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IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO.110 OF 1986

BETWEEN:

KHALID IBRAHIM HASSEN (MALE).....APPELLANT

- and -

S.R. NICHOLAS LIMITED.....RESPONDENT

Coram: BANDA, J.

Saidi of counsel for the appellant
Mbendera of counsel for the respondent
Mthukane, Court Clerk

JUDGMENT

This is an appeal from the learned Registrar's ruling which he delivered on the 16th of September, 1986. The plaintiff was involved in a car accident at Namwera Turn Off on the 8th of August, 1985. His car was extensively damaged and it was necessary to put it in a garage for repairs. Liability in this case is admitted and the case came before the learned Registrar for assessment of damages only.

The plaintiff claimed special damages as follows:-

(1) Car Hire charges -

(a) daily rate which came to K8,120 at K70.00 a day, and

(b) distance covered at the rate of 75t per kilometre at 48 kilometres per day, totalling K4,176.

(2) Excess on insurance policy which came to K150.

The plaintiff also claimed general damages.

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An appeal from the Registrar to this Court is by way of re-hearing and although I may give due weight to the findings of the learned Registrar I am not bound by them. The evidence which was before the learned Registrar seems to be as follows. The plaintiff testified that his vehicle which was a Mercedez Benz was, as a result of the accident, extensively damaged. He stated that he put the vehicle into a garage on the 9th of August, 1985 but that due to lack of spares the car was not ready until the 3rd of December 1985. He had telephoned SS Rent-A-Car if he could hire a car from them but that SS Rent-A-Car had told him that they had no Mercedez Benz which they could hire out. He stated that having been used to driving a Mercedez Benz car he could not hire any other car. He stated that in order to minimise his travelling problems his company, Khalid Construction Company Ltd. for which he is the managing director, bought a Mercedez Benz 190E. The evidence was that the company hired out this car to the plaintiff at a daily rate of K70 and then a mileage charge of 75t for every kilometre travelled. It was the plaintiff's evidence that he covered an average of 48 km a day. His house is at Michiru and he had to travel to Ginnery Corner and Limbe on company business. He stated that when his car was out of the garage, the company, Khalid Construction Co. Ltd, raised an invoice, Exh.1, for the sum of K12,296 for using the Mercedez Benz on hire for 116 days. There was also another claim for loss of no-claim-bonus for K762.63. Both this claim and the excess on insurance policy of K150.00 were not disputed and the learned Registrar allowed both these amounts as clainable.

However, the car hire charges in the sum of K12,296, as shown on Exh.1, were disputed on the ground that they arose from an illegal contract which could not be enforced by the Courts. The learned Registrar also found that the plaintiff was entitled to general damages for loss of use of his vehicle and he awarded a sum of K600. It is from those findings that the plaintiff has appealed to this Court.

Four grounds of appeal were filed but only three grounds were argued by Mr. Saidi. He did not argue ground (d). It was Mr. Saidi's contention that the learned Registrar erred in law in finding that section 75(2) of the Road Traffic Act applied to the facts of this case. He submitted that in section 75 the operative words are "plying for hire or reward or which carries passengers for hire or for reward". He submitted that the issue to be determined

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is whether the car which was hired by the plaintiff from Khalid Construction Company was plying for hire or carrying passengers for reward. Mr. Saidi referred this Court to a number of cases in the Current Law Year Book 1977, where a number of cases are cited. Mr. Saidi also referred this Court to Vol.IV of the Words and Phrases Legally Defined. I have considered those authorities very carefully.

It was Mr. Saidi's submission that the facts in the instant case do not support the learned Registrar's finding that section 75 of the Road Traffic Act applied. He contended that there was no evidence to show that the car was used by the plaintiff for carrying passengers for reward other than himself and his family. He submitted that the plaintiff's evidence that the car was only used by himself and his family was not challenged. He contended therefore that the learned Registrar's finding that section 75 applied was an error in law and in fact.

