

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 1890 OF 1996

BETWEEN :

F.A. MLOMBWA t/a UMODZI TRANSPORT PLAINTIFF

AND

COTAM TRANSPORT DEFENDANT

CORAM : CHIMASULA PHIRI, J.

Maulidi of counsel for the plaintiff

Phoya of counsel for the defendant

Mtchera - Official Interpreter

Mrs Khan - Recording Officer

JUDGMENT

The plaintiff's claim against the defendant is for recovery of motor vehicle BJ 1801. It is alleged that the defendant unlawfully converted the said vehicle for its own use. Further the plaintiff prays for an injunction order restraining the defendant from removing the said vehicle out of Malawi. The plaintiff claims for damages for loss of use from 8th February, 1994 to date of assessment or as the court may determine.

The defendant in its defence denied that it converted to its own use. The defendant contended that it legitimately bought the said truck on the overt market in the Republic of South Africa and that the defendant is the legitimate owner of the vehicle registered in Mozambique as MLX 60-52. The defendant made two claims in its counter-claim. First, the defendant states that the allegations of armed robbery made by the plaintiff are very serious and damaging to the reputation of the defendant. Hence the defendant claims damages for defamation. Secondly, the defendant claims that each day the said truck is under custody of the plaintiff, the defendant is suffering financial loss in the sum of K6,500.00 and this runs from 5th November 1996. The plaintiff put up a defence to the counter-claim contending justification and truth.

The plaintiff called 5 witnesses. The first witness was Frera Mlombwa who stated that he

is trading as Umodzi Transport. Umodzi Transport is involved in transporting goods within and outside Malawi Umodzi Transport uses trucks and trailers and has a fleet of 7 trucks out of which 3 are Mercedes Benz and 4 are Mitsubishi. In February 1994 he was still doing this business and had 8 trucks and he stated their registration numbers. Among them he mentioned BJ 1801 a Mercedes Benz which he said was hijacked in February 1994 in the Republic of South Africa. He explained that he had contract with Trans African Transport (TAT) in 1994 providing a transport service. Umodzi provided 2 Mercedes Benz trucks BJ 1801 and BJ 1804. TAT would pay on monthly basis less TAT's running expenses. The plaintiff tendered exhibits P1(a) - (h), P2 and P3(a) - (k) as evidence in support. Further exhibits were tendered specifically for BJ 1804. The plaintiff received a report that BJ 1801 had been hijacked in RSA. He flew to RSA. He went to Police there and efforts to trace the vehicle were futile. He came back and reported to Malawi Police but it bore no fruits. It was not until July 1996 when he was tipped that the vehicle was seen at a port of Beira in Mozambique. The plaintiff made a trip to Beira and made his own inquiries and established that the vehicle was with Cotam Transport, the defendant herein. He came back to Malawi. A fortnight later the vehicle was spotted at Kanengo in Lilongwe loading tobacco. The witness said that he was positive about its identification because there were some distinct features. One of them was the improvised hole for mounting a radio because the original space was too small for the radio which the plaintiff had. This was identified by the witness when he was recalled. The second feature was the damaged but sewn air engine cyclone. The witness stated how the damage was caused by a spanner. The plaintiff said the original colour was white before it was hijacked. The truck is a 1991 Model but was bought in 1992. The registration book shows the name of the plaintiff as its owner and was tendered as exhibit P6. The Chassis number is WDB 649136-25-719856 and the Engine is 442952-20-631191. It was bought under a Lease agreement with Leasing and Finance Company. When the vehicle was spotted in Mozambique and Kanengo it did not bear the registration number BJ 1801 but MLX 60-52 and the paint was no longer white but yellow with red stripes. The plaintiff stated that when the vehicle was spotted at Kanengo, he went to report to Kanengo Police Station. He went with a police officer to where the vehicle was parked and plaintiff confirmed the identification marks. The vehicle was detained and an official from the dealers of Mercedes Benz was called to the Police Station to help in identification process. The official from Automotive Products Limited Mr Loga recorded the serial numbers of the engine, gearbox and two rear axles. Mr Loga was unable to find the numbers on the vehicle of the front axle, gearbox and the cab. Further, the chassis and engine numbers were different. The plaintiff saw these and confirmed that these were not the same as the original numbers or similar to the numbers in Mercedes Benz of which he is familiar. The plaintiff said there was supposed to be a star (*) and prefix letter WDB and number 649 and close again with a star (*). On this vehicle the star and the letters WDB are missing and the number is not 649 but 623. The report/working notes for Mr Loga were tendered as exhibit P8 and this shows the Chassis frame number, engine number and the two rear axle numbers. The chassis number was rubbed off and reprinted and this was observed when the court went to inspect the vehicle at Chichiri Police Station. This was also confirmed by the plaintiff's witness number 5 Mr Loga who came in as an expert witness from the dealers of Mercedes Benz. The plaintiff tendered a data bank card for BJ 1801 from Germany. The numbers for the rear

