

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)

2011/HP/1227

BETWEEN:

GRIVER CHOLA SIKASOTE



PLAINTIFF

AND

SOUTHERN CROSS MOTORS LIMITED

DEFENDANT

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 22nd DAY OF
AUGUST, 2017**

For the Plaintiff : Mr K. Kaunda, Ellis and Company

For the Defendant : Mr A.D. Mumba, A.D. Mwansa Mumba and Partners

J U D G M E N T

WORKS REFERRED TO:

1. Halsbury's Laws of England Volume 28, 4th edition

The Plaintiff commenced this action on 2nd December, 2011 by way of writ of summons claiming;

- i. *Damages for failure to repair the Plaintiff's motor vehicle registration number AAR 9876*
- ii. *Damages for non-use of the said motor vehicle registration number AAR 9876 from 1st December, 2010 to date*
- iii. *An order that the Plaintiff's said vehicle be returned to the Defendant's garage or be collected from Mecurious Motors and be repaired*

iv. Interest

v. Costs

The statement of claim filed shows that the Plaintiff is the owner of the Mercedes Benz vehicle registration number AAR 9876. That in July, 2010 the Plaintiff took the said vehicle to the Defendant's garage for repairs, as it is the authorized agent of Mercedes Benz, Germany and South Africa. In paragraph 4 of the statement of claim it is stated that the Defendant accepted to repair the vehicle, and promised to complete the repairs within a period of less than three months. The paragraph further states that the Plaintiff paid a deposit of ZMW20, 000.00 towards the intended repairs, and supplied five tyres and other spare parts.

It is also stated in the statement of claim that the Plaintiff kept on checking on the progress of the vehicle, but the Defendant kept on giving him excuses as to why the repairs could not be completed on time. Paragraph 6 states that in July 2011 the Plaintiff was informed by the Defendant's Finance Manager and Workshop Manager that his vehicle had been taken to Mercurious Motors for repairs, and that this was done without his consent and authority.

It is averred in paragraph 8 that to date the Plaintiff's vehicle remains unrepaired, and is still in the hands of Mercurious Motors, and that it was wrong for the Defendant to take the said vehicle to Mercurious Motors without his consent and authority, and to have neglected/failed to repair it.

The Plaintiff therefore claims;

- i. Damages for failure to repair the Plaintiff's motor vehicle registration number AAR 9876*
- ii. Damages for non-use of the said motor vehicle registration number AAR 9876 from 1st December, 2010 to date*

- iii. *An order that the Plaintiff's said vehicle be returned to the Defendant's garage or be collected from Mercurious Motors and be repaired*
- iv. *Interest*
- v. *Costs*

On 21st December, 2011 the Defendant filed a defence admitting that the Plaintiff had taken his vehicle to its garage for repairs, and it had promised to repair it in less than three months. The Defendant denies the assertion by the Plaintiff that he kept on checking on the progress of the repairs, but that the Defendant kept on giving him excuses as to why the vehicle could not be repaired on time.

The Defendant in paragraph 4 of the defence denies that its Finance and Workshop Manager informed the Plaintiff that it had taken his vehicle to Mercurious Motors for repairs, and that the same was done without the Plaintiff's consent and authority. Its defence is that the vehicle was taken back to Mercurious Motors for continued and complete repairs to the transmission system, upon the Plaintiff's instructions.

The Defendant also denies that to date the Plaintiff's vehicle remains unrepaired, and is still in the hands of Mercurious Motors stating that it completed the repairs to the Plaintiff's vehicle, save for the transmission system, as the Plaintiff had instructed Mercurious Motors to repair that. Further that Mercurious Motors withheld the vehicle for alleged unsettled bills for earlier repairs done to the vehicle. The Defendant denies the claim that the vehicle should be returned to its garage and repaired, and also denies the claim in paragraph 10 of the statement of claim.

The claims in paragraph 11 of the statement of claim are also denied stating that the Plaintiff is not entitled to them. The Defendant in paragraph 10 of the defence counterclaims;

- i. *Payment of ZMW36, 000.00 being the balance from ZMW56, 000.00 work charge bill on the Plaintiff's motor vehicle registration number AAR 9876*
- ii. *Interest thereon*
- iii. *Any other relief that the court may deem fit*
- iv. *Costs*

At the hearing the Plaintiff testified and called no witnesses, while the Defendant called two witnesses. In his testimony the Plaintiff stated that he had purchased the Mercedes Benz S500 registration number AAR 9876 worth about \$240, 000 from Germany, through a loan that he had obtained from Parliament. That the vehicle developed a problem with the transmission system, needed service, replacement of tyres and spraying it white, so he took it to the Defendant in December 2009, as it is a dealer for Mercedes Benz, and is a reputable garage.

