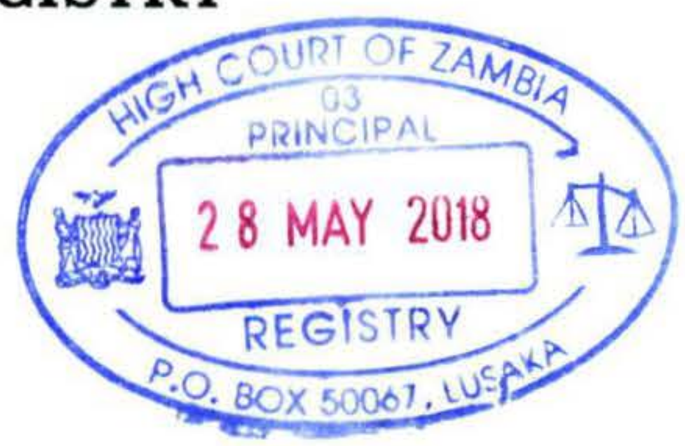
IN THE HIGH COURT FOR ZAMBIA **2014/HP/0572**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

SCIROCCO ENTERPRISES LIMITED **PLAINTIFF**

AND

VEHICLE CENTRE ZAMBIA LIMITED **DEFENDANT**

CORAM: HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mrs. M.M. Harawa of Messrs M.C Mulenga and Nzonzo Advocates*

For the Defendant: *Mrs. B.M Chanda of Messrs AB & David Legal Practitioners*

J U D G M E N T

Cases Referred To:

(i) *Khalid Mohamed v. The Attorney General (1982) ZR 49*
(ii) *Zambia Horticultural Products Ltd v. Tembo 1988 – 1989 ZR 24*
(iii) *Rio Restaurant Bakery and Service Station v. Long, Trading as Broken Hill Panel Beaters (1969) ZR 4 (HC)*
(iv) *Curtis v. Chemical Cleaning Co. [1951] 1 KB 805*

(v) *Li'estrange v. Graucob [1934] 2 KB 394*
(vi) *Price Water House v. University of Keele EWCA CW 583*
(vii) *Hadley v. Baxendale (1854) 9 Exch 341*
(viii) *Victoria Laundry (Windsor) Ltd v. Newman Industries Ltd [1949] 2 KB 528*

Delay in delivering this Judgment which was scheduled for delivery on 18th January, 2018 is entirely due to the improper conduct of the Plaintiffs Advocates who unknown to the Court or the Marshal on 25th October, 2017 wrote to the Assistant Registrar of the High Court requesting for the file to be referred to that office for purposes of typed proceedings.

The effect was that the file was withdrawn from the Judges office which was to be worked on during the Christmas recess. The file could not be traced until it was discovered in the first week of May, 2018 in the typing pool by the Civil Registry staff after painstaking search for the file.

The resultant consequence is that there has been unreasonable delay in delivery of this Judgment. The conduct of the Plaintiffs Advocates is disapproved. It is disapproved on the basis that it is the litigants and some unkind Advocates who have been orchestrating a myth that all adjournments delayed delivery of Judgments are caused by the Courts. This is obviously a misconception. This case demonstrates that sometimes it is the litigants or indeed the Advocates themselves who contrive schemes to delay expedient delivery of Judgments.

There was no basis for the advocates for the Plaintiffs to request for the withdrawal of the file for purposes of typing the Judges notes. The matter was not on appeal.

Further, the concerned Advocates were present at all the material time of the proceedings. They are expected to take meticulous record of the proceedings for purposes of making their submissions or optionally to conduct a search on the courts file to cross check the courts record with their record.

Advocates are respected and honorable officers of the Court and as such they are duty bound to assist the Court in efficient managing of the cases and not taking such steps that leads to disappearance of records when under custody of a Judge for Judgment or Ruling delivery.

There is no authority, order Rule or practice direction that permits an Advocate or a litigant to demand for typed Judges notes when matter has been adjourned for Ruling or Judgment.

In future such indiscretion shall be visited with sanctions. Advocates found wanting will be asked in befitting cases to show cause why they should not be condemned to personally suffer the costs caused by such indiscretions.

The Plaintiffs action is for

(i) Special damages for the sum of US$ 20, 700 which moneys were lost by the Plaintiff during the six months that the subject vehicle was with the Defendant.