axle are identical to the one recorded by Mr Loga in Exhibit P8 and confirmed by the court during inspection. The plaintiff also tendered exhibit P10 which is a letter from Automotive Products Limited which reads as follows:-

“RE - YOUR TRUCK - LMK 6052

Mercedes Benz of South Africa has confirmed once again that such a truck does not exist. The engine number and the chassis number is false.

**J. Glauser
Service Manager.”**

The plaintiff stated that he does not know who stole the vehicle but it was found in possession of the defendant and registered in Mozambique. The plaintiff showed a quotation for a similar vehicle for K2,232,357.00. He claims for K2.5 million less 10% for depreciation. In cross examination the plaintiff stated that the vehicle was not insured comprehensively. The plaintiff insisted that the incident concerning the missing vehicle was reported to Police in RSA as well as Malawi. The plaintiff stated that in Beira, he saw the truck in issue parked outside the fence perimeter of the defendant’s premises. He said he went close to the vehicle and was able to see the chassis number. The plaintiff was adamant that the vehicle was stolen in RSA and the plaintiff was able to make follow-up in RSA and Mozambique. The plaintiff stated that the 2536 series sold in Malawi were smaller than those sold in other countries. He denied that he pursued this action after the insurers rejected his claim. The plaintiff stated that he continued paying for the lease agreement with LFC until July 1997. The plaintiff stated that the factory colour for Mercedes Benz Truck is not white but that it is according to customer specification. The plaintiff disputed counsel’s assertion that the plaintiff personally knew the mechanic from Automotive Products Limited as a family friend. The plaintiff stated that the trailer belongs to the defendant and the plaintiff has made no claims over it and has not been approached about it by anyone. The plaintiff stated that the trailer for BJ 1801 was towed by another horse. In re-examination the plaintiff stated that he did not sell BJ 1801 but that it was hijacked. The plaintiff explained that the vehicle was driven from Lilongwe Police Station to Chichiri Police Station by his driver because the Police could not provide a driver. The second witness for the plaintiff was Jurg Glauser, service Manager of APL and based in Blantyre. He stated that he had a request from the plaintiff to check on chassis number and engine number from RSA. On inquiries from the Data Bank it was confirmed that the specified numbers under check were unknown and not part of production of Mercedes Benz RSA or Germany. He tendered in confirmatory Fax mail as exhibit P12. PW2 confirmed that BJ 1801 was from Germany. He said numbers from Germany have letters WDB while ADB are from RSA but all numbers are indicated by a star (*) and have 14 digits. The witness said that the number in Exhibit P12 does not have WDB. He said that 15 years ago Mercedes Benz would be sold in mouse grey colour and then be painted according to customer order. In cross examination he said apart from West Germany and RSA Mercedes Benz vehicles are manufactured in many countries like Spain, Yugoslavia but that Yugoslavia manufactures passenger vehicles and

not trucks. He said Brazil which is also Portuguese speaking country like Mozambique also makes trucks. The witness finally stated that the mouse grey paint is basecoat but one may use it as finishing colour too. The trucks which came in 1991/92 were white.

