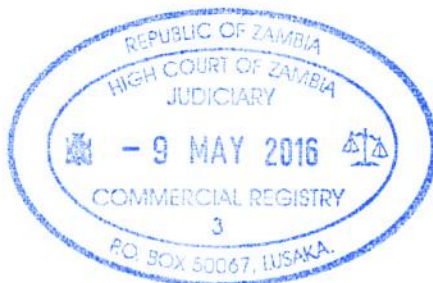


IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2014/HPC/0053

**BETWEEN:**

PETER JOHN NEL  
AND  
UKZED CARS LIMITED



PLAINTIFF

DEFENDANT

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC  
AT LUSAKA IN CHAMBERS**

For the Plaintiff: Mr. Alfred Roberts  
*Alfred Roberts & Company*  
For the Defendant: Mr. Paul G Katupisha  
*Messrs Miler Katolo & Associates*

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**JUDGMENT**

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**Legislation referred to:**

1. Sale of Goods Act, 1893

The Plaintiff's claim is for:-

1. Payment of the sum of ZMW60,200.00 being monies paid to the Defendant from the purchase of a Range Rover Motor Vehicle which the

Defendant has failed to deliver to the Plaintiff, with interest therein at bank lending rate from 2<sup>nd</sup> October 2012 until final settlement.

2. Damages for breach of an implied warranty that the said Motor Vehicle was in good and roadworthy contract when in fact not.
3. Damages for breach of contract or non-delivery.
4. Further or other relief as the Court deems fit.
5. Costs.

The undisputed facts are that the Defendant is in the business of importing second hand vehicles from United Kingdom for sale to local customers in Zambia. In or about September 2012 the Plaintiff approached the Defendant with a view to purchasing a Range Rover 200.

The Defendant sent eight (08) pictures of a selection of motor vehicles from an on-line inter-net car outlet in the United Kingdom called "*Auto trader*" to the Plaintiff.

A contract was then entered into between the Plaintiff and the Defendant whereby the Plaintiff paid to the Defendant the sum of K60,000.00 to attend to the importation and delivery of a second hand Range Rover 200. The Defendant admits receiving the amount of K60,000.00 aforesaid.

To date the Defendant has not delivered the said Motor Vehicle to the Plaintiff as agreed, for the reason that the said Motor Vehicle broke down in the United Kingdom and was never shipped to Zambia.

In a letter dated 13<sup>th</sup> February 2013 addressed to Charley's Debt Collection Enterprises appearing at pages 9 and 10 of the Plaintiff's Bundle of Documents it is stated as follows:-

2. *"Our instructions were to verify that the vehicle was in good working condition and thereafter, if in good working condition, proceed to purchase and ship to Zambia.*
3. *As per our client's instructions, we engaged a recognized assessor to assess the vehicle and who verified to us that it was in good working condition for a used car.*
4. *The dealership that the client found stated that the vehicle had a warranty and we had no cause to suspect otherwise. At no point did we state to the dealership that we did not want a warranty for the vehicle. Unfortunately, the warranty was not issued upon purchase of the vehicle".*

The letter ends by stating that: *"To respond specifically to your demand, we wish to reiterate that we are ready to take a loss as a company and refund the client the sum of ZMW 60,000.00. We hereby formally undertake to refund the client the amount of ZMW 60,200.00 within a period of six (06) weeks from the date of this letter".*

The above facts are documentary evidence and not in dispute.

At trial the Plaintiff called two (02) witnesses. The first was **Mr. Peter John Nel** the Plaintiff herein. He testified that he did not select the vehicle from the



list provided by the Defendant but that he chose a Range Rover 200 from the same Autotrader, and requested the Defendant to deliver this Motor Vehicle to him in Lusaka Zambia. He stated that he did not have any direct or indirect dealings with the foreign supplier. He stated *inter alia* that before he committed himself he requested **Mr. Minez Mc Killigan** the Defendant's Managing Director to ensure that the subject vehicle was inspected by assessors based in the UK to be appointed by the Defendant who should confirm that the vehicle was in good condition and road worthy. He further requested **Mr. Minez Mc Killigan** to ensure that the vehicle would be purchased with a warranty from the foreign supplier and the Defendant agreed to this.

Subsequently he was assured by **Mr. Minez McKilligan** that the subject vehicle had in fact been assessed by the Defendant's assessors in the United Kingdom and was found in good condition and roadworthy and that it would be purchased with a warranty from the foreign supplier. He then paid the Defendant the sum of K60,200.00 on 2<sup>nd</sup> October 2012, paid partly by cheque and partly by bank transfer. On 6<sup>th</sup> September 2012 the Defendant issued the Plaintiff with Invoice No. ZC0024 for total sum of K62,340.00 which included charges for port-to-port shipping from the United Kingdom to Wavis Bay, Namibia, pick-up, storage, full check up, full valet and service charge, as indicated at page 1 of the Plaintiff's bundle of documents. He submitted that since he paid for the vehicle the Defendant has breached the Contract for non delivery and for breach of an implied warranty that the said vehicle was in good and road worthy condition when in fact not.