(ii) Damages for breach of contract.

(iii) Any further or other relief as the Court may deem just and equitable.

(iv) Interest on the sum claimed.

(v) Costs.

The Defendant entered appearance and denied the Plaintiffs claim.

The Plaintiff called 2 witnesses.

PW1 was **Lavene Kare Doogan** a marketer. The essence of her evidence was that on 13th September, 2014, **AVIS** purchased a Ford Ranger, Registration number ARG 2847 for car hire and rental services. She had a client by the name of **Mr. Denga** who hired the said vehicle from Lusaka International Airport. On the way to the Copperbelt the vehicle had a breakdown.

Upon being informed of the breakdown, she called a Mr. Musonda of **Vehicle Centre** (the defendant herein) and requested for a replacement vehicle as Mr. Denga was a foreign client. She was advised that there was no replacement vehicle and irrespective of the guarantee, the company did not replace vehicles regardless of the warranty.

Mr. Musonda could neither assist in providing a towing vehicle nor refer her to any towing company since he was not aware of any towing company. She then contacted **Richbell Car Hire** and spoke to a Mr. Mulenga from whom he requested for a replacement vehicle and a towing vehicle to tow the broken down vehicle. Mr. Mulenga

paid for all the expenses and he was reimbursed. The vehicle was then that very afternoon conveyed to **Vehicle Centre** in Kitwe on 13th September, 2014. The same day on 13th September, 2014 she called Mr. Musonda to find out if any mechanic had attended to the vehicle. He referred to her to the foreman. She contacted the foreman who acknowledged receiving the vehicle but at that time he had not received any instructions from the superiors.

She tried in vain to contact Mr. Musonda. Later she was advised by the foreman that the vehicle had been opened up. The vehicle stayed for six (6) months at the defendant's workshop and all she was given was story after story as to what happened to the motor vehicle.

She then brought the matter to the attention of her superiors about her predicament. At that time the explanation rendered for the breakdown of the vehicle was that a turbo charger had broken down. This was the second time they had worked on the turbo charger since defendant had worked on it earlier after it had done 1600 KM. When she pressed for the collection of the motor vehicle, she was told that the problem was not actually with the turbo charger but it was an engine knock.

Frustrated, she then contacted **SANDRA** at the Defendants Lusaka office and she expressed her displeasure on their failure to work on the vehicle. The witnesses' suggestion that the vehicle be towed from the Defendants workshop to their Lusaka workshop was rejected on the ground that the mechanics at their Kitwe office were

qualified. The witness then made reference to a tax invoice which she had generated for Mr. Anthony Denga for US$641.50 for an initial 5 days.

It was her testimony that they had huge loss of business as vehicles were prebooked. That particular vehicle was at that time on high demand as it was the latest model. Reference was then made to document number 4 being an invoice for Richbell Car Hire for towing for K1, 000.00. Document at page 5 was the replacement charge for K1, 200.00.

Cross examined by Senior Counsel Mrs. Chanda, the witness testified that a request had been made for print out from Airtel on telephone made in respect of this matter, but the telephone provider said they do not store data for a long period of time but could recall if they had written response from Airtel. She said she got police report on the matter.

Shown letter at page 6 of the Plaintiffs bundle of documents which reads:-

> *"We regret to inform you that we are unable to furnish you with SMS details / content on the above stated number 0971251448 for stated periods due to the restrictions on our system. The system can only avail call logs and not actual voice calls or SMS content"*

She conceded that the reason she had given for failure to provide the Airtel activity data was contrary to the response Airtel had

given. She did not remember writing to the Defendant to complain about the delay in repairing the motor vehicle in question.

When shown page 12 of the Defendants bundle of documents, she conceded that that was the first letter written by the Plaintiffs Advocates which was six (6) months after the accident. She stated that she had no idea if there was a response to her Attorneys lawyers by the Defendants.

Confronted with a letter at page 14 from the Defendant, she said it had not been brought to her attention. When asked to read paragraph 2 of the said letter, she said the explanation was that turbo charger had blown and ceased; that spares had been fitted and vehicle finally delivered. Details of mechanical and other challenges were alluded to.