The third witness for the plaintiff was Lazaro Laiti, a mechanic working for the plaintiff. He described the fleet of the plaintiff as earlier stated by the plaintiff himself. He stated what the reaction of the plaintiff was when a report of missing vehicle reached the plaintiff. The witness stated he knew the features of BJ 1801 very well and that he identified it in Beira. He had gone there to repair another vehicle which had broken down. He told the court that he easily identified the vehicle because one day when he was repairing it he damaged some part and this was still visible on the vehicle he saw in Beira and that it resembled BJ 1804 which belongs to the plaintiff and was parked nearby. He said both are 2635 models. He also identified the dent on the chassis which was caused by himself during an attempt to tow it out of mud where it was stuck. He also identified the improvised radio fitting cubicle as well as the original space. He did not ask anyone but he took down the registration number of the vehicle and reported to the plaintiff upon return. The new number was foreign. He went to Beira Port with the plaintiff but did not find the vehicle there. Upon inquiries, the vehicle was located at Cotam Company and the plaintiff was shown the vehicle by PW 3. Later the vehicle was seen at Kanengo in Lilongwe. The vehicle is in the possession of the police. In cross-examination the witness said the registration pre-fix letters were MLV and that when they went to Beira with the plaintiff, the driver who was driving this truck when it was new accompanied them and he too identified the features mentioned above. They talked to nobody but the vehicle was loaded. Later about 4 days or a week after seeing the truck in Beira, he saw it at Kanengo. This witness is the one who drove the vehicle from Lilongwe Police to Chichiri Police Station and was in company of a police officer.

The 4th witness for the plaintiff was Sinta Mlombwa who works with his brother the plaintiff in transport business. He explained about the fleet owned by Umodzi Transport. He mentioned about BJ 1801 and that it missed in RSA and was subsequently spotted in Mozambique. He went to Beira with the plaintiff and a mechanic (PW 3) when information was received that the vehicle had been spotted in Beira-port. The paint had been changed and the new registration number was MLX 60-52. He said he easily identified some features on this vehicle because he had driven it for a very long time. He described those features just like the other witnesses. Later the vehicle was seen in Lilongwe. This witness is the one who bought the big radio which failed to fix in the original space provided for fitting car radio hence the existence of the much talked improvised radio space. In cross examination he confirmed that he saw the vehicle near Cotam Transport premises and that at that moment all his interest was fixed on to the missing truck and no other vehicles around that area. In Lilongwe, when the vehicle was spotted again, the witness said he told the police in advance the features on this vehicle and were confirmed on inspection.

The fifth and last witness for the plaintiff was Mr Lekani Lawrence Loga a workshop

manager for Lilongwe Branch of APL. He said he knows the plaintiff as a client and that in November 1996 the plaintiff went to APL offices to ask for some official to check on chassis and engine numbers on a vehicle at Lilongwe Police Station. They went and the witness checked the numbers and wrote them down on exhibit P8 and P8 (b). This witness explained that Exhibit P9 is a Data Bank Card which comes from the factory together with the vehicle - one copy is given to customer and the other is left with Sales Office. P9 shows the same numbers as recorded by the witness in exhibits P8 and P8 (b). He said BJ 1801 is a 2635 model Mercedes Benz Truck and the chassis numbers begin with WDB - 649 - and the material number follows. In his opinion the chassis number on P8 and P8 (b) is not original. It was ground off and re-printed. He said that on all Mercedes Benz chassis there is always a star (*) then WDB and the number. On this particular vehicle there was no WDB. Further the chassis number began with 623 on this vehicle yet this was not a number for series 2635. The only digits for 2635 model are 649. The witness was emphatic that the chassis number has been changed. The witness also stated that the numbers on the rear axles are similar to the ones the data card and there is no way two different vehicles can have the same axle numbers as these are in a serialised order. The numbers shown on this rear axle are the ones on the data bank card for BJ 1801 and BJ 1801 did not have 623 as opening numbers. The witness also stated that the vehicle was in the same condition as he saw it at Lilongwe Police Station. In cross examination he stated that this was his first encounter with the plaintiff and that he was not a family friend. He said that WDB is West Germany Daimler Benz and that this was for Benz manufactured world over. He stated that the serialised numbers are never shared by vehicles. He was emphatic about pre-fix letters for all Mercedes Benz vehicles. He has worked for APL for 10 years. He stated that the chassis numbers are engraved while the axle numbers are on a plate which is riveted. He said the numbers on the axle of this vehicle were not tampered with. PW1, PW4 and PW5 were recalled when the court went to inspect the vehicle at Chichiri Police Station for purposes of identifying the features or marks stated in their evidence. The case for the plaintiff rested.

