IN THE HIGH COURT FOR ZAMBIA **2014/HP1507**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

RTD COLONEL BERNARD M.KUNDA **PLAINTIFF**

VS

RASHID BUTT **1ST DEFENDANT**

DELL MOTORS LIMITED **2ND DEFENDANT**

BEFORE HONORABLE JUSTICE MR. MWILA CHITABO, SC

For the Plaintiff: *Mrs. C. K. Mulenga of Messrs CMK Associates*

For the 1st and 2nd Defendant: *Ms. N. Mbuyi of Messrs Ituna Partners*

JUDGMENT

Cases Referred to:

1. Hughes v Metropolitan Railway (1876-77) LR 2 App Cas 439

2. Charles Rickards Ltd v Oppenheim (1950) 1KB 616

This matter was instituted by way of writ of summons accompanied by a Statement of Claim. The Plaintiff claimed the following reliefs:

a) A refund of K45,177,600, in old currency, being monies given to the Defendants for the repair of a minibus registration No. ABT 427

b) K363,220,000, in old currency, for the loss of business during the three year period the vehicle was not earning the Plaintiff an income

c) Damages

d) Interest at the prevailing bank rate

e) Costs

For ease of reference all amounts will be referred to in the current currency. In the Plaintiff's Statement of Claim it was averred that on 10th December, 2010, the Plaintiff's Coaster minibus Registration No. ABT 427 was involved in a road traffic accident with a bus belonging to Mazhandu Bus Services. The damages were duly assessed and the Defendants took up the repairs. The 1st Defendant towed the vehicle to his garage in Makeni from the Plaintiff's home in Woodlands on 13th January, 2011.

According to the claim the vehicle had the following accessories

(a) One ignition Key
(b) Six wheels
(c) Three mirrors

It was further averred that when the motor vehicle was finally collected from the 3rd garage, the following items were missing:

(a) One wheel complete with a rim

(b) Speed limiter

(c) Alternator

The agreed period for the repairs was 6 weeks which was the period between 13th January and 22nd February, 2011. It was further averred that on the 5th of April, 2011, the 1st Defendant pleaded with the Plaintiff to advance him some money to quicken the repairs and the Plaintiff released K12, 960 which cheque was drawn from Finance Bank Longacres. On 17th June, 2011 the 1st Defendants requested for a further K4, 000 in cash.

On 21st November 2011, the 1st Defendant asked for the balance of the money paid to the Plaintiff by the Insurance and he was given a cheque in the sum of K28, 217.60 which cheque was drawn from Zambia National Commercial Bank Civic Centre Branch. The total of the monies paid to the 1st Defendant amounted to K45, 177.60.

He revealed that upon realizing that no works were being done on the vehicle and the spare parts promised by the 1st Defendant were not found, the Plaintiff reported the matter to Central Police. On 27th January, 2012, the parties entered into an agreement whereby the parties agreed that the repairs shall be completed by 3rd February, 2012 and if in abrogation the Plaintiff would be free to litigate.

The agreement was signed by the Accountant of the 2nd Defendant and witnessed by the 1st Defendant. He further claimed that on 2nd March, 2012 the Plaintiff wrote a letter to the Defendants to which there was no reply. Further that on 25th

October, 2012 the Plaintiff reported the matter to the police again but still nothing came out of it.

The Statement of Claim further revealed that the parties met physically but the only thing that came out was that the 1st Defendant insulted the Plaintiff and challenged him to a fight. The 1st Defendant was spoken to by the Police and he agreed to take the vehicle to a garage owned by a Mr. Bobo. The agreement was that he pays for the panel beating and other repairs but once the vehicle left Dell Motors, the Defendant refused to honour their obligation.

The vehicle was then taken to another garage owned by a Mr. Ngosa in Emmasdale but the said Mr. Ngosa was never given any money and the Plaintiff ended up paying K2,700just to have the bus released. It was the Plaintiff's contention that in order to salvage the bus and as the years were passing the Plaintiff decided to take the vehicle to a garage in Libala on 9th September, 2013 where he was charged K550 to have the bumper and grill bought by the Plaintiff fixed. It was revealed that the vehicle was in the garage for over 3 years without being fully repaired. That the said vehicle was a public service vehicle and was used by the Plaintiffs family to earn an income.