On the second ground of the plaintiff's appeal, Mr. Saidi has submitted that the award of general damages in the sum of K600 was grossly inadequate. He submitted that there was evidence that the plaintiff was deprived the use of his car for a period of 116 days and that although this evidence was not disputed, the learned Registrar, nevertheless, proceeded to award K600 for loss of use. He submitted that what was in dispute before the learned Registrar was the quantum of damages for loss of use. He submitted that the plaintiff was at the time of the accident using a Mercedez Benz owned by himself and he was accustomed to driving a Mercedez Benz and that after the accident the car was put into a garage for repairs. He had looked for a similar car for hire but none was available. He submitted that it was only after he contacted the dealers who told him that there was no Mercedez Benz for hire that he entered into contract with Khalid Construction to hire a Mercedez Benz to him. Mr. Saidi submitted that the plaintiff was entitled to hire a Benz instead of a cheaper car. He contended that an award of K600 for 116 days represents K5.17 per day. He submitted that there was evidence that the plaintiff covered 48 km a day for supervision of business and he contended, therefore, that K600 was grossly inadequate.

On the third ground of appeal, Mr. Saidi has submitted that this was a negligence claim for a total sum of K13,000 and that it was necessary to file the case in the High Court and that the issues involved were negligence, the law of contract and whether or not the contract was illegal, enforceable or not. He contended that intricate issues were involved and that the damages were large. He submitted therefore that the facts could not have been dealt with by a learned magistrate.

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Mr. Mbendera for the respondent has submitted that the issue is whether section 75 was applicable and he contended that in deciding that issue, it depends on what construction is placed on the section. It was Mr. Mbendera's submission that section 75(2) is disjunctive in its application. He submitted that the offence under section 75(2) is committed when a vehicle plies for hire without a licence or when a vehicle is used for carrying passengers for reward. He argued that Mr. Saidi only dwelt on the interpretation to be placed on the "plying for hire" but did not consider the other limb of the section, namely carrying passengers for reward. He submitted that the latter limb of the section does not involve soliciting. He, therefore, invited this Court to analyse the parts of section 75 of the Road Traffic Act. Mr. Mbendera referred to the definition of a "public service **vehicle"** in section 2 of the Road Traffic Act and submitted that a contract car is a public service vehicle having seating accommodation for not more than 7 passengers other than the driver. He contended therefore that since Khalid Construction entered into the hire agreement with the plaintiff over this vehicle that constituted the car a contract car which was hired for more than 24 hours. Whether it was driven by the plaintiff himself or a driver or on private errand, Mr. Mbendera submitted, was irrelevant. He contended therefore that marrying the definition of a contract car and the provision of section 75(2) of Road Traffic Act, he submitted that an offence had been committed. He argued that it was conceded that Khalid Construction Co. was a construction company and was not licenced to hire cars. It was Mr. Mbendera's submission therefore that the learned Registrar was justified in holding that the contract was illegal. Mr. Mbendera referred this Court to authorities on CHITTY ON CONTRACT and other authorities. I have considered them in this judgment.

I have carefully reviewed the evidence which was before the learned Registrar and I have considered the various authorities which learned counsel were able to cite to this Court. In my view, it is vitally important to appreciate what happened between the plaintiff and his company, Khalid Construction, before one applies the law to those facts. It is clear, in my view, that what happened was this, that Khalid Construction Company put a Mercedez Benz at the disposal of its managing director, the plaintiff, and said, "For the use of this car we are going to charge you the normal hire rate". There is no evidence to suggest that the charges which were raised against the plaintiff by Khalid Construction Company were more or less the normal hire rate. Having ascertained what happened, and I am making that summary from the

evidence which was before the learned Registrar, it is now necessary to consider the law. Mr. Mbendera has said that in giving a Mercedez Benz to its managing director on the understanding that he would pay hire charges, Khalids Construction Co. was plying for hire or carrying passengers for reward. As Mr. Mbendera has rightly submitted, that is the issue which I have to determine.