His evidence was that the Defendant opened a job card and demanded that he pays ZMW20, 000.00, and buys five tyres, which he did. He was assured that the vehicle would be repaired within three months. The Plaintiff stated that after three months the Defendant would give excuses, and he confronted the Workshop and Finance Manager who informed him that the vehicle had been taken to Mercurious Motors for repair of the transmission system. That when he asked under what authority, no answer was given.

It was his testimony that he does not know where the vehicle is, and he denied having given the Defendant instructions to take the vehicle to Mercurious Motors. He further testified that if had given those instructions, they should have been in writing. The Plaintiff stated that after he paid the ZMW20, 000.00, he did not receive a bill that the vehicle had been repaired, adding that the Defendant should have so informed him, and he would then have test driven it and inspected it, and thereafter invoices would have been issued, and he would have been given time to pay.

In conclusion he testified that he wanted to be paid damages, the vehicle to be returned, and also to be paid damages for loss of use of the vehicle, as well as costs.

In cross examination the Plaintiff testified that he had given instructions to the Defendant to repair the vehicle, and that is how a job card was opened on 14th December, 2009 to repair the transmission system, service the vehicle, have a complete body re-spray with white paint done, as the vehicle is white in colour, and replace five tyres with new ones.

It was also his evidence that the Defendant demanded that he pays ZMW20,000.00, and he provides five new tyres, and provides some spare parts like brake pads, which he did. He agreed that the job card was not part of his bundle of documents. When referred to page 8 of the Defendant's bundle of documents, the Plaintiff denied that it was the job card that was prepared.

The Plaintiff agreed that the vehicle had been to the Defendant's garage a number of times, but he could not recall how many. When referred to page 3 of the Plaintiff's bundle of pleadings which states that the vehicle was taken to the Defendant for repairs in July, 2010, he stated that he relied on the job card as evidence of when he took the vehicle there for repairs. The Plaintiff further stated that paragraph 3 of the statement of claim is not correct.

Further in cross examination the Plaintiff told the court that the document on page 8 of the Defendant's bundle of documents is dated 27th July, 2010, and he agreed that it has the registration number of the vehicle in issue, as well as his names with instructions to replace parts supplied by the customer being an oil filter, jack cover, planning board and corner lamps.

It was stated that the vehicle took long to be repaired. He agreed that he had later asked that the windscreen of the vehicle be repaired, and that the vehicle was supposed to have been comprehensively serviced, and re-sprayed so that it could look new. When referred to P14 of the Defendant's bundle of documents

the Plaintiff testified that the document is dated 2nd December, 2010 with instructions for a full re-spray and removal of all round dents. His evidence was that he gave these instructions to the Defendant, and they subcontracted the job after he gave approval. He agreed that he had given the instructions on the job card, stating that he did so as he wanted the vehicle to look new.

The Plaintiff stated that the Defendant could not spray the vehicle as their equipment had broken down, and they took him to a sub-contractor, and he approved the sub contraction after he saw the equipment that the sub-contractor had.

It was the Plaintiff's evidence when referred to page 15 of the Defendant's bundle of documents that he could have taken the spare parts listed on that document to the Defendant for repairs, and he told the Court that he had provided the spare parts that the Defendant did not have after he bought them from South Africa. He denied that he had paid ZMW20, 000.00 after a proforma invoice was prepared, stating that it was after the job card was opened.

He also testified that the spare parts that he had supplied were written on the original job card which was not before the court. He agreed that the documents on pages 14 to 24 show the spare parts that were replaced after he paid the ZMW20, 000.00. He added that he was unable to confirm this position, as he had not seen the vehicle since 2009. The Plaintiff stated that he was not shown the spare parts that were removed and replaced with the ones he took there.

He denied that he was informed that the Defendant did a diagnostic assessment of the defects on the vehicle after it concluded the repairs, or that there was a problem with the transmission system of the vehicle, after the vehicle was worked on. It was his testimony that he only became aware of the same when he confronted the Workshop Manager in July, 2011, and was then informed that the vehicle had been taken to Mercurious Motors.

He stated that he did not know how the Defendant knew that the transmission system of the vehicle was previously worked on by Mercurious Motors. The Plaintiff agreed that he knows Humphrey and David of Mercurious Motors, but stated that he does not know what job Humphrey does there. He explained that he was introduced to Humphrey as a worker of Honourable Elijah Muchima, the owner of Mercurious Motors, and that this was before he took the vehicle to the Defendant for repairs.