It was her testimony that when they have new models they have more customers. For the same period of 2013 – 2014 they had few clients who prebooked for 4 by 4 which is on high demand from foreigners in Zambia.

After the accident they had to down size the bookings for the customers which resulted in loss of income as customers were given vehicles at lower grade.

She said vehicle was prebooked for 6 months but could not recall if such evidence was on the Court's record. It was her testimony that any vehicle can develop a fault.

There was no swift response from the Defendant and if that had been done, the Plaintiff would have been able to understand. She conceded that there was no insurance cover taken on the vehicle. She could not recall if anyone had been alternative transport. The Plaintiff did not pay for the repair costs because the vehicle was subject to warrant conditions.

Made to read page 8 under the *Limitations and disclaimers* which reads:

> *"Ford and your dealer are not responsible for any time or income that you lose any inconvenience that you might be caused by*
>
> - *the loss for your transportation or use of your vehicle;*
> - *the cost of rental vehicles, fuel, telephones, travel, meals or lodging loss of personal loss of property, revenue or any incidental and consequential damages you may have"*

The witness conceded that FORD was not responsible for loss of income. She maintained that the vehicle was serviced on a regular basis – that the standard procedure was to service vehicle after 500 or 10, 000 kilo metres.

Shown page 2 of the service history of the vehicle she testified that between service done on 28th November, 2012 and 5th July, 2013, the, the mileage was almost 20, 000 kilo metres which shows according to the Defendants record that vehicle was not having regular service.

According to her 60 days would have been reasonable to access spares from overseas and to fix the vehicle. Indeed it was anticipated that spare parts would be accessed from overseas. She could not know if lack of maintenance could have led to malfunctioning of the vehicle as was not in mechanical motor engineering.

Re-examined by the Learned Senior Counsel in respect of the Airtel activity and data storage, the witness testified that Airtel did not have storage space for data and information.

In respect of service of motor vehicle, she stated that the last day of service was on 5th July, 2013, the kilo metres were 25, 750 and there is a difference. She would not comment on the mileage as it might be attributed to incorrect recordings.

She finally stated that it was a turbo charger which was supposed to be imported.

PW2 was **Chizyuka Muyovwe**, the General Manager of SCIRROCCO Motors. The gist of his evidence was that in 2013 they hired a vehicle to one of their clients a Ford Ranger which had been purchased from the Defendants. On his way to Kitwe, the client had a breakdown on the dual carriage way. The office was notified. PW1 the Branch Manager received the notification.

Since the Company only has a branch in Lusaka, they engaged an alternative supplier Richbell Car Hire Limited and proceeded to inform the Defendant to assist with managing the mechanical issue.

Vehicle was taken to Defendants Kitwe office; Ms. Doogan was following up matter.

At the end of the month he received a "DIVE" report which indicates the usage of their fleet. It revealed that vehicle was on a pending "defleet". He queried the Defendant. The following month the same status was prevailing on "DIVE" report. He queried PW1 who advised that an assessment had been made and there were damages to the engine which had to be replaced. He reminded PW1 that vehicle was under warranty and Defendant had to be reminded. She confirmed that they were aware.

The 3rd month, the status was the same which was very worrisome. They started calculating revenue loss as average usage of vehicle was sitting at 89%.

It was his testimony that this was the average use of the vehicle per month and they were able to determine what revenue each vehicle brings in and how much it is used or rented. A loss of 4 – 5 days per week is occasioned every time a vehicle is not available in their system.

Their Advocates were finally instructed to write to the Defendants to which they formally responded in letter dated 6th March, 2014 being document number 14. Defendant advised that some work had been done on motor vehicle and they were waiting to fix a pump after engine fitting.

It was stated in paragraph 3 of the said letter that under FORD'S and its Dealers obligations *"these do not include any payments for loss of income"*. He admitted not having gone through the Defendants vehicle warranty.

It was his evidence that mechanical works were supposed to be done in reasonable time in consideration their business. In his view, 6 months was not a fair period and Defendant did not give the due urgency to the matter.

Cross examined by Senior Counsel Mrs. Chanda, the witness testified that (i) **under Hire**, the vehicle was being hired 4 – 5 days per week and much sought for out of town destinations at an average of 1000 kilo metre per rental per week and an average of 2000 kilo metre per month. He also admitted the average rental could be 500 kilo metres per week. The vehicle was being hired for US$115 being the *"rack rate"* but could go as far as US$ 141 per day.