In their defence, the Defendants filed in their defence where they admitted that they took up the repairs of the vehicle but the Defendants were not aware of the assessment that took place as the same was within the peculiar knowledge of the Plaintiff. It was their contention that it was the 2nd Defendant who hired a

private break down to tow the vehicle to the 2nd Defendant's garage in Makeni from the Plaintiff's home in Woodlands.

He admitted that the vehicle had one ignition key and six wheels but contended that the 2nd Defendant repaired the vehicle as agreed but the Plaintiff was not impressed with the small touch ups on the right hand side of the driver's door. It was further contended that the repairs were indeed agreed to be done within 6 weeks. However, the agreement between the Defendants and the Plaintiff stated that 50% of the cost of repair was to be paid before the commencing of any repairs on the vehicle and the remaining 50% when the repairs reached half way. Thus the period of repair depended on whether or not the Plaintiff was going to fulfill his obligations to remit the money in accordance with the agreement

The Defendants stated that they would aver at trial that only a sum of K4, 000 was advanced to the Plaintiff which was not enough to commence the repairs. That when the 2nd Defendant called the Plaintiff concerning the money as agreed but the Plaintiff responded by stating that he could not advance the whole 50% because he needed to raise money as he was waiting for his house in Kabwe to be sold before he could pay the 50%.

It was their contention that the Plaintiff was paid by the insurance company but he had used up the money and that was why he delayed in fulfilling his obligations according to what was agreed. Accordingly, the repairs only began 5 months later which meant that the 6 weeks agreed period for the repairs was open. They admitted that the spare parts for the vehicle were promised

by the 2nd Defendant. However, the headlights were not available in Zambia and thus they needed to be ordered from Dar-es-salaam but the supplier could not wait for 30 days and he sold them. They said the Plaintiff was aware that they were coming from Tanzania and that was why they delayed.

The Defendants denied receiving any letter from the Plaintiff and stated that when the matter was reported to the police, the police visited the premises of the 2nd Defendant and inspected the vehicle and found it complete and that was why nothing came out of the report.

They stated that the Plaintiff never returned to the premises of the 2nd Defendant after. The Defendants averred that the claim for a refund was unreasonable in that a sum of K12,000 was refunded to the Plaintiff in the presence of a police Officer and further that Mr. Bobo was paid by the Defendants for the touch ups on the door. According to the Defendants, they were not aware of the 3 years loss of business because the vehicle only stayed in the premises of the 2nd Defendant for 8 months. In view of the foregoing the Defendants denied each and every allegation contained in the statement of claim.

When the matter came up for trial the Plaintiff gave evidence and testified that sometime in December 2010 his Coaster Bus Registration No. ABT 427, a public service vehicle, was involved in a road traffic accident. The insurance company with whom the said vehicle was insured paid him his claim amounting to over K45, 000. On 13th January 2011, the 1st Defendant, who was

Director in the 2ndDefendantCompany and is now deceased, went to his home and collected the vehicle for repairs.

The 2nd Defendant was one of the registered garages with the insurance company. The vehicle was towed from the Plaintiff's residence in Woodlands to the 2nd Defendant's garage in Makeni. The said vehicle had two rear view mirrors, one cabin mirror, one ignition key and a key holder which items were signed for by the driver towing the vehicle.

It was his testimony that the agreement for the repairs to be concluded was within six which was from 13th January, 2011 to 22nd February, 2011. A month later the 1st Defendant asked the Plaintiff for an advance payment so that he could finish repairs on time and the bus could be back on the road. He then wrote a cheque of K12,000in the 2nd Defendant's name. A few weeks later the 1st Defendant asked for more money because the initial money had run out. The plaintiff the advance him a further sum of K4, 000.