Still in cross examination, the Plaintiff stated that Mr Muchima had told him that the garage had equipment, when in fact not, and he denied having taken the vehicle from Mercurious Motors to the Defendant. He also denied that he took the vehicle to the Defendant in January 2009, stating that it was on 14th December, 2009. He further denied that there was an arrangement to take the vehicle to the Defendant from Mercurious Motors in 2007. The Plaintiff could not recall having taken the vehicle to Mercurious Motors so that the transmission system could be worked on. He did however agree that Mr Muchima took the vehicle to his garage, but that he got it back as the garage had no equipment.

When referred to pages 32 to 36 of the Defendant's bundle of documents, the Plaintiff stated that he disputed that the said parts were replaced, until he saw the parts that he been replaced. In conclusion he told the court that no repairs were done, including the body spray.

In re-examination, and in reference to the document on page 8 of the Defendant's bundle of documents, the Plaintiff testified that he could not read what was on that job card, and that it does not have his signature.

The first defence witness was Robert Omara, the Workshop Manager for the Defendant. He told the Court that he had worked for the Defendant then known as Marunouchi from 2001 to date. He took the court through his duties stating that he oversees the day to day operations of the workshop, including vehicle repairs, service and body repairs.

In relation to the matter before court, DW1 testified that in July 2010 the Plaintiffs vehicle registration number AAR 9876, a Mercedes Benz S500 was taken to the garage for repairs. That upon receipt of the vehicle, they took down the client's instructions and they were recorded on a job card. DW1 further told the court that the Plaintiff gave them an oil filter, jack hole cover which is mounted onto the running board, and at a later stage he supplied five brand new tyres. DW1 identified the job card as the document on page 8 of the Defendant's bundle of documents.

He explained that the job card was opened on 27th July, 2010, and that the tyres were fitted onto the vehicle, adding that other spare parts were supplied so that the vehicle could look new. Further in his evidence DW1 told the court that a quotation was prepared and given to the Plaintiff, and thereafter the Plaintiff paid a deposit of ZMW20, 000.00, with instructions to order the spare parts that the Defendant did not have.

It was stated that upon receipt of the amount of ZMW20, 000.00, the Defendant ordered various spare parts, among them the suspension stabilizer links, rear shock absorbers, rear brake discs, brake pads, front brake discs and others. He identified the documents on pages 15 to 17 of the Defendant's bundle of documents as the proforma invoices for the spare parts that were required to be replaced, adding that they are dated 3rd December, 2010, and are addressed to the Plaintiff, and were prepared by their Parts representative.

Still in evidence, DW1 stated that the top part of the document states that a fifty percent down payment was required to be made towards the order, adding that it was arrived at taking into account the amount quoted on pages 14 to 17 for body repairs. This amount came to ZMW50, 000.00 broken down as ZMW16, 000.00 for spray painting, ZMW29, 853.787 on pages 15 to 16, and ZMW9, 266.147 on page 17. That they considered the ZMW20, 000.00 as the fifty percent payment.

DW1 also testified that the spare parts were not readily available at the Defendant, and an order was placed for the purchase of the said parts with the manufacturer in Germany. He stated that the spares were supplied but not at once, but in batches. It was DW1's testimony that when spare parts are ordered, the manufacturer or supplier invoices the spares that are available, and that for those that are not available, back orders are made, meaning that the manufacturing plant is contacted for manufacture of the same, and this leads to delays in the delivery of some parts ordered.

He identified the documents on pages 20, 21, 22, 23, 24, 25, 26, 27 of the Defendant's bundle of documents as invoices indicating that spare parts were charged and drawn to the Plaintiff's account, while page 28 shows that twenty litres of fuel was put in the vehicle. DW1 told the court that after the mechanical repairs were undertaken, the vehicle was spray painted through another company called Auto Pantique, as their spray painting equipment had developed a fault. That this was done through use of that company's spray booth, but the Defendant's staff did the spray painting, to ensure the quality demanded by the customer.

Further in his testimony, DW1 stated that page 14 of the Defendant's bundle of documents is an estimate of the body repairs that were required to be undertaken on the vehicle, full body spray and dent removal. He told the court that final control checks were done before the vehicle was certified as roadworthy, and that this involved a physical inspection and diagnostic check using the computer. It was stated that the final check revealed that there was a problem with the automatic transmission of the vehicle, as it was malfunctioning.

DW1 went on state that the Plaintiff was informed of the problem, and he had responded seeking guidance on how the same could be attended to. The evidence by DW1 was that the Defendant consulted two vehicle repairing firms namely Automatic Transmission Centre and Spark Light Gear Box Services,

who gave them the cost of the repairs, adding that Automatic Transmission Centre is in the Buseko area of Lusaka, while Spark Light Gear Box Services is in Johannesburg, South Africa.