The first witness for the defendant was Eduardo Augusto Nobre, owner of a transport company and Maintenance Works Company in Beira. He has been in this business since 1982 and 1986 respectively. He has 28 trucks for his transport business. In June 1996 he bought a truck registration number MLX 60-52 a Mercedes Benz truck series 2635. He explained that a customer came with this vehicle as an accident damaged vehicle for repairs. After the vehicle was repaired, a bill was raised but the customer was unable to pay. It was at that stage that the company agreed

with the customer on the sale of the truck. The customer's name is Felizardo Joachim Franscisco. The vehicle was not roadworthy at the time it was brought to the defendant. The defendant repaired it and made it roadworthy again. The witness said that it was his first and last contact with the said Franscisco. After the sale agreement, change of ownership of the vehicle was done and a new registration book was issued. This has been received in evidence as Exhibit **D1(a)** and its translation from Portuguese into English has been tendered as Exhibit **D1(b)**. The witness testified that this vehicle was detained in Malawi during its second international trip. He mentioned that the vehicle was repainted

with the defendant's colours. The witness said he did not have any worries about the origins of this vehicle. He mentioned that before the vehicle left for Malawi it went to load at the port of Beira. On the trip to Malawi the vehicle and trailer were loaded with fertilizer. The trailer is registered as MB 2643. The Registration Book and its Translation were tendered as Exhibits **D2(a)** and **D2(b)** respectively. The trailer was brought brand new from Zimbabwe. The witness indicated that Franscisco was from Maputo and indicated that he bought the truck at an auction in RSA. The witness testified that when the vehicle was impounded in Malawi, he was informed by phone. He took all the documents for the vehicle and came to Malawi, and showed the police proof of ownership. Whilst this process was still under way the plaintiff obtained a court order granting an injunction restraining the release of the vehicle and the trailer to the defendant. The witness indicated that this was first time he heard that someone was claiming ownership of the vehicle. He said a request by the defendant was made to a South African company to issue an authenticated cash sale for the sale of the truck. He received a tax invoice number 9419 from G and P Engineering and Contracting dated 14th February 1996. He identified it during his testimony. The witness stated that it has been impossible for him to contact Franscisco. On the specific repairs and costs for the vehicle, the witness tendered Exhibit **D4(a)** and its translation Exhibit **D4(b)**. The details of the work done are on original job card:- Exhibit **D5(a)** and Translation:- Exhibit **D5(b)**. The witness stated that he bought the vehicle for 250 million meti-cash and by adding the spares and labour charges it comes to 550,683,464 meti-cash. He further stated that during the trips the vehicle was engaged, he earned an average of US\$250 - 300. He claims that as a result of the seizure, he has lost that income.

The witness further testified that there is a fabricated story that the defendant organised armed bandits in RSA who stole the vehicle. He alleged that this has ruined the name of the defendant as a transporter both in Malawi and Mozambique. He indicated that his parents operated the defendant company for 25 years in Mozambique and there are 5 partners in the company whose reputation has throughout been good. The company has done work for the World Bank and other international agencies. In cross examination the witness said he did not know the South African registration number of this vehicle. He said he bought the vehicle from Franscisco with whom he dealt only for 4 to 5 days. He stated that he did not bring a copy of a quotation he gave Franscisco because he thought it was unnecessary. The witness said the address of Franscisco was on one of the exhibits but after checking all the exhibits, he said he could not find it. The witness repeated that he had no knowledge of where the vehicle was sourced. He said the vehicle was towed to the defendant's garage. He repeated how the sale agreement was entered into between himself and Franscisco. At this stage the witness changed his stand and indicated that he knew that the vehicle was bought in RSA and that he had papers which he gave to his lawyers. He said that among the papers there was a copy of a cash sale. He said his garage specialises in repairing Mercedes Benz vehicles and has more stocks of spares than the dealers. He said that when he checked the chassis number it tallied with official records. He admitted that he noted some small differences but since there were official records he saw it fit to buy the vehicle. He contended that it is not true that there should be a star before a serial number. The witness maintained that the vehicle was imported from RSA into Mozambique and he bought it without knowing that it had been stolen

because it had all relevant documents. The witness indicated that it is normal to buy parts from car-breakers and fit them to a vehicle.