The 1st Defendant is said to have returned to the Plaintiff a third time but he did not want to give him the money because he was of the view that the progress on the repair works was not matching. When the Plaintiff noted that the parties were entering a stalemate, he gave him a final cheque for the sum of 28,217on 21st November, 2011 and the total amount given to the Defendants came to over K45, 000. The Defendants are then said to have disappeared because the Plaintiff could no longer get through get through to their phones. When he went to the 2nd Defendant he could not locate the 1st Defendant.

He testified that a little over two months from the date he was give the last cheque, the Plaintiff accidentally bumped into the 1st Defendant at his office and asked him why he had become so elusive and he did not give a satisfactory response. According to the Plaintiff the 1st Defendant was with a woman who was crying and complaining that the previous year she paid to have her vehicle repaired by the Defendants but the same had not been done.

This incident prompted the Plaintiff to report the matter to the Police and two police officers accompanied him to the Defendants' garage where the Plaintiff explained what had transpired and the 1st Defendant requested for a few days to put the spare parts on the bus. The Plaintiff objected to this and demanded a full refund as he wanted to take the vehicle to another garage. The 1st Defendant told him that that was not possible as the money had already been used to buy spare parts.

The 1st Defendant then proposed an agreement which stated that he be given 7 days for him to complete all the repairs, failure to which the Plaintiff was at liberty to claim for loss of business. He referred to this agreement on page 11 of the Plaintiff's bundle of documents which highlighted that the Plaintiff's vehicle would be ready for collection by the 3rd of February, 2012 which was seven days from the date of the agreement. This agreement according to the Plaintiff was signed by himself as well as the 1st Defendant.

It was his testimony that seven days later it was found that nothing had been done to the vehicle and the Plaintiff reported the matter at Castle Police Post. He was given a call out which he

served on the 1st Defendant. He referred to this call out on page 13 of the Plaintiff's bundle of documents which instructed the 1st Defendant to report to Castle Police Post on 26th October, 2012 at 10:00hrs.However, the 1st Defendant did not report to the Police and when he followed him to his garage he found that his vehicle was not there. Upon enquiry to the 2nd Defendant's accountant, he was informed that the Vehicle had been moved to a Mr. Bobo's garage.

He was given direction to the same garage and a number to call. He called the number and was informed that in fact the vehicle was there and that the said Mr. Bobo had entered into a contract to with the 1st Defendant to complete the works on the vehicle. After a month he went there and found that the vehicle had not been worked on because Mr. Bobo had found it difficult to source the spare parts required. The Plaintiff then informed him that he had paid all the money to the 1st Defendant for the spare parts. According to the Plaintiff Mr. Bobo went to the store room and brought back two second hand head lamps that the 1st Defendant had given him.

The Plaintiff testified that he then called the 1st Defendant and queried him over the same with no satisfactory answer. He told him that he would tell Mr. Bobo to take the vehicle back to his garage since he was not releasing the money for the required repairs. He said the 1st Defendant expressly told him that he did not want to see that junk in his garage again and he cut the line.

The Plaintiff asked Mr. Bobo to continue with the repairs. When he went back a month later he was informed that the 1st

Defendant had gone there with an electrician to do the repairs but they did not finish. He was then told that a Mr. Ngosa from Emmasdale was ready to finish the repairs. The Plaintiff said he was not happy with this information as the agreement had already been made without consulting him. The bus was then driven to Mr. Ngosa's garage and the Plaintiff was informed that the 1st Defendant said he would pay for all the requirements.

However, after sourcing the spare parts, the 1st Defendant failed to pay Mr. Ngosa the money. He testified that two months later, the 1st Defendant still had not paid Mr. Ngosa the money. Mr. Ngosa explained to him that the 1st Defendant was going to be difficult bas regards the money. He then advised him to take the vehicle for fear of it being vandalized which the Plaintiff grudgingly did. The Plaintiff had to pay him the sum of K2, 700 and then took the vehicle to another garage called Muchimuchi in Lusaka where he was asked to buy a grill, bumper, headlamps and pay for labour which all came to the sum of K550. Pages 16 to 19 of the Plaintiff's bundle of documents showed the various receipts for the various spare parts that the Plaintiff bought as well as payment of labour to the garage.