That the Plaintiff was informed of the two possible channels of repairing the vehicle, and he was informed of the costs verbally. It was DW1's testimony that at that point they were informed that the gear box of the vehicle had been attended to by Mercurious Motors, and DW1 contacted the said Mercurious Motors, and a technician there named Humphrey confirmed the position, with regard to the transmission system of the vehicle.

Further in defence, DW1 stated that the information was relayed to the Plaintiff who instructed that a repeat job should be done at Mercurious Motors' account, entailing that he was not prepared to pay for the said repairs. That the Plaintiff had told them that Mercurious Motors should pay for the repairs. He stated that he was instructed to ask Humphrey of Mercurious Motors to collect the vehicle so that it could be repaired, and Humphrey collected the vehicle after two weeks.

He explained that during this period the Plaintiff had been following up on the repair of the vehicle, and he had told him that Humphrey had not yet collected the vehicle. DW1 told the court that the instructions to move the vehicle from the Defendant to Mercurious Motors came from the Plaintiff, and that due to the delay by Mercurious Motors to repair the vehicle, the Plaintiff had expressed his displeasure to the Defendant, and had demanded retrieval of the vehicle from Mercurious Motors.

Still in his testimony, DW1 stated that they followed through with the instructions given by the Plaintiff, and approached Mercurious Motors in an attempt to retrieve the vehicle, but Mr Muchima informed them to tell the Plaintiff that there were outstanding dues on the vehicle, and he should get directly in touch with Mr Muchima. That the Plaintiff was informed of the development, and in the presence of the Defendant's former Finance Manager,

the Plaintiff had expressed his disgust, and told them that he would commence legal proceedings against them.

He further told the court that after this action was commenced, they were sent to mediation, where Mr Muchima's presence was required in order to facilitate retrieval of the vehicle, but that process failed. DW1 testified that they did repair the vehicle according to the instructions given by the Plaintiff, and denied the claim for loss of use of the vehicle. He further denied the claim for retrieval and repair of the vehicle, as they had repaired it. DW1 counterclaimed the payment of ZMW36, 000.00, being the balance for the repairs that cost ZMW50, 000.00, as the Plaintiff paid only ZMW20, 000.00. That the proforma invoices at pages 32, 33, 34, 35 and 36 of the Defendant's bundle of documents show that the repairs were done to the Plaintiff's vehicle.

When cross examined DW1 stated that he does not know the value of a brand new S500 Mercedes Benz vehicle. He agreed that the Plaintiff had instructed the Defendant to repair his Mercedes Benz vehicle, and he paid ZMW20, 000.00 as a down payment. He also agreed that the vehicle was collected from the Defendant by Mercurious Motors, but that there were no written instructions from the Plaintiff allowing the release of the vehicle to the said Mercurious Motors.

DW1 further agreed that the Defendant did not have photographs to show that the vehicle had been repaired. When referred to pages 32 to 36 of the Defendant's bundle of documents, DW1 stated that none of them were signed. He stated that the Plaintiff owed Mercurious Motors money for repairs, but clarified that those bills were not before the court. It was stated that DW1 also had no evidence that Mercurious Motors had previously repaired the Plaintiff's vehicle.

DW1 testified that the document on page 16 of the Defendant's bundle of documents is not dated but has the Plaintiff's name, while the one on page 17 of the same bundle of documents does not have the Plaintiff's name, and is

equally not dated. He denied knowledge of any judgment in favour of Mercurious Motors against the Plaintiff. It was also DW1's testimony in cross examination that orders for spare parts from Germany are made online, and he had no documentary proof to that effect. He further stated that there were no invoices before the court that were issued by Mercedes Benz Germany.

With reference to pages 20 to 28 of the Defendant's bundle of documents, DW1 testified that the Plaintiff did not sign these documents to acknowledge receipt, but stated that they were invoiced to his account, after the parts were fitted. DW1 did however concede that there was no evidence to show that the parts were fitted on the vehicle, or that they had contacted specialist garages on gear boxes, and had provided quotations for their repairs.

It was further DW1's testimony in cross examination that the transmission problem of the vehicle was only discovered after the final check of the vehicle, and not at the initial analysis in July 2010, adding that the final analysis was done in 2011. He could not recall if the Plaintiff had driven the vehicle to the Defendant. DW1 denied that the gear box problem developed while the vehicle was in the custody of the Defendant.