In my judgment, plying for hire must surely mean that the vehicle must be at the disposal of any member of the public who may wish to hire the vehicle. It cannot be said, in my judgment, that when the vehicle was given to the plaintiff for his own use it was at the disposal of any member of the public who might want to hire it out. The evidence, and it was not disputed, was that the vehicle was only for the use of the plaintiff and his family. In "plying for hire", in my view, it must mean that there must be an element of soliciting and I can see no evidence that in putting the vehicle at the disposal of its managing director, Khalid Construction was soliciting for passengers for hire. Plying for hire must mean that the car is ready at any moment to be hired by any member of the public. There must be some exhibition of the vehicle to potential hirers as a vehicle which may be hired out. Equally, I can find no evidence that in putting the vehicle at the disposal of its managing director Khalid Construction Company was exhibiting the vehicle for carrying passengers for reward. It cannot be said, in my judgment, that the car which the plaintiff's company gave him for his own use was there for the carriage of passengers. With respect to Mr. Mbendera, in interpreting the provision of the Act, you cannot disregard other clauses of the same section and interpret subsequent clauses completely in isolation. An elementary rule of construction is that construction is to be made of all parts together and not of one part only by itself. In the case of Canada Sugar Refinery Co. v. R, (1898) A.C. 735 at 741, Lord Davey said, "Every clause of a statute should be construed with reference to the context and other clauses of the Act...." There is no evidence that in placing the motor vehicle at the disposal of its managing director Khalid Construction were soliciting or waiting for persons to make a contract of hire with them. I am satisfied therefore that the transaction which was made between Khalid Construction and its managing director was not illegal in terms of section 75(2) of the Road Traffic Act. The company was neither plying for hire nor carrying passengers for reward.

A plaintiff who suffers damage to an expensive car through the negligence of another is under no duty to mitigate his damages by hiring a cheaper but adequate

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vehicle during the repairs; Vide Current Law Year Book 1977, paragraph 2021. Indeed, a plaintiff who suffers damage to a prestigious car is entitled to hire a prestigious substitute car whilst repairs are taking place. As Lord MacMillan said in the case of Banko de Portugal v. Waterloo & Sons, (1932) A.C. 452 at 496. "The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures, and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken".

There is some dispute on the length of period it took to repair the plaintiff's vehicle. It was contended by Mr. Saidi for the plaintiff that it took 116 days before the vehicle was repaired and that this was due to the fact that the spare parts were not readily available. That, it would appear, was what the plaintiff was told by the garage where the vehicle was being repaired. Clearly, as Mr. Mbendera submitted, the evidence that the spare parts were not readily available was hearsay evidence and the learned Registrar was right when he found that there was no evidence on this point. In those circumstances, the learned Registrar was right when he said that all he could do was to do his best with the material which was before him. Therefore, it is clear that there was no evidence to show why it took so long to repair the plaintiff's vehicle. In the absence of such evidence then it becomes the duty of the Court to do its best in arriving at what would be a reasonable period for such repairs to take place. Three months which the learned Registrar found cannot, in my judgment, be said to be unreasonable period. In those circumstances therefore and in view of my earlier findings in this case, I am satisfied that the plaintiff ws entitled to claim against the defendants the hire charges which his company raised against him. On the basis, therefore, that the vehicle would have taken three months to be repaired it would mean that 90 days at K70 per day would give K6,300 and 48 km at 75t a kilometre for 90 days would come to K3,240, giving a total of K9,540. I am satisfied that the plaintiff was entitled to general damages for loss of use of his car. His car was a prestigious car and in assessing those damages that factor must be borne in mind. In those circumstances and considering the awards which were made in the case of Nakvakva v. Oilcom Limited, Civil Cause No.77 of 1981 (unreported) and Sagawa v. United Transport (M) Limited, Civil Cause No.70 of 1982 (unreported), and having regard to the car which the plaintiff was using, I consider a sum of K1,200 being

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a reasonable award for general damages for a period of three months. I would, therefore, award special damages to the plaintiff in the sum of K10,432.63 including the amount of no claim of bonus and excess on insurance and for general damages I would award the sum of K1,200.

I am satisfied that this was a proper case to be brought in the High Court and on that basis, the costs to be awarded to the plaintiff will be on the High Court scale.

Made in Chambers on this 30th day of December, 1986 at Blantyre.

R. A. Banda
JUDGE

MBENDERA: I would apply to appeal under O.58.

COURT: Leave to appeal granted.

R. A. Banda
JUDGE