The Plaintiff testified that as these repairs were going on he noticed that one of the tyres on his vehicle was missing and replaced with an improperly fitting one. He said he was not sure which garage was responsible for this. He further noticed that the speed limiter was missing. On 9th September, 2013, the Plaintiff took the vehicle home as his son drove it and further noticed that

the internal and two rear view mirrors were missing as well as other small things like wiper blades.

He stated that because of the time that the vehicle was not operating he had to explain to the Zambia Revenue Authority (ZRA) so as not to pay charges. He was asked to get a letter from the garage where the vehicle is said to have been. The 1st Defendant refused to give him such a letter but Mr. Bobo and Mr. Ngosa did. ZRA however still charged him the sum of K800to clear the vehicle and pay for vehicle licensing with the Road Traffic and Safety Agency (RTSA).

It was the Plaintiff's testimony that the vehicle was in the hands of the 1st Defendant from 13th January, 2011 to 9th September, 2013 which according to him was a total of 974days. He said this vehicle used to earn him the sum of K280which came to over K265,000 lost for that period. He asked the Court to ask the 1st Defendant to:

a) Refund the Plaintiff as he failed to repair the vehicle
b) Pay the Plaintiff over K265, 000 for the period of K947 days which ever was easier.
c) Pay for the speed limiter which was missing and costs K1,900
d) Replace the rim and tyre that was missing which costs K1, 400.
e) Replace the mirrors which K360 for all three of them.
f) Interest on the award at the current bank rate
g) Any other reliefs that the Court deems fit for the Plaintiff's suffering.

In cross examination the Plaintiff explained that he was given the sum of K32, 400 by his insurance company and Mazhandu Bus Services gave him K12,000 for the excess. He said there was a verbal agreement between the Plaintiff and the Defendant with respect to the time within which to fix the vehicles. He said it was agreed that he pays 50% of the costs or repairs which money he paid immediately it was requested for.

He further clarified that the vehicle was collected on 13th January, 2011 and taken to the 2nd Defendant. He said according to the page 7 of the Plaintiff's bundle of documents the 2nd Defendant was paid out by a cheque dated 21st November, 2011. He confirmed that this was a period of 11 months and two weeks. He stated that the document on page 9 of the Plaintiff's bundle of documents was a statement by the 2nd Defendant's accountant as to how the figures should run. He stated that the initial amount was K52, 617.60and after a K4, 000 discount the amount came to about K48, 617.60.

The Plaintiff explained that the initial payment was K16, 000 and eventually there was a cheque of K28,217 which left a balance of K4,000. He said the K4, 000 was where the tax was provided for. According to him, the first amount of K12, 960 was paid to Dell Motors on 5th April 2011, three months after the vehicle was collected. The next payment was on 17th June, 2011 which was a sum of K4, 000. This was six months and five days from the date the vehicle was collected. The third amount was by a cheque in the sum of K28, 217.

The Plaintiff denied there being any agreement that he pays 50% of the repair costs. He emphasized that he was under no obligation to pay for the repairs or spare parts and him doing so was at his discretion. He said there was a verbal agreement that the Plaintiff should pay after all the repairs were done. He further stated that the said repair works were to be completed within six weeks. He added the 1st Defendant did not make any refund to him for the advances given to him for the repairs. He denied owing a house in Kabwe.

He stated that he used to previously make K280 per day. He said he wanted the Defendants to pay for the missing parts because they were responsible for the safety of the vehicle form the day it was in their custody. He said he did not ask Mr. Ngosa about the missing parts because it was the 1st Defendant who was responsible for the vehicle. He however explained that he did not ask him also about the said missing parts and was not sure if he was aware about their missing or not.

In re-examination the Plaintiff told the Court that there were two major contracts with respect to the repair of his vehicle. The first one was that the repairs would be concluded within a period of six weeks. Secondly, after it was apparent that the vehicle would not be repaired the 1st Plaintiff entered into an agreement that the repairs would be done within one week. He said he paid for the repair of the vehicle in the total sum of K 45,177and none of this money was ever refunded to the Plaintiff.