In re-examination DW1 stated that the instructions to take the vehicle to Mercurious Motors were verbal. He stated that the Defendant does not have pictorial evidence to show that the vehicle had been repaired, but that the invoices so reflect. DW1 further stated that the Defendant did not have the tax invoices from Mercurious Motors as it did not ask for services from there. He clarified that page 17 of the Defendant's bundle of documents is a continuation of page 16 as it indicates brought forward, and the customer's details are on the bottom of the page.

On the documents on pages 20 to 28 of the Defendant's bundle of documents, DW1 told the court that they are internal tax invoices that move spare parts from the Parts Department to the workshop, and are not for the use of the customer. He also told the court that a defect in the transmission system of a

vehicle does not completely immobilize a vehicle. That the detections in this case showed slipping, but the vehicle could still be driven. He concluded by stating that the problem was detected during the road test of the vehicle.

The last witness for the defence was Humphrey Mutemwa. He is a mechanic, and he told the court that he is one of the directors in Mercurious Motors, the other person being David Chongwe. That he had worked for Mercedes Benz, being Lonro Zambia or Star Motors at the time from 1984 until 1996, and that it was the only company that repaired Mercedes Benz vehicles. The testimony of this witness with regard to the matter before court was that in January 2009 the Plaintiff had called him whilst he was at the workshop stating that he was at Mosque Club, and had a breakdown, as the vehicle had a tyre puncture. He had asked for a spare tyre.

DW2 stated that the second time that the Plaintiff had called him was in 2010 when he had informed him that he had taken the vehicle to the Defendant for repairs but they had told him that the vehicle had a gear box problem and it was slipping. DW2 also stated that the Plaintiff had told him that he had instructed DW1 to have the vehicle picked up. He testified that he only went to the Defendant to pick up the vehicle after two weeks as they had works at the garage, and that this was between January and February 2010. That when he had tested the vehicle with DW1 they found that the slipper age of the gear box was due to oil leakage, and thereafter the vehicle was signed off by the Defendant to Mercurious Motors.

He went on to state that DW1 had informed him that after they concluded the works, they should return the vehicle to the Defendant as it was still carrying out repair works on the vehicle, but he did not state the nature of the said repair works. DW2 explained that they worked on the vehicle and the leakage stopped, and that they did not charge the Plaintiff as it was a comeback job. That they had replaced the washer. He continued stating that when they were about to take back the vehicle to the Defendant, the landlord of the premises

Mr Muchima went there and laughed that his friend's vehicle was back, and had asked what repairs were being carried out on the vehicle.

It was his evidence that Mr Muchima had asked for the keys for the vehicle stating that he wanted to remind the Plaintiff about an old bill for the vehicle. DW2 stated that that is how he had given the car keys to Mr Muchima, who said that he would meet the Plaintiff before the vehicle could be released. DW2 also testified that he had informed the Defendant of the development through DW1, and had advised him to get in touch with Mr Muchima.

In cross examination DW2 testified that apart from his word he had no other evidence that the Plaintiff gave them instructions to get the vehicle from the Defendant. He also stated that there was no document before court showing that Mercurious Motors is a certified Mercedes Benz garage, but that the document is there. DW2 told the court that he had not brought documents to court that showed that they had previously worked on the Plaintiff's vehicle, but he added that there was a file for the vehicle.

He further explained to the Court that he had worked for Lonrho known as Star Motors but he had no documents to that effect, and that he had no documents to show that he is a trained mechanic. He agreed that he had testified that the Plaintiff had phoned him and told him to collect the vehicle from the Defendant, but that he had no documents to that effect. He also agreed that DW1 had told him to take back the vehicle once he finished repairing it, but did not specify the nature of the repairs that were still needed to be done.

DW2 further agreed that Mr Muchima did not show him the bill when he asked him to drive back the vehicle into the garage, and that Mr Muchima was not with bailiffs when he asked him to do so.

I have considered the evidence. It is a fact that the Plaintiff had on a date that has not been established taken his motor vehicle Mercedes Benz registration

number AAR 9876 to the Defendant for repairs works to be done to it. It is also a fact that on 2nd December, 2010, the Defendant did issue a job card for body repairs to be done to the vehicle, and that the body spray of the vehicle was sub-contracted. It is further a fact that the Defendant issued proforma invoices on 3rd December 2010 for spare parts that were needed for the vehicle to be repaired.

It is also not in dispute that the Plaintiff's motor vehicle was taken from the Defendant to Mercurious Motors sometime in 2011, and the vehicle has since not been returned to the Defendant. The question is whether the Plaintiff is entitled to the reliefs sought against the Defendant?

