particular purpose for which the plaintiff required the bus?
2. Whether it was express or implied condition of the said contract that the bus shall be reasonably fit for the purpose it was acquired?
3. Whether or not the defendant has breached any express or implied term of the contract?
4. Whether or not the plaintiff has suffered any loss or damage and the nature and extent of any such damage or loss?
5. Whether the sale of the bus was by description.
6. Whether there was an implied condition and/or a warranty that the bus should correspond to the said description and be merchantable under the said contract?

BURDEN AND STANDARD OF PROOF

Burden of Proof

The burden of proof rests upon the party (the plaintiff or the defendant), who substantially asserts the affirmative of the issue. It is fixed at the beginning of trial by the state of the pleadings, and it is settled as a question of law remaining unchanged throughout the trial exactly where the pleadings place it, and never shifts in any circumstances whatever. See Joseph Constantine Steamship Line vs Imperial Smelting Corporation Limited [1942] A.C. 154,174.

Standard of Proof

The standard required in civil cases is generally expressed as proof on a balance of probabilities. "If the evidence is such that the tribunal can say: We think it more probable than not, the burden is discharged, but if the probabilities are equal it is not." Denning J in Miller vs Minister of Pensions [1947] ALL E.R. 372; 373, 374.

THE EVIDENCE

The plaintiff called one witness while the defendant summoned two witnesses. These witnesses adopted their witness statements and tendered in evidence documentary evidence. The evidence of the plaintiff was that on 23rd August 1999 the defendant offered to sell an Aeolous Coach Mini Bus to the plaintiff at the price of K2,500,000. The plaintiff accepted the offer. The plaintiff contacted Leasing and Finance of Malawi Company Limited(LFC) for a loan facility to be used in purchasing the said minibus. On 5th November 1999 LFC granted the plaintiff a loan of K2,500,000. The loan attracted interest of 50% per annum. The loan sum was paid to the defendant. The sole purpose of purchasing the bus was for the plaintiff to use it as passenger carrying business which fact the plaintiff claims to have made known to the defendant. Part of the money realised from the business was to be used for repayment of the loan.

The plaintiff stated that he noticed that there was demand for transport in terms of luxury travel between Lilongwe and Blantyre since the only coach service was provided by Stagecoach Malawi Ltd which had over-aged vehicles and constantly experiencing breakdowns. The plaintiff thought of buying a new bus which would serve those who desired to travel in executive class between Blantyre and Lilongwe.

He took the bus from the defendant in December 1999 and the plaintiff alleges that shortly afterwards some faults were discovered. In February 2000 the bus was returned to the defendant for repairs. Initial faults were air-locking in the fuel system, reverse gear hardness, improper adjustment to brake system and

malfunctioning of the electrical system. The bus remained in the defendant's garage until 3rd July 2000 when the plaintiff collected it for use. On 12th July 2000 the bus was again returned to the defendant's garage after developing faults relating to brakes, electrical system and excessive consumption of engine oil. The plaintiff collected the bus from the defendant's garage on 14th July 2000 after being assured by the defendant that the fault on the bus had been rectified. However, on 15th July 2000 the bus was taken back to the defendant's garage when the plaintiff discovered that the bus could not operate. When the plaintiff checked on progress on the bus on 17th July 2000 he was told that the gear box had been removed to rectify an inner problem. Further he was told that the high oil consumption could not be rectified.

On 8th August 2000 the plaintiff wrote to the defendant telling them that he was no longer interested in the bus as it had proved to be not commercially viable. On the other hand on 28th September 2000 Leasing and Finance Company terminated the lease agreement with the plaintiff on account of his failure to service his loan account for a period of 10 months which by then had accumulated to over K3,373,544.35. The plaintiff commenced this action because the defendant was not willing to compensate the plaintiff. The plaintiff stated that before taking delivery of the bus in December 1999, the defendant presented it to the Road Traffic Department for Certificate of Fitness and Registration formalities. The plaintiff applied for Road Service Permit and also took out a Comprehensive Insurance Cover.

In cross-examination the court was asked to take judicial notice of Civil cause 3659 of 2002 – **Leyland DAF(MW) Ltd vs Mapanga Transport**; Civil Cause 2738 of 2002 – **Leyland DAF(MW) Ltd vs Mapanga Transport** and Civil Cause 86 of 2003 – **Leyland DAF(MW) Ltd vs Christobell Machinjiri**. The plaintiff agreed that Mapanga Passenger Service is not a limited liability company. The plaintiff indicated that the correct date of delivery of the bus is mid-December 1999. The plaintiff expressed his dissatisfaction in the way COF test is conducted. However, the plaintiff conceded that the Road Traffic Directorate would not issue a COF to a vehicle which is not fit to be on the road. The plaintiff further admitted that the defendant sent its Foreman with the bus to the Road Traffic Directorate for COF test. He also admitted that Exhibit D1 was a record for Mapanga Coachline registration number BL 5155. The plaintiff stated that he had employed a driver who was driving this bus and it was the same driver who was taking it to the defendant for repairs. The plaintiff stated that he had 5 passenger service vehicles and all these were generating an income. If one of the vehicles broke down, the plaintiff would still generate income with the other buses. The plaintiff explained that an air-lock happens as a result of several factors including blockage of fuel passage, clogged fuel filters and dirty fuel tank. Whenever there is an air-lock, the engine does not receive the required amount of fuel for it to perform. He denied that in January 2000 the air-lock was caused because the vehicle was run on empty fuel tank. However, the plaintiff was quick to admit that he was not in the vehicle at the material time. Similarly, when the