The second witness for the defendant was Willie Michel Lukas of number 12 Wetkilt 4 ways, Reinbrooke, Johannesburg, RSA. He is an auctioneer and sells cars. His place of business is in Quawa and it is called G and P engineering. He is an employee of that company. Up to the time of the hearing he had worked for the company for 4 to 5 years. In 1996 he was still working for the company. He tendered Exhibit **D6** as a document that was issued by his company. His passport was marked Exhibit **D7**. In explaining Exhibit **D6** the witness said on 14th February 1996 he auctioned a Mercedes Benz truck to Mr Francisco from Mozambique. The witness said the vehicles which are auctioned are from the Police and are usually stolen but recovered vehicles. He tendered exhibit **D3** as tax invoice for the sale of Mercedes Benz and Engine. In cross examination the witness confirmed that the vehicle in issue was stolen and subsequently recovered. He could not remember the South African registration number of the vehicle at the time it was being sold but it had one. He said it was a cream white vehicle and not yellow or red with stripes. The chassis was black. Although the vehicle was accident damaged, it was in a moving condition. He said that always if a vehicle was not stolen, the Police would issue a clearance certificate stating that fact. The witness confessed that he knew about the issues which were before the court but he had not brought any documents from his office. The witness confirmed that he told Mr Nobre that the vehicle in dispute was stolen and recovered. The witness indicated that the vehicle had a police identification sticker when it was sold but he would not know who removed it. In Re-examination the witness stated that whenever his company buys vehicles from Police, documents for these vehicles are prepared and handed over to the purchaser especially when the vehicle is for exportation. That marked the end of the testimony from the witnesses.

The plaintiff's claim raises two issues. Firstly, the plaintiff has raised the issue of conversion. Secondly, the plaintiff claims that as a result of conversion by the defendant, the plaintiff has suffered loss of use of the motor vehicle resulting in loss of income. At law conversion is an act of deliberate dealing with a chattel in a manner inconsistent with another's right whereby the other is deprived of the use and possession of it. To be liable the defendant need not intend to question or deny the plaintiff's rights; it is enough that his conduct is inconsistent with those rights. It is not possible to categorise exhaustively all modes of conversion, for while some acts are necessarily an absolute abrogation of the plaintiff's rights and deprive him of the whole value in the goods, there may be others where the courts retain a degree of discretion in deciding whether those acts amount to a sufficient deprivation. Nevertheless the principal ways in which a conversion may take place include the following:- when property is wrongfully sold in market overt although not delivered; when it is wrongfully retained; when it is so dealt with that it is destroyed or otherwise totally lost to the person entitled; and when it is so dealt with that the manner of dealing constitutes a denial of title in the person entitled, that dealing being otherwise than the modes previously mentioned. The general rule is that the right to bring an action for conversion or wrongful detention of goods belongs to the person who can prove that he had, at the time of the conversion or detention, either actual possession

or the immediate right to possess. Where the goods of one person have got into the possession of another in consequence of unlawful dealings between them, the owner may recover them by action if he founds his claim on his right to possess that which is his own, and does not and is not compelled to rely on the illegal transaction in support of his right. In the case of **Belvoir Finance Co. Ltd vs Stapleton (1971) 1 Q.B. 210** the plaintiffs bought a car from a dealer and let it on hire purchase to the defendant's employer. Both contracts were illegal. When the defendant disposed of the car for his employer, the plaintiffs sued successfully for its conversion. In situations where a mere servant has custody or charge of goods on behalf of his master, the latter does not only have the right of possession itself: **Meux vs Great Eastern Railway (1895) 2 Q.B. 387**. The question not infrequently arises in actions of trover how far the defendant's ignorance of the unauthorised character of his act can be relied upon as a defence. It is not necessary that the defendant should know of the right which his act violates and a wish or desire to interfere with another's right is not an essential of conversion **Vide: Lancashire and Yorkshire Railway vs Mac Nicoll (1918) 88 L.J. K.B. 601**. At common law one's duty to one's neighbour who is the owner, or entitled to possession, of any goods is to refrain from doing any voluntary act in relation to his goods which is a usurpation of his proprietary or possessory rights in them. Subject to some exceptions, it matters not that the doer of the act of usurpation did not know, and could not by exercise of any reasonable care have known of his neighbour's interest in the goods. This duty is absolute; he acts at his peril. **Vide:** per Lord Justice Diplock in **Marfani and Co. Ltd vs Midland Bank Ltd (1968) 1W.L.R. 956 at page 971**. The damages to which a plaintiff who has been deprived of his goods is entitled are **prima facie** the value of the goods, together with any special loss which is the natural and direct result of the wrong **Vide: Re Simms (1934) 1 Ch. 1**.

