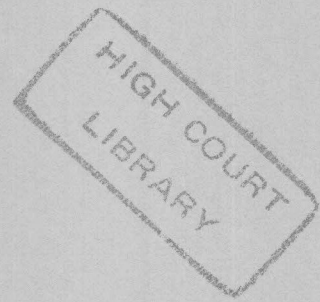


IN THE HIGH COURT OF MALAWI



CIVIL CAUSE NO. 183 OF 1979

BETWEEN:

DOMILIKO BOKOSI PLAINTIFF

and

DEREK BINWELL MALIRE DEFENDANT

Coram: Topping Ag. J.
For the Plaintiff: Chiudza Banda of Counsel
For the Defendant: Kumange of Counsel
Official Interpreter: Sonani
Court Reporter: Brown

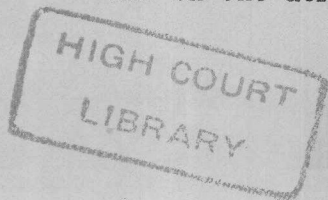
JUDGMENT

The plaintiff Mr. Bokosi claims against the defendant in respect of a contract whereby the defendant Mr. Malire agreed to sell the plaintiff a maize mill and engine at a price of K1,250. The plaintiff claims that he paid K960 towards the purchase price of the mill and took delivery. In his statement of claim the plaintiff claims that the mill was defective and that the engine failed to work satisfactorily. He claims that on 3rd March 1978 the defendant wrongfully seized the maize mill and engine and that in spite of a letter dated 26th August 1978 the defendant has failed to return the purchase price of K960, in consequence whereof the plaintiff has suffered loss and damage. The plaintiff therefore claims delivery of the said maize mill and engine or K1,250 its value, and damages for detention, damages for conversion, and costs.

In his amended defence the defendant admits selling the maize mill and engine to the plaintiff but claims that the written agreement signed by both parties did not represent the totality of the contract and that it was a further term that the property in the maize mill and engine should not pass to the plaintiff until the whole purchase price had been paid. The defendant denied that the maize mill or engine had any serious defects or at all. He denied repossessing the maize mill and engine wrongfully and claimed that the plaintiff gave him authority to collect the same.

The onus of proof is upon the plaintiff to prove his case on the balance of probabilities.

The plaintiff's evidence was that in 1974 he visited Farming and Engineering Services in Lilongwe with a view to buying a maize mill and engine. He met the defendant, who told him that his money was insufficient and could not be accepted as deposits were not taken on maize mills and engines. He then mentioned that he, defendant, had a maize mill and engine for sale, and on 4th July the plaintiff and the defendant went to see the engine. The engine would not start, but on the defendant's assurance that he would rectify this fault and



instal the engine the plaintiff paid him K600 and asked him to dismantle the engine so that he could collect it. He later paid him a further K336, making a total payment of K936. He removed the engine using the defendant's transport, but the defendant did not come to instal the engine. The plaintiff then obtained the services of a mechanic and the engine was installed. The plaintiff's mechanic did not give evidence. The plaintiff said that the engine gave trouble. He said that the injectors were worn out, the diesel pump was worn out, the diesel tank had a crack, and the cylinder head was losing water. He did not indicate how he knew this and the value of the evidence on this point is doubtful. He took the injectors to the defendant to show him, and it is said that the defendant sold him some spares at K10. However, the engine still did not work. The plaintiff said that he contacted the defendant at various times to repair the engine but he did not do so. This situation continued for a number of years until March 1978, when the defendant came to see him about the outstanding balance of K314. The plaintiff was unable to pay this and asked the defendant to wait until he had sold his tobacco. The defendant said that he would take away the engine, and according to the plaintiff he, plaintiff, objected strongly to this. The plaintiff says that he did not allow the defendant to take away the engine but that the defendant did so, asking the plaintiff to sign a blank paper to show that he, defendant, had not stolen the engine. This the plaintiff for some undisclosed reason agreed to do. Later the plaintiff received a summons for K314, as a result of which he went to see his legal practitioner. The plaintiff called one witness, his elder brother, who said that the engine was installed in 1974 but had never worked.