The plaintiff closed its case without calling any witnesses. The 1st Defendant gave evidence on oath and called three witnesses to support his case.

DW1 was the 1st Defendant who testified that he was the Director in the 2nd Defendant. The issue with the Plaintiff began when the Defendants gave a quotation to an insurance company for the repair of the subject vehicle. He said the said vehicle was very damages as it had a front impact requiring it to have windscreen, 2 headlights, 2parking lights, front bumper, grill and the electrical system.

Two months after giving this quotation, the insurance company contacted the Defendants and requested them to tow the vehicle from the Plaintiff's house which he did. A few days later, the Insurance Company informed the Defendants that the Plaintiff was demanding that the payment for the repairs be paid directly to him. He testified that on contacting the Plaintiff months later he told him to meet at Ndeke hotel to collect the 50% deposit for the total cost of repairs. He said on meeting the Plaintiff he was drunk and also offered him beer. After a moment of hesitation the Plaintiff finally issued a cheque to the Defendants in the sum of K12,960.

He reminded the Plaintiff that the agreement was that he pays half of the repair cost which should have been about K23,000. The Plaintiff pleaded for an extension of 3 days to organize the balance which he failed to do. He then told the Plaintiff that the agreement to finish the repairs within 6 weeks was null and void due to his failure to pay the 50% deposit as promised.

He testified that due to the Plaintiff's failure to pay the required deposit, the spare parts that were secured by the 2nd Defendant from Mad Max Auto Spares were sold and the Plaintiff was informed of the same and was asked to source them himself. The plaintiff agreed to source the spare parts but failed to source them and went back to the Defendants work shop where the Plaintiff, in his drunken state, assaulted the 2nd Defendant's accountant, a handicapped person. He then went to the work shop and went to beat the panel beater violently causing damage to both his clothes and his life. The Plaintiff then exited the building and drove off.

It was his testimony that 40% of the works had been done on the vehicle which included:

a) The two windscreen pillars
b) Lower bottom windscreen panel
c) Inner bus floor

From the Plaintiff's last visit the Defendants stopped the repairs and made several calls to him to meet the remaining sum on deposit to enable them resume repairs. He said the Plaintiff's only response was that he did not have money. They resumed works on the vehicle when the Plaintiff the second sum of K4, 000 which money was paid on June 17th, 2011. The said amount was insufficient to buy any materials towards the repair of the vehicle because the 2nd Defendant had a lot of material in stock which they were using on his bus and the K4, 000 had no meaning as a deposit.

From then the Plaintiff went to the work shop every two to three days. The Plaintiff was informed of the position in his drunken state and when he was queried as to why he used insurance money he said he gave it to the wife to start a business. The third installment was paid on 21st November, 2011 and the Plaintiff demanded that they sign an agreement that the vehicle would be ready in two weeks' time. Before the expiration of the said two weeks the Defendants called the Plaintiff to collect the vehicle.

The Plaintiff is said to have made approaches to extort money from the company and he complained with respect to the works done on the right side of the bus, front windscreen pillar and the right hand side small area of the driver's door. Due to this complaint the Defendants repeated the job at their own cost trying to please the Plaintiff which failed. They asked him what was the way forward to please him and the Plaintiff walked away and reported the matter to Central Police.

The Plaintiff went to the Defendants' premises with an officer from Frauds Department and the Plaintiff demanded a refund in respect of the right side and front windscreen on the vehicle. They made an agreement to pay the Plaintiff the sum of K8,000 cash and that he would be paid that evening in the presence of the police officer. The agreement was between the Plaintiff and the Defendants' accountant. The witness testified that the reason they gave the Plaintiff the said amount was to avoid his drunken violent behavior and threats on him.

When the said money was refunded the Plaintiff refused to sign for it and became violent. The 1st Defendant was informed of this by the accountant who handed him the money. The 1st Defendant then called the police officer and informed him about what had transpired. The officer is said to have called the Plaintiff and confirmed that the Defendants had paid him the K8,000. The Defendants asked the Plaintiff to collect his vehicle and take it to any other garage. The Plaintiff asked for advice and he was given five options to pick from. The Plaintiff then settled for Mr. Bobo's garage to finish the touch ups on the bus.