The first claim is for damages for failure to repair the Plaintiff's vehicle. The evidence given by the Plaintiff is that after he took the vehicle to the Defendant for repairs on 14th December, 2009, a job card was issued. He stated that the vehicle had a problem with the transmission system, needed service, replacement of tyres and also spray painting it white. That he had paid ZMW20, 000.00 down payment towards the repairs as demanded by the Defendant, supplied the five tyres and some spare parts among them brake pads. He denied that the job card on page 8 of the Defendant's bundle of documents is the one that was opened when he took the vehicle.

The Defendant denies this claim stating that it did in fact repair the vehicle as after the Plaintiff took the vehicle there, the job card on page 8 of its bundle of documents was opened, and the spare parts that were required for the repair of the vehicle were quoted to the Plaintiff, as seen on the documents on pages 15 to 17 of the Defendant's bundle of documents, dated 3rd December, 2010, which are proforma invoices addressed to the Plaintiff. Further that the Defendant issued the tax invoices on pages 20 to 27 of its bundle of documents dated between 17th January, 2011 and 24th January, 2011 after the spare parts were ordered from the manufacturer in Germany.

DW1 testified that the documents on pages 32 to 36 of the Defendant's bundle dated 22nd July, 2011 were raised internally moving the spare parts ordered from the Parts Department to the workshop, so that they could be fitted on the Plaintiff's vehicle, and that this was done. The burden rests on the Plaintiff on a balance of probabilities to show that indeed the Defendant did not carry out the repair works. In his testimony the Plaintiff stated that he had paid the down payment of ZMW20, 000.00 after the job card was opened on 14th December 2009.

DW1 also testified that the job card was opened on 27th July, 2010 after the vehicle was taken there. This job card which is on page 8 of the Defendant's bundle of documents, and which the Plaintiff denies, although it is not very clear states "*replace parts supplied by the customer (oil filter, jack cover of the running board, corner lamp)*". It is dated 27th July, 2010. On the back of this document there is the foreman's report indicating the spare parts that were required. This document does not indicate when the foreman did the assessment of the parts that were required.

The Plaintiff when cross examined agreed that after the initial job card was raised he had later asked that the windscreen of the vehicle be replaced, and that the vehicle be comprehensively serviced and sprayed so that it looks new.

The document on page 14 of the Defendant's bundle of documents is the job card for the body repairs and spray. It is dated 2nd December, 2010. Therefore this document can be said to have been raised after the Plaintiff gave the instructions to that effect. On pages 15 to 17 of the Defendant's bundle of documents are proforma invoices that were raised on 3rd December, 2010 informing the Plaintiff of the spare parts that were needed, and that a down payment of fifty percent of the total cost needed to be made. Page 17 is for the cost of the windscreen.

This evidence shows that the Plaintiff requested for additional repairs to be done to the vehicle culminating in the quotations on pages 15 to 17 of the

Defendant's bundle of documents being raised on 3rd December, 2010. It follows therefore that even the spare parts required for the full service that the Plaintiff in cross examination admitted that he had requested to be done are contained in those documents, as testified by DW1.

The Plaintiff did not state when he paid the ZMW20, 000.00 for repair of the vehicle, and the burden rests on him to show that despite having made the payment for the repairs timely, the Defendant failed to repair the vehicle within the three months that they had indicated to him that they would so. The documents on pages 15 to 17 of the Plaintiff's bundle of documents on top say that a fifty percent down payment had to be made towards the cost. As there is no documentary evidence to establish when the Plaintiff paid the ZMW20, 000.00 as down payment for the repairs to the vehicle, it is a question of credibility between the Plaintiff and DW1 as to when this was done.

When cross examined on paragraph 3 of the statement of claim which states that the Plaintiff took the vehicle to the Defendant for repairs in July, 2010, the Plaintiff stated that this paragraph was not correct, and that he relied on the original job card as to when he took the vehicle to the Defendant. Parties are bound by their pleadings, and the Plaintiff did not amend that paragraph to reflect that he took the vehicle to the Defendant for repair on 14th December, 2009. I therefore find that he did in fact take the vehicle for repairs in July 2010, and the job card on page 8 of the Defendant's bundle of documents dated 27th July, 2010 is the one that was opened for the repairs.

Further in the absence of evidence to the contrary, it would be reasonable to conclude that the ZMW20, 000.00 paid by the Plaintiff was made after the documents on pages 15 to 17 of the Defendant's bundle of documents were raised, contrary to the assertion by the Plaintiff that he paid the ZMW20, 000.00 after the job card was raised.