(ii) **Loss of income**; the Defendant was claiming US$20, 700 for a period of 6 months (for each and every day of 6 months)._ In his view reasonable time to undertake spares is 30 days.

(iii) **Indemnity / warranty** – he admitted that not money was paid to the defendant in respect of repairs because the vehicle was under warranty. In his view, it is not expected that vehicle would have a break or develop a fault as happened notwithstanding the use unless the vehicle was abusively handled so as to warrant engine damage.

He conceded that at page 9 of the warranty guide in the bundles pages 5 – 6 "punitive, exemplary and multiple damages may not be recovered unless applicable law prohibits a disclaimer".

(iv)**Service of motor vehicle** – the vehicle was initially to be serviced at 1000km for first check up; then at 5000 km and thereafter every 10, 000 km's. There was full service on the said vehicle.

(v) **Responses to inquire on follow up on vehicle repair**

Though there was no record of follow up on motor vehicle repairs, the Plaintiff was making inquiries through the Defendants workshop manager.

He admitted that documents at pages 14 and 17 disclose that reasons were given by Defendant but for the first time. In his view, the reasons were not genuine.

(vi) **SCIROCCO Motor Vis avis SCIRROCCO Enterprises**

It was his testimony that SCIROCCO Motors is owned by SCIRROCCO Enterprises. The later purchased vehicle from the Defendant. The purchase was on behalf of SCIROCCO Motors.

(vii) **Insurance**

The witness admitted that there was no insurance cover on the vehicle.

The Plaintiff rested its case.

The Defence opened its defence and called one witness **DW1 Susan Anderson** the Managing Director of vehicle Centre Zambia Limited. She recalled that on 6th arch, 2014 she received letter appearing at 12 of the Defendants Bundles of Documents from Messrs MC Mulenga & Company in respect of motor vehicle Ford Ranger Double cab on the issue of repairs. This was the first time she had heard about the problem. The vehicle was in their Kitwe office.

The Defendant was demanding compensation for time vehicle had spent in workshop. The Plaintiff is in the business of hiring vehicles.

Upon receipt of the letter, she responded to it as appears at page 14 of the bundles advising that vehicle had been received on 13th September, 2013 – turbo charger had blown and engine seized. The repairs were to be done under warranty (that is, customer was not to pay for repairs).

On 11th October, 2013, they received a replacement engine and was fitted. Some parts were on "back order" meaning manufacturer could not supply as they were out of stock. Some of them were received on 14th November, 2013 and the rest on 7th January, 2014.

Once parts were fixed, diagnosis revealed that the fuel pump was not working and a new one had to be ordered. This was received on 27th February, 2014 and fitted to the vehicle which now needed road test. The vehicle was road tested on 10th March, 2014. The Defendant was informed and the vehicle was delivered to the Defendant in Lusaka on 11th March, 2014.

(ii) **WARRANTY** – it was her testimony that the warranty covers manufacturing default which Defendant would submit and claim for repair costs. In order for a warranty to be approved by a manufacturer, there must be a service history of the vehicle.

(iii) **SERVICE HISTORY** – the history was available. It revealed that vehicle was not serviced at the right intervals. The service intervals were within every 5000 km. The first service at 5235 km was within the parameters up until the problem arose. The subsequent service was at 25, 750 km on 5th July, 2013.

Although the document shows regular service, it was for something else like charge for some oils as at 7, 500 km. That although the document shows regular service it was for something else. Vehicle was infact not serviced again and had missed the equivalent of 5 services.

Notwithstanding, since the Plaintiff was a good customer and mileage was relatively low, we appealed to the manufacturer on a good will claim. She explained that the consequence of not following service "rota" i.e filter not being replaced, the vehicle starts malfunctioning, oil loses bascusity (lubricating properly).

Letter received on 13th September, 2013 was only filed on 11th October, 2013. They had to order engine from the manufacturer in RSA, pay for it and VAT and have it delivered to Kitwe.

(iv) **FUEL PUMP ISSUE** – after engine was received and fitted to the vehicle, they were still waiting for some spare parts which were not

available namely turbo charger, oil cooler hose. These were received on 14th November, 2013; while the injectors were only received on 7th January, 2014. It was only when everything was fitted that one could try to start the engine.