The following day the Plaintiff called requesting for the Defendants to drive the vehicle to Mr. Bobo's garage with the Plaintiff's son and it was driven there. The 1st Defendant denied having received the call out dated 25th October, 2012. He testified that at Mr. Bobo's garage he was advised that with a little car polish the job would become right. The Plaintiff however insisted that the vehicle be painted. Mr. Bobo gave a quotation of K3,000 which the 1st Defendant paid in cash and informed the Plaintiff to deal directly with Mr. Bobo concerning that vehicle and that he did not want to have anything to do with the vehicle. The Plaintiff emptied all movable accessories such as the jack, wheel spanner, triangle, radio cassette player.

According to the witness' testimony there were no accessories like speed limiter, rim, tyre, rear view mirrors on the bus. He stated that when the vehicle was conveyed to Mr. Bobo's garage, it had all the wheels. From then on they did not hear anything from the Plaintiff as the Defendants obligations towards the Plaintiff had

been discharged. The 1st Defendant testified that the issue of collecting the vehicle was between Mr. Bobo and the Plaintiff and the Defendants were free from any claims by the Plaintiff.

In cross examination the witness confirmed that everytime the Plaintiff went to the Defendants premises he was in a drunken state and he had witnesses who would attest to this. He explained that the initial payment of K12, 960only covered small parts of the repair costs for the front windscreen panels and the floor as well as what had been put in as labour.

The 1st Defendant explained that in the 40 years he had been in the motor industry, it was a standard agreement that 50% be paid towards the major panel beatings jobs. He stated that while this was a verbal agreement, if the Plaintiff had informed him that he was only going to pay K12,960 from the K25,000he would not have accepted to work on his vehicle.

He contended that the oral contract between the Plaintiff and the Defendants was null and void because the Plaintiff did not honour the initial K50% deposit. According to him, there were two things involved in the repair which were firstly, spare parts such as headlights, grill, windscreen and bumper. Secondly, there was the materials used such as body filler, welding rods, metal sheets, oxygen and acetylene.

He confirmed that the Plaintiff assaulted the workers when he was informed that the vehicle could not be worked on upon payment of K4, 000 as he had not met the benchmark of

K23,000. He however stated that no legal action was taken against the Plaintiff for assaulting the accountant at the time.

He stated that with his level of experience it was impossible to tell the exact amount of the cost of spare parts due to the appreciation of the dollar against the kwacha. He also asserted that all agreements that were made were between the Defendants and the insurance company. He contended that the final payment was made on 21st November, 2011 and thereafter the vehicle was ready to go but the Plaintiff raised issues with two small areas which were redone at the Defendant's own cost.

When referred to the agreement dated 27th January, 2012 he stated that by the 3rd of February, 2012 the vehicle was ready for collection. He added that the agreement was signed to free the Defendants from threats and violence by the Plaintiff. He stated that the Plaintiff was blackmailing the Defendants over the works they had done. He denied that the K8, 000 was paid because of the incompetence of the garage. He stated that the only way that a garage would be listed by an insurance company was if they had qualified staff with proper tools and machinery.

He further explained that the Plaintiff refused to signed for the K8,000but that he paid the K3,000in the presence of Mr. Bobo. He stated that there was no receipt for that transaction because they were trying to avoid Value Added Tax. He told the Court that if the vehicle was not repaired by Mr. Bobo then that was an issue between the Plaintiff and Mr. Bobo. As the Plaintiff's son was present when the vehicle was taken to Mr. Bobo's garage.

It was his explanation that it was standard procedure to take an inspection is down when a vehicle is towed to the garage which was done and it was discovered that there was no jack, wheel spanner, triangles nor were there any valuable left on the bus. He state that he was no aware of any speed limiter on the bus.