On pages 1 to 3 of the Defendant's bundle of documents is a tax invoice dated 19th October 2007 from the Defendant to Mercurious Motors over the vehicle

registration number AAR 9876, which is the vehicle in dispute in this matter. The works quoted are checking the electrical system of the vehicle as it was not starting, and replacement of the fuel pump, fuel filters among others. On page 5 and 6 of the Defendant's bundle of documents are tax invoices from the Defendant to Mercurious Motors dated 20th January, 2009 for the Plaintiff's vehicle for requested works of removal of the automatic transmission of the vehicle, and replacing it with transmission 722.6 among other services.

Further on page 7 of the Defendant's bundle of documents is another tax invoice dated 28th May, 2010 to the Plaintiff from the Defendant for his vehicle to be serviced and sprayed, and the labour that was to be carried out included a diagnosis of the electric system of the vehicle. This evidence shows that the problem of the transmission system of the vehicle was dealt with by the Defendant from as way back as 2007 by reference of the same to Mercurious Motors, and that in May 2010 the Plaintiff had in fact raised the same with the Defendant who issued him the document on page 7 of its bundle of documents which reflects repair costs for the same. This evidence is contrary to the Plaintiff's denial that Mecurious Motors had previously worked on the vehicle.

There is no evidence on record to show that the request on page 7 of the Defendant's bundle of documents was worked on. What is on record is that the job card on page 8 of the Defendant's bundle of documents dated 27th July, 2010 was opened with a request to replace some parts of the Plaintiff's vehicle with the spares that the Plaintiff had supplied. As rightly pointed out by the Plaintiff he did not sign this document. He however did not deny that he had supplied the said parts, and it is therefore my conclusion that even though he did not sign the said document, he had instructed that the spare parts indicated thereon be replaced with what he had supplied.

A further analysis of all the evidence on record shows that the Plaintiff had on several occasions taken the vehicle to the Defendant for repair, which he did in fact concede in cross examination. The question that however arises is whether

the Defendant did carry out the works that it counter claims payment for in the amount of ZMW36, 000.00?

The Plaintiff when cross examined agreed that the vehicle was spray painted after the Defendant used a spray booth for Auto Pantique which he approved. There being no denial that this service was provided, the Plaintiff is liable to pay the amount quoted on page 14 of the Defendant's bundle of documents being ZMW16, 008.00 for the said spray painting.

DW1 in his testimony stated that the documents on pages 15 and 16 of the Defendants bundle of documents show that the spare parts required totaled ZMW29, 853.787. When the windscreen charges on page 17 of ZMW9, 266.147 are included the cost comes to ZMW39, 119.93 DW1 testified that the spare parts were in fact ordered from Germany as evidenced on the documents on pages 20 to 27 of the Defendants bundles, and the cost thereof was credited to the Plaintiffs account as the documents on pages 32 to 36 of the Defendant's bundle of documents show that the spare parts were moved from the Parts Department to the Workshop.

The Plaintiff denied this stating that if the parts were fitted he would have been shown the parts that were removed, and that once the parts were fitted, he should have been called to test drive the vehicle and inspect it. The Defendant did not dispute that it did not provide the Plaintiff with the spares that were removed and replaced with new ones. This was crucial more so that the Defendant counterclaims payment for the parts fitted.

DW1 did concede in cross examination that he had no evidence to show the court that the Defendant did order the spare parts from Germany online, whose payment they claim. He also conceded that he did not have the invoices raised by Mercedes Benz Germany after it supplied the said spare parts to the Defendant, or that the parts were fitted onto the vehicle. If the Defendant is to succeed on its counterclaim, it has to prove on a balance of probabilities that it did in fact supply and fit the spare parts as alleged.

DW1 told the court that after the spare parts were fitted they did a physical inspection and diagnostic check of the vehicle, and it was discovered that the transmission system had a problem, and they had informed the Plaintiff who later agreed that the vehicle be taken to Mercurious Motors for repair of the same.

The Plaintiff did not adduce any evidence to dispute that after the repairs were concluded, and at the point of the diagnostic check is when he was told of the defect in the transmission system. He did state in his testimony that after he kept following up with the Defendant, and he confronted the workshop manager, he was told that the vehicle had been taken to Mecurious Motors to repair the transmission system. The Plaintiff at the beginning of his testimony had stated that he had taken the vehicle to the Defendant for repair as it had a problem with the transmission system, needed service, replacement of tyres and spray painting

However when DW2 testified, he stated that the Plaintiff had told him that the Defendant had diagnosed a problem with the transmission system of the vehicle, and that it needed to be picked up for repair. He also stated that he only picked up the vehicle after two weeks as they had works that they were carrying out at the workshop. DW2 was not cross examined on this evidence, and further DW2 was only cross examined on whether he had evidence in writing to the effect that the Plaintiff had authorized him to pick up the vehicle from the Defendant, and not on whether the Plaintiff did in fact so authorize. Therefore DW2's evidence credible.