Once you start the engine, you plug in the diagnostics to check if there are damaged components. When this was done, it was discovered that the pump was not working properly and the component had to be ordered from RSA.

She testified that at that time, business houses in RSA go for atleast 2 weeks Christmas recess this also applies to manufacturers. According to her, the Plaintiff did not pay for the repairs.

(v) **LOSS OF INCOME** – It was her evidence that under Limitation and Disclaimer instrument, "*Ford and the Dealer, (i.e motor vehicle centre) the Defendant are not responsible for anytime or income that the Plaintiff might be caused. The exclusion covered or included loss of transportation of use of motor vehicle, fuel, telephone, travel, meals or lodging, the loss of personal or commercial property, the loss of or any other incidental or anticipated damage that may be suffered*".

It was her testimony that the vehicle was released on 11th March, 2014 to the Plaintiff and without any complaint. It was her further testimony that as Vehicle Centre they had honoured all their obligations and even went further by having vehicle repaired at "*good will claim*". Vehicle was even driven from Kitwe to Lusaka at the Defendants expense and handed over to client.

It was her further testimony that the relationship between Vehicle Centre and Ford is that Vehicle Centre is authorised dealer for Ford in Zambia. The warranty was explained to the customer as evidenced by document no. 1 at page 1 of the Defendants bundle of documents.

She wrapped up her evidence by stating that assuming that if all the spares were in stock, it could have taken maximum of 2 weeks to complete the repairs.

Cross examined by Senior Counsel Mrs. Harawa – and in so far the answers were not repetitive, it was her testimony that she only learnt about complaint upon receipt of letter from the Plaintiffs Advocates.

The day to day business at Kitwe is handled by the Branch Manager there unless there is need to contact her. She denied any blame on the part of the Defendant since all procedures were followed.

The spare parts manager who is based in Lusaka is responsible for purchase of all spares. Some of the services that are offered by the Defendant are service and maintenance of vehicles, selling of spare parts bought from manufacturers.

She did not expect an engine over heat seizure if it is regularly serviced. They did not have in stock a fuel pump which is a very expensive component. The time line was that engine was received on 11th October, 2013, the subsequent spares were received on 14th November, 2013.

The manufacturer supplies what he has whilst other parts are sourced from other suppliers. According to her, it is not correct to assert that there was no sense of urgency as orders were made promptly and items had to be delivered to Zambia.

Their records show that the vehicle was not regularly serviced. She stated that the computer operator had selected a wrong selection of the work done. She could access the document but it was not before Court.

She was not aware of turbo chargers being replaced (though witness subsequently testified that there was a turbo charger supplied to vehicle) as there was no evidence to that effect.

According to entry at P2 of repair under warranty on 10th October, 2013 under mileage it remained at 25750 which is the same mileage recorded on 5th July, 2013. She could not tell whether the vehicle was not moving during that period or not as she was not there.

It was her testimony that the record shows that between 5235 km and 25, 750 km there is no record of any service. The client therefore did not qualify for warranty. Client was not informed as there was no need. In any event repairs were done under the Good Will Claim". It was not a cheap but expensive repair.

If all spares were available it could have taken 2 weeks to fix the vehicle. However, 6 months is not unreasonable taking into

account all the circumstances of the case. She had no idea why it took long to inform client as there was no record.

She denied knowledge of one Sandra and could only verify after checking records. She denied that Plaintiff had been told that the Defendants Kitwe office had qualified staff to handle their own challenges. It was her testimony that she was responsible for the company and was the one to get involved if problems were not resolved.

Re-examined by Senior Counsel Mrs. Chanda – she testified that parts which are used regularly are stocked; these include brake pads, shock absorbers. She revealed that they carry approximately 3000 "lines item". That it was not possible to carry every single part that is on a vehicle.

The manufacturer is based in RSA. Most of the components would be secured from the suppliers who could be based in RSA or elsewhere in the world.

It was her testimony that service history tells them when the vehicle went and subject and in reference to actual documents produced and value of work done, service history is just a summary of what has been done on the vehicle. She concluded by stating that she had never seen any documentation from either the Kitwe or Lusaka officers in respect of complaint.