DW2 was **George Chembo Bobo** who testified that he met the Plaintiff when his bus which had been repaired by the 2nd Defendant was taken to his workshop for a quotation regarding touch ups on the door and right windscreen pillar which the Plaintiff was not happy about. The vehicle was nearly done when he started working on it. He began the works and amidst the work he had to move his workshop as the premises had been sold to the Post Newspaper. He then subcontracted his colleague a Mr. Ngosa who in turn finished working on the vehicle.

He testified that when the vehicle went to his workshop the Plaintiff was not satisfied with only two aspects and had asked the 1st Defendant to refund him. The 1st Defendant paid the Plaintiff for the two sets of spare parts that were needed and the issue with the 1st Defendant ended. He stated that the vehicle left his garage to Mr. Katongo's garage without the new spares and the same were give back to the 1st Defendant,

According to him the vehicle was moving when it left his premises. He confirmed that there was no speed limiter on the vehicle and he recalled the Plaintiff stating that everything was there on the vehicle.

In cross examination the witness told the Court that the vehicle was taken to his garage for touch ups after it had been repaired because the Plaintiff was not happy with the right front door and windscreen pillar. He stated that he was satisfied that there was need to work on those items and the quotation given was only for touch ups.

He explained that the 1st Defendant paid him K2, 500 at the time. He further explained that the reason he did not finish the repairs was because the premises he rented for his work shop were bought off by the Post Newspaper and he had to vacate the premises. He in turn paid his subcontractor. He stated that the Plaintiff did not supply him with any bumper and two head lamps. He also stated that the Plaintiff confirmed that he had been paid.

In reexamination the witness explained that when a vehicle has been involved in an accident, it cannot be expected to be in the same condition as previously. He also clarified that when the vehicle left his garage the bumper and head lamps had not been bought.

DW3 was **Ernest Chisamanga**, a former accountant at the 2nd Defendant Company. He testified that the Defendants were given a request for inspection of a bus and a quotation was given amounting to K50,000. It was thereafter agreed that the 2nd Defendant would repair the Plaintiff's bus. The insurances company started processing the papers and the amount of K32,400.

It was his testimony that the amount for the repairs was K45,000 and the Plaintiff was supposed to make up 50% of the agreed sum. The Plaintiff however only paid K12,560. The vehicle was being worked on and after further pushing the Plaintiff said he was expecting money from the sale of his house in Kabwe. He eventually paid an additional K4,000. After further pressing the plaintiff made the payment of K28, 217.60 on 21st November, 2011, ten months after the bus had been taken for repairs.

During that time all the panel beating had been done and some of the spare parts were bought and replaced. He asserted that the K16,500 paid by the Plaintiff was far below the 50% deposit he was required to pay. He stated that as regards the purchase of the spare parts, when the Defendants failed to secure the spares from genuine shops the Plaintiff said he would source them from Kitwe which he never did.

During the period between December, 2011 and January, 2012 the Plaintiff is said to have become violent to the extent of even pushing him on one occasion. When referred to the agreement dated 27th January 2012 he testified that he signed it under duress because the plaintiff was becoming violent. The Defendants were given up to the 3rd of February, 2012 to conclude the works. Before the 3rd of February, the Plaintiff was called to inspect the vehicle and he was not happy with the way the door was closing and the windscreen pillar and the Defendants had to redo the job but he was still not happy.

The witness was then called at Lusaka Central Police, Frauds Department where the Plaintiff went to report the matter. And it

was agreed that the vehicle be taken to another garage. The vehicle was then taken to DW2's garage which was chosen by the Plaintiff himself from the three options he had been given. The said vehicle was driven to DW2's garage by the Defendants panel beater who was accompanied by the Plaintiff's son. All the payments for this were made by the 2nd Defendant and also refunded the Plaintiff the sum of K8,000 for some spares which the Plaintiff said he would purchase.

The witness testified that he was the one who gave the K8,000 to the Plaintiff and when he was asked to sign for it he refused in his drunken state. Even after pleading with him the Plaintiff refused to compromise. He then went to report to the 1st Defendant and he asked him to go back to the Police, Frauds Department to alert them of this. He stated that while the witness was at the police, the Plaintiff acknowledged receiving the money and indicated that he would pass through the Defendants' office to sign for it later that day which he never did.