The defendant in his counter-claim has raised the issues of defamation and loss of use of a chattel. The right of each man, during his lifetime, to the unimpaired possession of his reputation and good name is recognised by the law. Reputation depends on opinion, and opinion in the main depends on the communication of thought and information from one man to another. He, therefore, who directly communicates to the mind of another, matter untrue and likely in the natural course of things substantially to disparage the reputation of a third person is, on the face of it, guilty of a legal wrong, for which the remedy is an action of defamation. **Prima facie**, the publication of a defamatory matter is a cause of action. The one suing must in his pleading be able to set out with reasonable certainty the alleged defamatory words. **Vide: Collins vs Jones (1955) 1 Q.B. 564**. He must also allege in his pleading that the imputation published is false and it is usual though not necessary, to allege that it is malicious. The motive is immaterial in determining liability. If the defence is justification i.e. that the alleged defamatory statement is true, the person being sued must prove the matter true. The defence must prove the justification of the defamatory matter as alleged but need not prove the literal truth of every fact which he has stated. It is enough if he can prove the substantial truth of every material fact.

In the present case a summary of the testimony of the witness on both sides has already

been given. It is a proven fact that the plaintiff is a transporter trading as Umodzi Transport and has a fleet of trucks. It is in evidence that in the course of business these trucks trek outside Malawi. It was alleged and has been proved that a Mercedes Benz truck registration number BJ 1801 belonging to the plaintiff was sent to the Republic of South Africa in 1994 in connection with the plaintiff's business. The plaintiff and his witnesses calmly and unshaken testified that this said truck disappeared in South Africa through acts of armed robbery. The defendant's witness number 2 unconditionally stated that a Mercedes Benz that was sold by his company on auction to a Mozambican was a vehicle which had been previously stolen and abandoned and recovered by the Police and never re-claimed by its true owner. The assertion by this witness confirms the plaintiff's story that his vehicle was stolen in South Africa. The defendant raised the issue that the plaintiff and/or his servant conspired and did sell the vehicle to a third party in South Africa. It is trite law that he who alleges must prove his allegation. Apart from making this allegation, the defendant brought no evidence to substantiate it. Whether the robbery was done by the defendants or their agents or servants or a total alien to these proceedings, the fact as found by this court is that the plaintiff's possession of his Mercedes Benz truck registration number BJ 1801 was interfered with. I am satisfied on the evidence from the plaintiff and his witnesses that efforts were made to locate the vehicle until November 1996 when the plaintiff put in motion the wheel of justice that led to the detention of a Mercedes Benz truck registration number MLX 60-52. I find as a fact that the plaintiff and his witnesses ably identified features on this vehicle as being in existence on BJ 1801 before it was stolen in South Africa. The evidence of Jurg Glauser, service manager of Automotive Products Ltd (PW2) and Lekani Lawrence Loga, (PW5) a workshop manager for Lilongwe Branch of Automotive Products Ltd was illuminating. Their combined evidence was on the types of Mercedes Benz vehicles, data bank and identification particulars by manufacturers. Specifically on the truck registered as MLX 60-52 these expert witnesses clearly pointed out the discrepancies or alterations of the factory identification marks. For instance the alteration of the chassis number or the removal of the engine identification number. It was very clear about the uniqueness in the identification numbers. Equally important was the assertion that there can never be duplication of an identification number as recorded on the data bank card. PW5 identified the axle number on the vehicle registration number MLX 60-52 and the identification number tallied with that of vehicle registration number BJ 1801 which was stolen in South Africa. There was no explanation whatsoever from the defendant as to how this axle came to be fitted on to this vehicle. The defendant tried to raise an issue that sometimes one fits parts from a car-breaker. Yes, that is true, but the issue here is has the defendant or his witness proved that this axle was from a car-breaker? The answer is an emphatic no. Would any reasonable court succumb to that suggestion in the light of the apparent falsification of the chassis number and removal of the engine number? Again, I say no. I am satisfied on the evidence before me that the vehicle currently bearing registration number MLX 60-52 is the very same vehicle whose registration was BJ 1801 belonging to the plaintiff. The issue I have to determine is whether the defendant have committed this tort of conversion. The evidence available shows that the vehicle was re-registered in Mozambique by the defendant in its name. The defendant claims right of ownership and challenges the right of the plaintiff over this vehicle. The defendant pleads that he is an innocent purchaser for value. The first witness for the

