IN THE SUBORDINATE COURT OF THE FIRST CLASS FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2016/CRMP/449

BETWEEN:

BENEDICT SICHULA **PLAINTIFF**

AND

MODULE METRIX CONSTRUCTION LIMITED **DEFENDANT**

Before: Mrs Mwaaka Chigali Mikalile - PRM

The plaintiff in person
For the Defendant: Mrs P.C. Hampongani – Messrs Milner & Paul Legal Practitioners

---

JUDGMENT

Cases referred to:

1. Ringford Habwanda v Zambia Breweries PLC 2007/HP/275 (unreported)
2. Printing and Numerical Registering Company v Simpson [1875] L.R. 19 EQ 462.
3. Colgate Palmolive (Z) Inc. v Chuka and Others Appeal No. 181 of 2005 (unreported).
4. Miller v Minister of Pensions (1947) 2 All ER 372

The plaintiff commenced this action by way of Default Writ of Summons on 8th April, 2016 and is claiming the sum of K 22,335.00 being and in respect of hiring charges and costs of repairing a vehicle.

The default writ is accompanied by an affidavit verifying debt sworn by the plaintiff. The plaintiff avers that on or about 15th January, 2016, the defendant hired his Mitsubishi canter truck for one month at a fixed charge of K 10,000.00. The defendant was supposed to surrender the truck on or by 15th February, 2016 but continued using it. Soon after 15th February, 2016, the driver called for a mechanic to look at the truck as it had a fault. Through the defendant's Finance Manager, another request was made for the mechanic to travel to Chingola to work on the truck. Eventually, the truck was brought to Lusaka. According to the plaintiff, a mechanical diagnosis indicated that the vehicle was driven through water and required replacement of some damaged parts whose cost is K 2,335.00. Further, the defendant did not remit the monthly rental charge of K 10,000.00 for March and April, 2016 bringing the total sum owed to K 22,335.00.

The defendant filed an affidavit in opposition to the affidavit verifying debt dated 21st April, 2016 sworn by its Finance Manager, one Muyasele Muyobo. The deponent avers that K 10,000.00 was paid to the plaintiff. The deponent denies the averment that the defendant continued using the truck. He avers that the defendant had taken back the truck to the plaintiff when the contract ended on 15th February, 2016 but the plaintiff refused to get the truck claiming that the truck was not in good condition and wanted the defendant to repair it. According to the deponent, the parties had agreed that all maintenance of the said truck and other expenses would be borne by the plaintiff. Exhibited to the affidavit is the truck rental agreement marked "MM1". It was further averred that the defendant does not owe the plaintiff rental charges for March and April because when the agreement ended, the defendant took back the truck to the plaintiff but the plaintiff refused to get it. There is no way the defendant could have paid for other rentals past February, 2016 and repairs as this was not part of the agreement.

The plaintiff filed an affidavit in response to the affidavit in opposition dated 24th May, 2016 in which he deposed that the truck was damaged and the defendant's own driver confessed to having driven it into a ditch of water at the work site. As such he could not accept it before it could be repaired. Exhibited to the affidavit is a statement made by the said driver at a police station and is marked "BS1". The plaintiff also averred that the agreement entered into does not refer to repairing the truck when damaged whilst in the defendant's possession but refers to routine maintenance such as servicing and replacing serviceable parts. The plaintiff further averred that it was unreasonable for the defendant to keep the truck and refuse to pay for loss of business.

At the hearing, the plaintiff gave oral evidence and called two other witnesses. The defendant called three witnesses. The following is the gist of the evidence heard.

PW1 was the plaintiff whose testimony was in line with his affidavit verifying debt. He told court that the truck did not return to him as agreed on 15th February, 2016 and towards the end of February, that is when he received a call from the defendant's driver informing him that the truck was involved in an accident. Apparently the truck was submerged in water and the engine went off. A few days later, Mr Muyobo advised the plaintiff to organise a mechanic which he did and the mechanic travelled to Chingola and found the vehicle non-operational. The plaintiff then agreed with My Muyobo to bring back the vehicle to Lusaka and it was brought and parked at the defendant's premises on 1st March, 2016. According to the plaintiff, Mr Muyobo advised him to find his own mechanic to work on the vehicle at the defendant's expense. Quotations in the sum of K 2,235.00 were handed over to Mr Muyobo and he promised to acquire the spare parts. However, the vehicle was not worked on. Before

commencing the action, he asked the defendant to pay hire charges for March and April but that was not done hence this action.

It was further the plaintiff's testimony that he interviewed the defendant's driver, one Billy Banda, who admitted having driven the vehicle through water. The plaintiff concluded by saying that he only retrieved the truck on 10th December, 2016 following the court order but would not pursue rentals for the months subsequent to April.

When cross examined, the plaintiff stated that his vehicle was in perfect condition before he released it to the defendant and he does not recall anyone calling him to tell him about the problems it was having. When referred to the last part of the agreement that says that all of the maintenance of the truck and other expenses will be shouldered by the owner of the vehicle, the plaintiff stated that the other expenses referred to are the replacement of tyres, oil change and servicing of motor vehicle. The plaintiff also stated that the driver denied having reported the accident to the police. The plaintiff denied having been called by the defendant at any point to collect the vehicle.

PW2 was Ernest Sinyangwe, a mechanic. It was his evidence that during the last weekend of February, 2016, he was engaged by the plaintiff to check his vehicle that was on the Copperbelt. Apparently the vehicle had a problem and the company that hired it had asked the plaintiff to look for a mechanic to work on it. It was PW2's testimony that he travelled to Kitwe and examined the vehicle. The vehicle was not in good condition and Mr Muyobo sent money for fuel for the vehicle to be driven back to Lusaka. The said Mr Muyobo asked him to work on the vehicle but he could not due to work commitments.

When cross examined, PW2 stated that the vehicle could not be started normally. It had to be started the mechanic's way. He also

stated that the vehicle was then driven from Kitwe to the defendant premises.

PW3 was Maki Phiri whose testimony was that in March, 2016, the plaintiff phoned him asking him to work on his vehicle. The plaintiff took him where the vehicle was parked. He observed that the vehicle had a hard starting, was smoking and oil was coming out. He then diagnosed that the rings for the engine needed to be replaced as well as the cylinder gasket, conrod bearings, silicone, oil filter and oil. He left a list of the items with the company and the proprietor of the company even asked him the labour charge which he pegged at K 1,500.00. He was asked to leave his phone number so that they could contact him once the items were purchased. One month elapsed and the plaintiff asked him to accompany him to the company to see the progress made. When they got there, they were told the list was lost and he was asked to write another one which he did. According to PW3, he took it upon himself to get quotations from three different shops and gave them to the plaintiff.

When cross examined, PW3 stated that the problem was the rings but that the same could not be changed without changing the gasket and the other items prescribed.

DW1 was Muyasela Muyobo, a Director in the defendant company who told court that at the material time, he was Finance Manager and his duties included managing the company's financial resources and being in charge of some contractors. It was his testimony that the company has a standard price of K 6,000.00 for the hire of canters regardless of where they operated from. In the plaintiff's case, the canter was hired at K 10,000.00 because he requested an additional clause to maintain his own vehicle. The contract was signed and the vehicle was due to depart for the Copperbelt that very day at 14h00. By 18h00, the vehicle had not been brought by the plaintiff and when

DW1 contacted the driver, he was told that they were fixing the gearbox in one of the streets in town and they were having challenges. According to DW1, even as the vehicle was leaving, the gears were not engaging well and there was a sound when shifting them. The driver, however, said the problem could be sorted out in Chingola and even the plaintiff when contacted made the same assurance.

It was DW1's further evidence that he rode on the plaintiff's vehicle and by the time they got to Chisamba, the gear problem worsened. They continued on their journey until they arrived in Kitwe. A mechanic there did some work to enable the vehicle reach Chingola. The driver then proceeded alone. The plaintiff said he had a specialist mechanic who changed the gearbox from automatic to manual. A Mechanic in Chingola made some adjustments and then the plaintiff's mechanic travelled to work on the vehicle. It operated for a couple of days. Later, DW1 said he travelled to Chingola with a mechanic to work on the vehicle again. The third time around, the mechanic travelled on his own. The vehicle operated for a week or two and broke down again. Management decided that the vehicle could not be kept longer that agreed thus called it back. The vehicle was parked at their offices and the plaintiff requested that it be serviced by them before he could collect it. According to DW1, he did not tell the plaintiff that the defendant would repair the vehicle. He said he advised him to put his request in writing so that he could show his colleagues. His colleagues, however, said it was not their obligation to repair the vehicle as per contract. In concluding, DW1 told court that even those times the plaintiff's mechanics travelled, the defendant did not pay them for their works.

When cross examined, DW1 stated that he dropped off in Kitwe and the driver continued to Chingola. He said he just got reports that the vehicle broke down upon arrival in Chingola. DW1 insisted that he phoned the plaintiff to inform him about the problem the vehicle was

having. DW1 also stated that the vehicle was brought back to Lusaka on 16th February, 2016. DW1 further stated that he did not reject the vehicle even after noticing the defects because the plaintiff assured him that he would send someone to work on it and he did.