The second witness for the Plaintiff was **Mr. Charles Sampson** a Debt Collector operating under the name and style of **Charley's Debt Collection Enterprises**. He testified that in February 2013 the Plaintiff engaged him to recover a debt of ZMW60,200.00 from the Defendant **UKZED Cars Limited**. Accordingly on 12<sup>th</sup> February 2013 he wrote to the Defendant demanding refund of ZMW60,200.00 in addition to his collection fees of ZMW K2,020.00 being 10% of the principal sum as indicated at page 13 of the Plaintiff's bundle of documents. He delivered the letter to **Mr. Minez Mc Killigan**, in the company of the Plaintiff.

After reading the letter **Mr. Mc Killigan** informed him and the Plaintiff that he needed to consult his lawyer before he could reply. He collected the letter from the Defendant on 13<sup>th</sup> February 2013 which appears at pages 9 and 10 of the Plaintiff's bundle of document; the contents of which are self explanatory.

On 19<sup>th</sup> March 2013 he received a telephone call from **Mr. Minez Mc Killigan** who was in the United Kingdom advising him to meet his uncle to negotiate a settlement. He met with the uncle, a **Mr. John Kasongo** on 26<sup>th</sup> March 2013 at Down Town Shopping Mall to try and negotiate the terms of the settlement.

Both witnesses were cross-examined by the Defendant but the cross-examination did not challenge the content of the evidence. The evidence as presented by the Plaintiff remains unchallenged and in fact is corroborated by the Defendant's documentary evidence as appears in the letter authored by the Managing Director of the Defendant **Mr. Minez Mc Killigan** dated 13<sup>th</sup>



February 2013, appearing at page 9 and 10 of the Plaintiff's bundle of documents.

A request for an adjournment of the case at trial for the reason that the client was in the UK was declined for lacking in merit.

As the record will show no defence witnesses were called to testify, save for the witness statements of the Managing Director **Mr. Minez Mc Killigan** and the Sales Director **Ms Victoria Mutale**. These statements were not formally tendered into evidence leaving the Defendant's evidence as mere pleadings unsupported by real evidence. I cannot therefore place any reliance on the witness statements. In any event the statements support the Plaintiff's case in material respects. A perusal of the witness statements show that they did not dispute the contents of the Defendant's letter dated 13<sup>th</sup> February 2013 addressed to **Charley's Debt Collection Enterprises** in which the Defendant admitted the debt and undertook to give a full refund to the Plaintiff. In the same letter the Defendant admits that their instructions were to verify that the vehicle was in good working condition, and if in good condition proceed to purchase and ship the vehicle to Zambia.

Specifically in the last paragraph of the letter the Defendant states:- *".....we wish to reiterate that we are ready to take a loss as a company and refund the Client the sum of ZMW 60,200.00"*.

In addition the Plaintiff's instructions to the Defendant included a request to obtain a warranty from the foreign supplier. It turns out that the Defendant did not obtain a warranty as requested.

From the facts outlined in this case the evidence establishing the liability of the Defendant is clear and abundant. This was a transaction where money was paid on a consideration which had wholly failed in a contract for the sale of a Motor Vehicle. The right of the Plaintiff to have the purchase price refunded cannot be challenged on any account. There was here a failure by the Defendant to deliver the Motor Vehicle sold to the Plaintiff within the ambit of the relevant provisions of the **Sale of Goods Act, 1893**.

Contrary to instructions and as agreed, the Defendant breached the contract for non-delivery of the subject vehicle and breach of an implied warranty that the vehicle was in good and road worthy condition.


In the event, I enter Judgment in favour of the Plaintiff in the total sum as invoiced of K60,200.00 for failure to deliver the Motor Vehicle as agreed as well as 10% collection charges due to **Charley's Debt Collection Enterprises** to be refunded by the Defendant to the Plaintiff with interest at the current Bank of Zambia commercial lending rate from the date of payment i.e. 2<sup>nd</sup> October 2012 to date of refund.

2. I also order damages for breach of an implied warranty that the said vehicle was in good and road worthy condition when in fact not.

3. Costs shall follow the cause, and are awarded to the Plaintiff, to be taxed in default of agreement.

Right to Appeal granted.

Dated this 9<sup>th</sup> day of May .....2016

  
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**Prisca M. Nyambe, SC**  
**JUDGE**