defendant Mr Nobre stated that he bought the vehicle from Francisco of Maputo. He said the vehicle came for repairs. At one instance he said that after showing Mr Francisco a quotation for repairs, the two embarked on a sale agreement. In another breath Mr Nobre said Francisco failed to pay for repairs and at that juncture they embarked on the sale transaction. This is contradictory. I must say that I found this witness to be evasive. It could be because of language barrier. The witness did not produce the quotation or any document signed by Francisco in respect of their sale transaction. The witness admitted that he had not known Francisco before except for the 4 days they interacted during this transaction. Would a reasonable court properly directing itself on the law relating to conversion say the defendant took reasonable steps to ensure that someone's ownership or possession rights were not interfered with? I would say no. Furthermore, if the defendants were serious in their challenge to the plaintiff's claim would they not have traced Francisco as a witness? I bear in mind that the defendants called Lukas who said that he knew the issues before the court but could not bring any records from his office. As far as he is concerned this was a stolen but recovered vehicle which the Police in South Africa disposed off. This witness could not even indicate the South African registration number or bring records thereof. The reason is simply that it did not have any such records. It was a BJ 1801 and that is all. The conduct of the defendant in Beira before and at the time of alleged sale and after that sale up to the identification of the vehicle in Malawi by the plaintiff does not confirm the virtues of an innocent purchaser. He could have vigorously looked for Francisco and records from South Africa concerning this vehicle. I can only attribute to the defendant's failure to do so to his knowledge that the vehicle's ownership was open to challenge. On the evidence it is clear that the defendant processed change of ownership for this vehicle into its own name. In short the defendant assumed ownership and possession of the vehicle and ousted any other person's claim to it. This conduct amounts to conversion. The plaintiff alleges that the deprivation started on 8th February 1994 while the defendant alleges that he bought the vehicle in June 1996. Be that as it may, the position would still be that from June 1996 the defendant has unlawfully converted the said vehicle to its own use thereby depriving the plaintiff the use of that vehicle.

The court is satisfied that the vehicle in question lawfully belongs to the plaintiff and there is no bar to the relief sought by the plaintiff that he should recover the said vehicle BJ 1801 now registered as MLX 60-52.

The plaintiff has also claimed special damages for loss of income from 8th February 1994 at the average rate of K33,000.00 per month from that time up to date. The plaintiff tendered a lot of documents to support the contention that his trucks are used in transport business. The vehicle was hired by Trans-African Transport Limited at the time it got stolen. There are exhibits from TAT Ltd showing the gross and net income for January and February 1994 for BJ 1801, BJ 1803, BJ 1804 and BJ 1806 which were plaintiff's vehicles operating at TAT Limited. The question I have to consider is whether special damages are recoverable. The law requires that special damages be pleaded specifically