Thus I find as a fact that the Plaintiff did give his authority for the vehicle to be taken to Mercurious Motors for repair of the transmission system after the Defendant did a diagnostic check on the vehicle. That this was after it had concluded its repairs on the vehicle, and this evidence is supported by the invoices that were issued to the Plaintiff on pages 32 to 36 of its bundle of documents.

The only defence raised by the Plaintiff to these documents is that they are not signed by him. DW1 did explain that these documents are issued internally when spare parts from the Parts Department move to the Workshop, which was not disputed by the Plaintiff.

The finding that the spare parts were put on the Plaintiff's vehicle is regardless of the allegation made by the Plaintiff that he was not shown the spare parts that were removed, or that the invoices from Mercedes Benz Germany which were issued after the spares were supplied are not before the court, as the Plaintiff when cross examined did concede that spare parts were in fact put on his vehicle, and this supports DW1's evidence that in fact the Plaintiff was informed when the repairs had been completed after the spare parts were put on the vehicle, and that there was a problem with the transmission system.

I note that there is evidence from DW2 to the effect that DW1 had requested that the vehicle be returned to the Defendant after Mercurious Motors concluded the repair of the transmission system, but this does not mean that the Defendant had not completed the repairs, as DW2 could not state the nature of the works yet to be concluded because he had no knowledge of the same.

DW1 could have so intimated to DW2, as the Plaintiff was alleged to have paid only ZMW20, 000.00 from the total bill of ZMW56, 000.00, leaving a balance of ZMW36, 000.00, which he wanted to see paid. DW2 told the court that when DW1 had called him to go and collect the vehicle, he was told that it had a gear box problem, and he had tested the vehicle with DW1. This evidence was not disputed by the Plaintiff. DW2 did not testify on any other problems that were detected apart from the gear box, when he tested the vehicle with DW1. Thus it has not been proved by the Plaintiff that the Defendant did not repair the vehicle after supplying the parts quoted in the bundle of documents.

Therefore in my view, the Defendant did in fact repair the vehicle after supplying the said spare parts, and I find that the Plaintiff's claim for repair of

the vehicle fails, as it has not been proved, as the evidence shows that the vehicle was in fact repaired. The Defendant on the other hand succeeds on a balance of probabilities on the counterclaim, as it has established that it did repair the vehicle and supply spare parts for the same, and I enter judgment in its favour for ZMW36, 000.00.

The Plaintiff also claims damages for non-use of the vehicle. This claim is founded on the fact that when the Defendant took the vehicle to Mercurious Motors for repair of the transmission system the vehicle was detained, and the Plaintiff was deprived of its use. Both DW1 and DW2 testified that the vehicle was detained by Mr Elijah Muchima on the ground that there were unpaid bills for the vehicle.

The Plaintiff did not deny that he owed Mr Muchima money for repair of the vehicle. This being the position, Mr Muchima can be said to have exercised a lien over the vehicle, going by Halsbury's Laws of England Volume 28, 4th edition at paragraph 501 on page 221, which defines a lien as **"a legal right to keep possession of property until a claim has been met"**. The evidence also shows that the Plaintiff did consent to the vehicle being taken to Mercurious Motors for repair of the transmission system, as DW2's testimony that the Plaintiff had called him and informed him that the Defendant had told him that there was a problem with the transmission system, and he needed to pick up the vehicle to attend to the same, was not disputed by the Plaintiff.

Having given authority to the Defendant to take the vehicle to Mercurious Motors to work on the transmission system, the Defendant cannot be held liable for non-use of the vehicle, as Mr Muchima is said to have exercised a lien over the vehicle to secure payment for amounts owing to him, which was outside the Defendant's control. The claim for damages for non-use of the vehicle will fail on that basis.

The third claim is for an order that the vehicle be returned to the Defendant's garage, or be collected from Mercurious Motors, and be repaired. The evidence

on record shows that Mr Muchima is the person who detained the vehicle, and kept it. He is not a party to these proceedings, and neither is Mercurious Motors. Therefore such an order cannot stand as it is not the Defendant who is in possession of the vehicle, and the court cannot make an order against a person or entity that is not party to the proceedings. Moreover the Defendant repaired the vehicle, and this claim will equally fail. All the Plaintiff's claims fail and are dismissed, with costs to the Defendant, to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 22nd DAY OF AUGUST, 2017

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE