



**IN THE HIGH COURT OF MALAWI
COMMERCIAL DIVISION
BLANTYRE REGISTRY
COMMERCIAL CASE NO. 14 OF 2014**

BETWEEN:

RAIPLY (MALAWI) LTD.....CLAIMANT

-and-

ISSA T/A TAHERA INVESTMENTS.....DEFENDANT

CORAM

HON. RACHEL SOPHIE SIKWESE
Ms Mndolo; of Counsel for the Claimant
Sauti ; of Counsel for the Defendant
Nyirongo; Official Court Interpreter

JUDGMENT

Sikwese J

Concise Statement of Facts and Issues

The claimant is and was at all material times a processor and manufacturer of timber products. The defendant is a trader and transporter carrying on business as Tahera Investments. In or about October 2013, the claimant entered into a transportation contract to carry and transport a consignment of goods comprising raw materials on behalf of the claimant from Johannesburg, Republic of South Africa to Blantyre, Malawi. The goods to be carried were valued at ZAR 247 170- 00. The goods were collected from Johannesburg but they were never delivered to the claimant. The parties

had previous business dealings together and the practice was that the goods on this route would be delivered within a 14-day period.

The claimant argued that the goods were lost in transit because the defendant was negligent by not taking reasonable care of the goods. They took out this action claiming the value of the goods and MK90 000 000-00 being loss of business.

The defendant admitted entering into the contract with the claimant. He also admitted that he collected the goods from Johannesburg. He further admitted that he never delivered the goods to the claimant. He however denied that he owes the claimant any money representing cost of the goods or for loss of business. He argued that he acted reasonably under the circumstances.

The defendant pleaded that he was not negligent in handling the goods. He averred that the goods were mistakenly seized by the Sheriff of the Republic of South Africa under a warrant of seizure issued by a South African High Court against a third party. The defendant argued that he tried to discharge the warrant but the High Court did not release the goods. Subsequently, the goods were sold and the proceeds used to pay off the third party's debt.

The Court would like to acknowledge the resourcefulness of counsel for the claimant. She filed her final submissions as specified, citing relevant Malawian authorities which this Court found very useful indeed.

The Issue

The issue before the court is whether failure to deliver the goods arose out of the defendant's negligence? If the answer is in the affirmative, the claimant's claim for damages must succeed. If the answer is in the negative the claimant's case must be dismissed.

Contract of Bailment

The claimant argued, rightly so, that the parties' relationship constituted a bailment contract. Bailment is, a temporary placement of control over, or possession of personal property by one person, the bailor, into the hands of another, the bailee, for a designated purpose upon which the parties have agreed for a reward¹. At common law, a bailee is under a legal obligation to take reasonable care of any goods under his control and possession. He is liable in tort of negligence if the bailor can prove that the bailee or his servant was negligent in his handling of the goods.

¹ Legal-dictionary. It could also be gratuitous

Negligence

It was held in *Gondwe V Barros Engineering* [1984-86] MLR, 40, that, “where goods were entrusted to a bailee in return for remuneration, liability for any loss or damage to them could be discharged only by demonstrating that, it had occurred through no fault of the bailee or its servants”. In *Zimpita and another V Okoyo Garage* [1991] MLR 532, it was held that, “the bailee is required is required by law to take reasonable care of the chattel entrusted to him. If the bailor’s goods were to be damaged, the onus was on the bailee to show that he and his trustworthy servants had exercised the required diligence and care, and that he should thus escape liability for the bailor’s damage”.

In the instant case, the claimant gave the defendant control and possession of raw materials for the purpose of transporting the same from Johannesburg to Blantyre at an agreed rate/ price. It is the claimant’s case that the defendant did not take reasonable care in handling the goods, that were, entrusted to him to transport. Their argument is that when the truck carrying the goods was impounded by the Sheriff of the Republic South Africa the defendant did not take any active steps to ensure that the goods were released. The claimant pointed out that the court documents filed in the High Court in the Republic of South Africa did not disclose the fact that the goods belonged to a third party and not to the party sued in the particular case.