and equally be proved specifically. An example would be a situation where the plaintiff would hire another vehicle to complete the task that was assigned to BJ 1801. There is no evidence that this was done. After all the plaintiff has not specifically pleaded and proved special damages. However, the law makes provision for general damages. These are losses which a party suffers as a direct or natural flow of the wrongful act. The evidence from the plaintiff is overwhelming that the said BJ 1801 was an active vehicle in the transportation business of the plaintiff. This is even evident from the serialised exhibits under P1, P2, P3 and P4. Naturally it follows that the non-operation of BJ 1801 from the fleet of plaintiff resulted in the lowering of the income to the plaintiff. The plaintiff has exhibited Exhibit P2 as an Income/Expense Account for BJ 1801 and BJ 1804. This has been the basis of the claim of an average income of K33,000.00 per month indicated in the amended statement of claim. I have considered all the documents before the court relating to the financial transaction of the plaintiff's transport business. I would award the plaintiff general damages of K25,000.00 per month with effect from June 1996 when the defendant took possession of the vehicle up to 8th November 1996 when the court granted an injunction restraining the defendant from taking the vehicle outside Malawi. Basically I am ordering payment of K125,000.00 as general damages.

I now turn to the issue of the defendant's counter-claim. The law on defamation has been elaborately stated in this judgment. The question I ask is whether the plaintiff has committed this tort against the defendant? Has the defendant adduced any evidence to prove defamation? In my judgment I find as a fact that the plaintiff was justified to say he lost his vehicle BJ 1801 through armed robbery and this has been proved. The law clearly states that it is not necessary that each and every minute detail of the allegation should be proved. Furthermore, the defendant just alleged that it suffered defamation both in Mozambique and Malawi as a transporter. The entire record of the court proceedings will not show any evidence about this defamation. What is it that is happening to the defendants i.e. are people shunning them or having a negative picture of the defendants? There is no evidence whatsoever to support defamation and I would dismiss this claim without much ado.

The next claim by the defendant is for loss of revenue calculated at the daily rate of K6,500.00 with effect from 5th November, 1996. The basis of this claim is that the defendant is lawful owner of the truck MLX 60-52 having bought it on an open market in the Republic of South Africa. The court has already determined that the circumstances under which the defendants bought the vehicle from Francisco should have put them on a due diligent inquiry. The defendant was careless and negligent. The defendant did not get title to the vehicle which can be described as beyond reproach. The plaintiff has had a better and superior title to the vehicle than the defendant and as such there is no way the plaintiff can be liable to the defendant in damages for loss of use. There is a secondary issue of the defendant's claim that it repaired the vehicle and made it roadworthy. The defendant exhibited documents marked Exhibits D4 (a) and D5 (a) to support supply of spares and also work carried out in the workshop. I have to be emphatic here that the defendant failed to produce the quotation he gave Francisco for the repairs and yet he found it easy to produce exhibits D4 (a) and D5 (a). I have no doubt in my mind that the defendant prepared these documents purely for the purpose of the trial to try and mitigate

his loss. I do not believe their authenticity. It was the evidence of DW2 that when the vehicle was sold in South Africa it was roadworthy and was moving. It was the duty of the defendant to bring evidence that the time it was brought to their garage it was not roadworthy. I have no doubt in my mind that the defendant has failed to prove this. The defendant could have called Francisco to prove this.

Again the defendant indicated that the vehicle was bringing an income of between 250-300 United States Dollars per trip. Apart from the statement, no income/expenditure account was produced. I am of the view that the defendant is fond of plucking figures from the air without any supporting documents. Findings of courts are based on facts as proved by the evidence and not mere assertions or allegations which are unsubstantiated. Therefore I find the defendants claims not proved and I dismiss the counter-claim in its entirety. I need also state that the detention of the Trailer was pursuant to court order and loss of its use cannot be attributed to the plaintiff.

The issue of costs is discretionary. Normally costs follow the event. In this case it is shown that if the plaintiff had not brought these proceedings, he would not have recovered his lost but found vehicle. Again the defendants did not appear to be such a company as would be readily surrender the vehicle to its true owner. Therefore in the exercise of my discretion I order that the plaintiff will have costs of and incidental to these proceedings. I order that the vehicle MLX 60-52 otherwise registered in Malawi as BJ 1801 be taken by the plaintiff.

PRONOUNCED IN OPEN COURT at Blantyre this 25th day of October 1999.

CHIMASULA PHIRI

JUDGE