DW2 was Billy Banda, the defendant's former driver. He testified that he worked for the defendant for two years and was still in employment when the plaintiff was contracted by the defendant. After the negotiations between the plaintiff and the company, he left the company premises with the plaintiff and they went into town. The plaintiff said he wanted to service the vehicle. In town, the mechanic started repairing the clutch cylinder and said the gears were not okay. Even after the vehicle was worked on, they still had a problem with gear 3 and reverse. DW2 said he was told that the vehicle was an automatic but was changed to manual and so the problem could be with the selector. He then informed the plaintiff about the problem. Between 21 and 22h00, he and DW1 started off for Chingola and the vehicle gave them problems. It had to be switched on and off after a distance. The problem worsened in Kitwe and the vehicle had to be repaired. He proceeded to Chingola alone with the same gear 3 and reverse problem. DW1 advised him to call the plaintiff about the problem. Subsequently, PW2 travelled and checked the clutch. He said the problem was the selector but he did not work on the vehicle. In week 2 approaching week 3, the problem worsened and he kept on reporting the problem. The second time PW2 came, the vehicle was brought back to Lusaka.

It was DW2's further testimony that he had a breakdown on the Chingola/Solwezi road where there is a depression. The vehicle could not go over due to the gear problem and so it had to be towed to the site. When PW2 arrived, he worked on the clutch and they started off for Lusaka. Throughout the journey, the vehicle kept getting stuck in gear 5.

DW2 further testified that in May, 2016, he received a call from the plaintiff saying he wanted to employ him. By then he was still working for the defendant. DW2 said he met the plaintiff who then took him to Longacres Police post where he was asked to give a statement regarding the breakdown in Chingola. According to DW2, what he had in Chingola was a breakdown, not an accident and there was no report made to any police.

When cross examined, DW2 stated that when he got to Chingola, he informed the defendant and the plaintiff about the gear problem and the plaintiff sent a mechanic. He also stated that the vehicle worked for 3 weeks at the site. DW2 said he praised the vehicle because it had a container which meant that it could transport workers during the rainy season. He denied praising it for being in perfect condition.

DW3 was Clebby Banda, a Foreman in the defendant company who worked at the Chingola site. It was his evidence that the company sent a vehicle and driver (DW2) meant to ferry workers from town to the site. According to DW3, he worked with the vehicle for three weeks and in that period, it gave problems such as failing to start in the morning and the driver told him it had gear problems.

When cross examined, DW3 stated that he only remembers that the vehicle operated for three weeks but cannot remember when it left Chingola. He also stated that he only saw the mechanic once. He said the mechanic checked the vehicle and then brought it back to Lusaka.

Having considered the evidence and the written submissions on behalf of the defendant, I now state my findings of fact. I am satisfied that on 15th January, 2016, the plaintiff entered into a contract with the defendant for the defendant to hire the plaintiff's Mitsubishi canter for one month at K 10,000.00. It is a fact that the defendant paid the K

10,000.00. I am also satisfied that the vehicle had defects from the onset. From the unchallenged evidence on record, the vehicle had to be worked on in town before it departed for Chingola.

What I ought to determine is whether or not the plaintiff is entitled to rental charges for March and April and whether or not the defendant ought to have repaired the vehicle before surrendering it to the plaintiff.

It is important to mention at this stage that he who alleges must prove and proof is on a balance of probabilities, thus, the party with the most probable story carries the day.

I have examined the truck rental agreement which clearly states that the rental period was one month from 15th January to 15th February, 2016. The agreement goes on to state that *"the renter will provide fuel and the driver only. All of the maintenance of the truck and other expenses will be shouldered by the owner of the vehicle."*

The said agreement is signed by DW1 on behalf of the defendant and the plaintiff herein.

I will first address the issue of repairing the vehicle. I note the plaintiff's argument that the vehicle was involved in accident and was damaged as a consequence thereof. I noted, however, that the plaintiff's mechanic (PW3 herein) who diagnosed the problem of the engine rings did not mention that the problem arose from an accident.

In support of the argument that there was in fact an accident, the plaintiff produced the statement obtained from the defendant's driver, DW2 at the police station to the effect that between 15th and 20th February, 2016 around 05h00, he was driving the vehicle in issue and it was heavily raining and flooded and he drove into a pothole created

by excavators. The engine was submerged in water and it went off. He had to be pulled out by another vehicle and the vehicle in issue was towed to the site.

In his oral evidence, DW2 insisted that what he experienced in Chingola was a break down and not an accident and that is why no report was ever made to any police station. Of course the word 'accident' is mentioned in the statement obtained from DW2 but careful analysis of his statement reveals that indeed what he had was not necessarily an accident. I am of the considered view that driving into a pothole is not an accident. I am fortified in my resolve by the fact that there was no mention of the depth of the said pothole and furthermore, there was no mention of any damage caused to the body of the vehicle as a result of driving it into the pothole. Because of the absence of this information, I will assume that the pothole was an ordinary pothole and that is why there was no damage to the vehicle body.