It was argued that the affidavit in support of the application to discharge the impounding order and release the raw materials did not make any mention that the claimant was the owner of the goods loaded on the impounded truck. The defendant failed to disclose the claimant’s interest in the impounded goods to the third party resulting in their loss. It was their conclusion that, had the defendant acted promptly with diligence and had they disclosed the claimant’s interest in the goods, the goods would not have been lost. They would have been redeemed.

Where as in this case, the bailor alleges that the bailee acted negligently in dealing with the bailor’s goods, the burden of proof lies on the bailee to show on a balance of probabilities that he or his servants and or agents had taken reasonable care of the goods entrusted to him. It was thus the defendant’s case that the goods were delivered to his driver on 10 October 2013 and were seized on the same day. He notified the claimant of the seizure within the same week, maybe on 14 October, he wasn’t sure.

The defendant did not call a witness or adduce any evidence to substantiate his claim that he reported the impounding to the claimant on that date. The claimant disputed this fact and adduced evidence in the form of a letter written by the defendant to show that the defendant notified the claimant of the impounding of the good in a letter dated 5 December 2013, exhibit FN7. In this letter, the defendant, assured the claimant that he had engaged a lawyer in the Republic of South Africa who was handling the matter

on his behalf. That the matter would be resolved as soon as possible. The defendant did not visit South Africa in person to ensure that the truck or the goods were released. He said he had no money to take the trip.

It is clear from the evidence that the defendant did not take reasonable care of the goods entrusted to him. This is obvious from the fact that, the defendant did not disclose to the court in South Africa that the goods belonged to a third party. He also was very casual about the fact that it was his father's debt which led to the seizure of the goods. He made no undertaking to recover the loss from his father. He did not even make much effort to follow the proceedings in South Africa.

Failure to disclose to the court that the goods belonged to a third party constituted an act of negligence because the omission led to the loss of the goods. It was the duty of the defendant to act promptly and diligently by notifying the claimant, so that the claimant could do something about redeeming the goods. The delay in notifying the claimant of the seizure was an act of negligence. By the time the defendant informed the claimant about the impounding of the goods, it was too late to redeem them. It is found as a fact that the defendant was negligent and is liable to pay damages for the loss of the goods. The claimant's claim is allowed.

Loss of Business

The defendant admitted that he was aware of the claimant's business. He was also aware that he was carrying goods that would be used in the claimant's business. He also conceded that the claimant may have incurred some losses. It is therefore fair to find that the omission of the defendant caused the claimant to lose business.

How much business did the claimant lose?

Mr. Shetty, General Manager for the claimant, argued that due to the loss, they did not have raw materials to manufacture and process its timber products, resulting in heavy losses of business in the range of MK90 000 000-00. To support this contention, he attached a 'schedule evidencing these matters', marked exhibit 'SS'. This exhibit is a table without a heading or explanation. The Court finds it useless as evidence of a liquidated claim. The principles regarding proof of specific claims are so trite that, this Court would not be bothered to repeat them in a case where a party is represented by counsel. The claim for loss of business is dismissed.

Costs

Costs are in the discretion of the court. The usual principles of exercising discretionary powers judiciously apply in this case. The norm being that the successful party is awarded costs. In the instant case the claimant has succeeded in the main cause. The claimant has on the other hand not succeeded in the claim for loss of business. This

Court will exercise its discretion in favour of awarding costs to the claimant. However, these costs shall be reduced by twenty percent (20%) for the part of the claim that the claimant lost. The rationale is to discourage parties from overloading the Court with claims which they cannot justify. The Court wastes resources considering the merits of wishful claims.

ORDER

The defendant is ordered to pay the claimant damages constituting the cost of the lost goods being ,ZAR 247 170- 00. They are also ordered to bear eighty percent of the costs of this litigation. This Order is with immediate effect.

Pronounced in Open Court this 3rd day of May 2018 at High Court (Commercial Division) Blantyre.



A handwritten signature in black ink, appearing to read "Rachel Sophie Sikwese", is written over the seal and extends to the right.

Rachel Sophie Sikwese
JUDGE