The defendant in his evidence said that the plaintiff was introduced to him by a Mr. Chimphande. Mr. Chimphande was not called as a witness. The plaintiff wished to buy a new maize mill and engine but clearly did not have sufficient money to buy the engine and mill which he wanted. He asked the defendant, who was a salesman, if the company had a cheaper engine. The company did not have a cheaper engine, but the defendant said that he had an engine for sale. He took the plaintiff to where the engine was, and they found women milling maize. The plaintiff liked the engine and was satisfied. He decided to buy it, and later he paid K600 towards the cost of the engine and mill in respect of which a price was agreed of K1,250. The maize mill was only two months old, although the engine appears to have been somewhat older. Later the plaintiff came again and paid K336. The engine was dismantled and taken for service and sent out to the plaintiff's village. A Mr. David Piyasi, described as a mechanic, went with the engine with a view to installing it, and according to the defendant the arrangement was that when the stones, sand and cement were all available the engine would be installed by Mr. Piyasi. The defendant was somewhat surprised when the plaintiff arrived claiming to have installed the engine and complaining that the injectors were defective. It appears from the evidence of the defendant that the injectors had been interfered with, allegedly by the plaintiff, but that these were rectified by Mr. Piyasi. The plaintiff went away with them after they had been tested, for which the plaintiff paid K10.

Nothing further happened until 1978, when the defendant began to look for the balance of the purchase price of the items sold to the plaintiff. He went to the plaintiff's village in a pickup hired from D.W.2 and together with D.W.3. They saw the plaintiff, who said that he had no money and that they had better take the engine and sell it to cover the cost. The engine was dismantled with the assistance of the plaintiff and others from the plaintiff's village and taken away. The plaintiff signed a paper in which he authorized

the removal of the engine and its sale if the debt was not paid by March 10th. The defendant's evidence as to the events in the plaintiff's village was confirmed in broad outline by D.W.2 and D.W.3. The engine was subsequently sold.

The question of credibility is a difficult one. The defendant's case was not put to the plaintiff by the defendant's legal practitioners so that the plaintiff did not have an opportunity to deny it. The defendant was evasive when cross-examined, seeking refuge in a reply to the effect that matters had not been put to the plaintiff because he, defendant, knew that he would be given an opportunity to give his evidence later. This was not satisfactory. However, it appears that the defendant is serving a prison sentence and it may be that his counsel had difficulties in obtaining instructions.

The onus of proof is upon the plaintiff. The plaintiff saw the engine and the basic maxim of law is "caveat emptor". The plaintiff must satisfy me by evidence that the engine suffered from a serious defect so as to convince me that there has been a total failure of consideration, or that the defendant repudiated the contract and that he, plaintiff, is entitled to the return of his money as damages for breach of contract. There was no claim for breach of statutory warranty under the Sale of Goods Act. The only evidence that would support the idea of a total failure of consideration is the simple fact that the machine did not work. No evidence by any trained mechanic was called nor did the mechanic who installed the engine give his view as to its condition. The defective injectors in respect of which spares were said to have been purchased were not produced nor was their absence explained. The plaintiff waited for a number of years before doing anything to vindicate his rights. He now explains this on the ground that he was in possession of the engine. This is not satisfactory. It is not for the court to speculate on the reason for the failure of the engine to work, if indeed it did not work, but for the plaintiff to adduce some evidence of defect. The plaintiff could have called the mechanic who installed the engine to give evidence as to its condition, or some other suitably qualified mechanical expert, but no such person was called. It may be that some fault in the installation was responsible for the failure of the engine to work, but this is a matter of speculation. I am not satisfied on the evidence before me that the plaintiff has proved on the balance of probabilities that there was a serious defect in the engine which would entitle him to repudiate the contract and to claim damages.

I do not accept the plaintiff's version of what occurred at the village when the defendant came to repossess the engine. I do not believe the plaintiff when he says that he signed a blank piece of paper. The evidence of D.W.2, who impressed me as a truthful witness, shows that he signed a paper authorizing the removal of the engine from the village and its subsequent sale. Indeed, if he had not done so I do not believe that it would have been possible for the defendant to remove the engine against the will of the plaintiff whose village it was, and in the presence of so many of the plaintiff's relatives and friends. I find that the plaintiff consented to the removal and sale of the engine and assisted the defendant in its removal. The torts of detinue and conversion have not been established.

The plaintiff's claim fails and is dismissed with costs.

Pronounced in open court this 28th day of June 1980 at Blantyre.

R.G. TOPPING
ACTING JUDGE