The defence rested.

The parties filed written submissions. It was submitted by the Plaintiff:

(1) (a) **That there was a valid contract for the Defendant to repair the Plaintiffs vehicle and an implied term to do the same within a reasonable time**.

In support of that proposition Counsel referred to the case of ***Robophone Facilities Limited v. Blank [1906] 3 All ER 128*** and also to the Learned authors of *Chitty on Contracts 22nd Edition, Vol. paragraph 6226* where they state as follows:-

> *"A contract may be inferred from conduct as by a person getting into an omnibus, hailing a cab or going on a board or infers steamer. The Law implies or infers from the facts that the parties have actually entered into a legal obligation containing certain stipulations. Thus if I employ a person to do any business for me or to perform any work the law implies that I undertook or contracted to pay him a reasonable reward for his labour"*

(b)**Status of Warranty**

It was submitted that the Plaintiff did not sign the invoice as means of accepting the conditions of sale 1st mandatory vehicle and the manufacturer's vehicle warranty.

I will summarily deal with this limb of submission.

The invoice which alluded to the warranty and disclaimer appearing at page 2 of the Defendants bundle of Documents was indeed not

signed. The impeccable evidence from PW1 and PW2 is that the witnesses were aware about the warranty. Their only complaint was that it had taken too long (i.e 6 months to repair the vehicle). I do not therefore accept the proposition that the Plaintiff did not accept that the conditions under warranty and disclaimer did not apply. The Plaintiffs pleadings in paragraph 5 and 7 alludes to the warranty.

The warranty and disclaimer having been acknowledged by the Plaintiff was binding on the Plaintiff. The warranty excluded liability on the part of Ford and its dealer, the Defendant from paying damages or costs

> *".....for any time, or income that you lose any inconvenience that you might be caused*
>
> - *the loss for your transportation or use of your vehicle;*
> - *the cost of rental vehicles, fuel, telephone, travel, meals or lodging loss of personal loss of property, revenue or any incidental and consequential damages you may have"*

The terms were express as to the disclaimer. The Defendant knew about these terms. It is trite law that a document is conclusive and exclusive of what it talks about itself. We cannot go on a voyage of speculation so as to read into the warrant exceptions to the general rule, so as to avoid an otherwise binding contract.

Further, it is encumbent upon the one who is alleging to demonstrate that the warranty and disclaimer fell into the exception

to the doctrine of the sanctity of a document and for the proposition that parole evidence is inadmissible to tend to vary the terms of a written instrument.

It is further trite law that even a bad contract is binding if entered into by persons of legal capacity to contract.

There is no merit in this limb.

(c) **A compromise claim amounting to good consideration**

Referring to the Learned Authors Halsbury of England Vol. 9, 4th Edition on pages194 paragraph 32 it was submitted that a disputed claim may be valuable consideration. He called in aid the following paragraph by the Learned Authors as thus:-

> *"A compromise of a claim which is honestly made whether legal proceedings have been instituted or not constitute valuable consideration, even if the claim ultimately turns and be unfounded"*

It was argued that the contract was supported by valuable consideration in form of the Plaintiff forfeiting their right to sue the Defendant on an honest claim of the vehicles fitness and merchandise quality. The compromise, the argument went being the Defendant's promise to repair the vehicle under warranty.

This argument has no foundation. The evidence is that the Plaintiff did not sue under the warranty. Instead it elected to found their claim on loss of business on account of delay in effecting repairs to the vehicle.

The Plaintiffs Advocates letter of demand of 6th March, 2014 made no mention of claiming under the warranty for a replacement brand new vehicle, instead they demanded for delivery of the same vehicle upon it being repaired.

Further, they claimed for loss of business as aforesaid alleging there was unreasonable delay in effecting repairs and that such complaints were communicated to the Defendant. There is no such documentary evidence on record to support the claim that such demands were made apart from the unsupported evidence of PW1 and PW2.

The only recorded official complaint came from the Advocates in their Advocates letter alluded to.

This limb is destitute of any merit.