Having stated the foregoing, it becomes obvious that the plaintiff cannot rely on the statement made by DW2 to prove that there was an accident. In any case, it was submitted by the defendant in their written submissions, and I do quite agree with them, that it would be folly of me to accept the statement which was not taken on oath. The evidence in court, on the other hand, was given on oath and tested through cross examination. Besides, the statement at the police station was obtained on 6th May, 2016, obviously in reaction to the affidavit in opposition filed by the defendant on 21st April, 2016. By virtue of this very fact, its authenticity cannot be guaranteed. Quite clearly, the plaintiff used his authority as a police officer to obtain this statement.

But assuming that what DW2 had was indeed an accident, I ask myself if the plaintiff would then be entitled to claim for repair costs.

Again, I have carefully looked at the agreement and note that it makes no provision for an accident occasioned by the defendant. The agreement says all maintenance and other expenses are to be shouldered by the plaintiff. This is a very broad statement and in my view covers all expenses including repairs as a result of an accident. Thus, I cannot agree with the assertion that the defendant ought to repair the vehicle whether or not DW2 had an accident. To do so would be to introduce a new term to the contract not agreed upon by the parties.

In the case of **Ringford Habwanda v Zambia Breweries PLC (1)**, the High Court stated that oral evidence cannot be admitted to vary the terms of a written contract.

The agreement is clear and unequivocal and requires no interpretation by way of extrinsic evidence. Further, the two parties having freely and voluntarily entered into the agreement, I am, as a Court obliged to enforce it. This is in line with the holding in the case of **Printing and Numerical Registering Company v Simpson** (2), quoted at page 8 in the case of **Colgate Palmolive (Z) Inc. v and Chuka and Others** (3) as follows:

"If there is one thing more than another which public policy requires is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by Courts of justice."

In light of the foregoing, I am satisfied that the plaintiff's claim for repair costs has no merit and is dismissed.

As to whether the plaintiff is entitled to rental charges for two months, I have again referred to the agreement to the effect that the contract was for one month from 15th January to 15th February, 2016. I must mention here that there was no clear evidence from either the plaintiff

or defendant regarding the exact date when the vehicle returned to Lusaka. The plaintiff told court that it returned on 1st March, 2016 while the defendant's witnesses told court that the vehicle only operated for three weeks and was returned to Lusaka. Clearly, therefore, it is the plaintiff's word against the defendant's word. This means that it could be true that the defendant used the vehicle beyond 15th February and it could also be true that the vehicle was only used for 3 weeks as alleged. When the probabilities are equal, it becomes impossible for the court to make a finding in favour of one party and not the other.

In the case of **Miller v Minister of Pensions** (4) the court stated with regard to the standard of proof as follows:

> *It must carry a reasonable degree of probability, but not so high as is required in criminal cases. If the evidence is such that the tribunal says: we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not.*

Therefore, the plaintiff ought to have done more than make verbal representations to show that the vehicle was used by the defendant beyond 15th February, 2016.

One thing that is clear from the evidence in its entirety is that the plaintiff made no effort after the 15th February, 2016 to renew the contract. Now if the defendant had decided to use the vehicle beyond 15th February, I wonder why the plaintiff did not ask for a fresh contract knowing that the one signed had expired. It would not be far-fetched to conclude that no such effort was made by the plaintiff because the defendant had made no indication to use the vehicle beyond the initial contract period.

In light of the foregoing, I cannot uphold the plaintiff's claims for rental charges for March and April especially that the plaintiff was at

liberty at any point to collect his vehicle from the defendant but chose not to in the hope that the defendant would repair it. As was rightly pointed out in the written submissions on behalf of the defendant, the plaintiff had a duty to mitigate his loss by getting the vehicle at the earliest possible opportunity and not to have waited for a long period of time even when it became clear that the defendant had no intention to repair it.

I now turn to the prayer made by the defendant in the written submissions. I was urged to order a refund of part of the rentals paid by the defendant, damages for breach of contract and damages for misrepresentation, inconvenience and stress suffered by the defendant by virtue of the fact that the plaintiff's vehicle was not fit for the purpose owing to the multiple mechanical defects. However, such claims cannot be upheld for the reason that they were not specifically pleaded by the defendant. The defendant did not make a counterclaim. Moreover, proper evidence needed to be adduced showing the exact number of days in which the vehicle was operational to enable me determine the value of the loss with a fair amount of certainty. As the evidence stands, I would be making inspired guesses which is not ideal.

In the circumstances, the defendant's claims, made via submissions at the close of the case are dismissed.

No order is made as to costs.

DELIVERED IN OPEN COURT THIS 26TH DAY OF MAY, 2017.

REPUBLIC OF ZAMBIA
THE JUDICIARY
MAGISTRATE BUILDING COMPLEX
26 MAY 2017
PRINCIPAL RESIDENT
MAGISTRATE 2
P O BOX 30282 LUSAKA

PRINCIPAL RESIDENT MAGISTRATE