Lest the plaintiff forgets the burden of proof lies on he who alleges. This debate was put to rest in the case of ***Khalid Mohamed v. The Attorney General*** [1] where his Lordship Ngulube DCJ as then was artfully put it this way:-

> *"I cannot accept a proposition that a plaintiff should succeed automatically where the defence has failed. It is for the Plaintiff to prove his case, and if the plaintiffs claim fails due to inanition or other reason, he cannot succeed no matter what might be said of the plaintiffs claim. Quite clearly in such circumstances the defendant will not even need a defence"*

(d) **Unreasonable delay in effecting motor vehicle**

The defendant's evidence under this limb was not supported by any evidence other than the word of mouth of PW1 and PW2. No attempt was made to demonstrate the unreasonableness by calling for example independent expert or person from business houses that deal in the same business to foster an opinion as to whether taking into account the damage on the motor vehicle and taking into account all the circumstances of the case, 6 months was unreasonable in which to conclude the repairs.

On the other hand, the Defendant gave a clear and laudable account as what led to the delay in expeditious completion of repair works which included lack of available spare parts in the country which necessitated sourcing from outside the country, discovery of certain components not functioning properly after engine was fixed and period of recess of suppliers.

To this effect, I uphold the Defendants submission and the rightful holding in the case of ***Rio Restaurant Bakery and Service Station v. Long Trading as Broken Hill Panel Beaters***[3] wherein the Court stated that:-

> *"Here we have the evidence of Mr. Riley that in his opinion a reasonable time to complete the job would be two to three months according to the availability of spares; I will therefore give the benefit of the doubt to the defendant and take the longer period as a reasonable time to complete the job (i.e three months) Underlining mine for emphasis only)"*

The Court further proceeded to pronounce itself as follows:-

> *"There was finally the evidence of the defendant of the break failure which he said held them up for another fortnight..... I must give the defendant the benefit of doubt and accept his evidence on this point and I would therefore allow a fortnight's delay to be added to what was reasonable time"*

There does not exist any reason why I should depart from this decision of the High Court of equal jurisdiction. I endorse it and adopt it as my very own on the issue at hand.

There is no force under this limb.

(2) (a) **Exemption clause being ambiguous**

It was submitted that exemption clause was ambiguous. This is far from the truth. The terms in my view a categorical emphatic and plain and need no interrogating. The test is simply that;

> *"what would an ordinary person who rides on a minibus or omnibus from Kulima Tower to Chelstone picking the warranty alluded herein what is he going to say it talks about itself"*

I am certain the ordinary person will have no hesitation to proclaim that the disclaimer and exemption clause is clear.

Counsel then called in aid and made capital of the case ***Zambia Horticultural Limited v. Tembo***[2]. This is the case where the appellant agreed to store chickens for the respondent in the cold room. However the temperature in the cold room was too low and

the chickens went bad. In response to a suit, the appellant produced a letter containing the clause

> *"The company will bear no responsibilities on the conditions of the commodities stored in the cold room by yourselves"*

The appellant argued that the letter exempted it from liability by negligence. The Court of final resort held that the words used in the purported exemption clause were certainly not enough to cover the defendants own negligence. (Underlining mine for emphasis only)

This authority least assists the plaintiff. Firstly, in the case in casu, the action is not anchored on negligence. The pleadings do not reveal so. In any event, in a claim of negligence, particulars of negligence must be specifically pleaded. The ingredients of negligence which the plaintiff must prove were succinctly enunciated in the case of ***Donoghue v. Stephen [1932] AC 562***.

The case of ***Curtis v. Chemical Cleaning Co.***[4] is instructive. In that case the plaintiff took a wedding dress to be cleaned by the defendants. She signed a piece of paper headed "receipt" after being told by the assistant that it exempted the cleaners from liability "for damages howsoever arising" (underlining mine for emphasis). The dress was returned badly stained. It was held that the cleaners could not escape liability for damage to the material of the dress by relying on the exemption clause because the scope had been misrepresented by the defendant's assistant.

The Court refused to uphold the exclusionary clause on the basis that it had been misrepresented to the plaintiff.

In the case in casu, there is no such allegation as fraud or misrepresentation. In the case of ***L'estrange v. Graucob***[5], the Court stated as follows:-

> *"Where a document containing contractual terms is signed then in the absence of fraud or I will add, misrepresentation, the party signing it is bound and it is wholly immaterial whether he has read the document or not"*

In my view that position also prevails where like in this case, the Plaintiff had the personal knowledge of the exemption clause, warranty or disclaimer. It is immaterial if the plaintiff elected not to read it or to ignore it or not.

Exemption clauses – contra proferentum rule

I accept that as a general rule, exemption clauses are construed ***Contra proferentum*** the maker. The position was however clarified in the case of ***Price Waterhouse v. University of Keele***[6], where the Court concluded that "*the contra proferentum rule does not apply if the clause has a clear meaning*".

(b) **Whether damages are due**

The learned authors of the Common Law Library No. 9 in paragraph 1102 say the following on "Damage and Damages"

"Damage" *may be defined as disadvantage which is suffered by a person as a result of the act or default of another.*

"Injuria" *is damage which gives rise to a legal right to recompense, if the law gives no remedy there is* ***damnum absque injuria*** *or damage without the right to recompense. The meaning damage in a statute is a matter of construction.* ***Damages*** *are the pecuniary recompense given by process of the law to a person for actionable wrong that another has done to him.*

Damages distinguished from other kinds of money payments

Damages as defined in the previous paragraph are distinguishable from debt or from a sum payable under contractual or liability to pay a sum certain on a given event (other than breach) but include sums payable under claims under insurance policy when the quantum of damages has been proved. Damages are also distinguishable from compensation from a penalty and form costs"

At paragraph 104 ***Measure of "damage"*** *or* ***"Measure of damages"*** *or* ***"measure of damage"*** *is concerned with the with the legal principals governing recoverability, remoteness, being the negative aspect of this measure. The assessment of quantum of damages not being concerned with legal principles is distinct from measure of damages.*

*At paragraph 1105 "**Damages as ingredient in the wrong suffered**". In those torts which have been developed from the action on the case, such as negligence or nuisance, proof of actual damage is an essential ingredient in the cause of action. Another example is slander (other than libel which is actionable per se). A breach of contract or an infringement of an absolute right is actionable per se and no actual damage need be proved, if none is any damage will usually be nominal"*

It is clear from the works of the Learned authors that for there to be damages to recompense a party there must be a breach of a legal right or some default which results in proven injury on the part of the claimant.

In the absence of breach of a right or failure to prove negligence in respect of a recognizable breach of duty and care even if the one suffers an injury, such injury will be remediless. This is what is referred to in the legal parlance as "*damnum absque injuria*". Put differently damages without recompense.

The rationale is that one of the functions of pleadings is to alert the opponent as to what is being alleged against him so that he knows what case he is to meet and by what evidence. There is a conspicuous absence of those critical particulars.

Secondly, in a tort of negligence a clear duty of care should be established and further, the claimant must demonstrate that because of the breach of duty, the claimant suffered damage which is a direct consequence of the breach of care. This burden has not

been pleaded and Counsel for the plaintiff is seeking to sneak in a claim anchored on negligence when the same was not specifically pleaded.

(3) (a) **Remoteness of damages**

It is trite law that the term "consequential loss" refers to loses which would be recoverable only under the "second limb" of the test of remoteness. The English case of ***Hadley v. Baxendale***[7] is instructive. In that case the Court stated as follows:-

> *"The damages should be such as may fairly and reasonably be considered either aiding naturally i.e according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract and probable result of breach"*

I have already in one of the preceding paragraphs observed that the warranty and disclaimer or exemption clause having been in place extinguishes any claims in respect of the categorical loses specified in the said exemption clause. However, if I were said to be wrong, there is no evidence from the plaintiff that the defendant knew that the vehicle was to be specifically utilized in hiring business.

I am fortified in this view by PW1's evidence that when the defendant was contacted for a replacement or relief motor vehicle, the defendant clearly stated that there was no such provision under the warranty.

The English case of ***Victoria Landry (Windsor) Ltd v. Newman Industries Ltd*** is instructive; it was stated in that case as follows:-

> *"the test for remoteness was whether the loss reasonably foreseeable as liable to result from the breach"*

On the foregoing, I have come to the only irresistible conclusion that the plaintiff has palpably failed to prove its case and it fails on all claims.

The costs are for the defendants to be taxed in default of agreement.

Delivered under my hand and seal this 28th day of May, 2018

Mwila Chitabo, SC

JUDGE