In cross examination the witness explained that the full payment was made by the Plaintiff on 21st November, 2011 and the final repairs were concluded on 3rd February 2012. He said he did not remember when the vehicle moved to DW2's garage but it was sometime between February and March.

He stated that they discharged their obligation to repair the vehicle but the Plaintiff was not happy with the works done. He also emphasized that the Defendants had done a number of repairs and it had to be noted that a car involved in an accident could not be 100% the way it initially was.

He stated that the reason there was a delay from 21st November, 2011 when final payment was made to 3rd February was because there were no spare parts required to finish the works. He explained that the reason the refund was not signed for was because the Plaintiff refused to sign for it.

In re-examination he stated that according to him the work was done adequately but the Plaintiff brought up other things. He was of the view that there was no breach on the part of the Defendants. He clarified that he gave the Plaintiff money that the 1st Defendant authorized him to give. He stated that he had worked for the Defendants for 11 years and in cases where there was a serious accident to the car, almost every customer had complaints.

DW4 was **Simon Kalumba** a former panel beater at the 2nd Defendant Company. He testified that he was the one who was working on the Plaintiff Coaster bus which had been smashed in from. When it was taken to their garage the front lights were broken, the windscreen was broken and the radiator was broken. He worked on the panel beating, the replacing of the lights and indicators, replacing the windscreen as well as replacing the radiator.

He testified that the vehicle was at the garage for a while and he heard his boss say the owner had not paid the money. On one occasion the Plaintiff came in a bad mood wanting to fight the witness but he directed him to see the owner of the garage. He then went to fight DW3who called for help and the witness and others went to rescue him from the Plaintiff. Since that fight the

Plaintiff did not come back until he was asked to tow his vehicle to DW2's garage in the company of the Plaintiff's son.

In cross examination the witness explained that he did not know why the vehicle had to be towed to DW2's garage and suspected it could have been a battery problem. According to him he worked on the vehicle sufficiently. He stated that he heard that DW2 charged the 1st Defendant for the additional minor works that had to be done.

This was the close of the Defendants' case and both parties filed in written submissions which I have carefully considered.

I have considered the evidence on record and it is not in dispute that the Plaintiff's Public Service Bus, a Toyota Coasta Registration No.ABT 427 was involved in a road traffic accident with a bus owned by Mazhandu Bus Services. It has not been disputed that as a result of this accident the insurance company paid the Plaintiff a sum of K32, 400 by cheque to the Plaintiff. It is also not in dispute that the 2nd Defendant was selected as the company that would work on the vehicle at the agreed sum of K48, 617.60. I have found as a fact that the Plaintiff and the Defendants initially agreed that the works would be concluded within six weeks from the date the vehicle was collected by Defendants and taken to their garage on 13th January, 2011. I have also found as a fact that the first installment of K12, 960 was only paid to the Defendants on 4th April, 2011. Further that a subsequent amount of K4, 000 was paid on 17th June, 2011 with the balance of K28,217.60 being paid on 21st November, 2011.

The Plaintiff alleges that despite paying the full amount the vehicle was still not repaired until September, 2013 when the Plaintiff took the vehicle to another garage.

The issue for this Court's determination is whether the Plaintiff's claim for a refund of the amount of K45, 177.60 is valid as well as the claim for damages and loss of business for three years amounting to K363, 220.

I will begin by addressing the issue of whether there was a breach by the Defendants pertaining to the time within which to repair the vehicle. Having carefully considered the evidence on record, the Plaintiff alleges that the Defendants were obliged to conclude the works within six weeks from the date they took his vehicle in. He asserts that this was even if he did not pay the 50% deposit which he was not obliged to pay as it was at his discretion. The Defendants on the other hand strongly contend that works could not begin without the payment of the 50% deposit by the Plaintiff. The evidence shows that the Plaintiff only paid the first installment was paid about four months after the vehicle was taken to the garaged. The Defendants stated that had they known that the Plaintiff would not pay the requisite 50% deposit, they would not have accepted to work on his repairs.

I must state that it is common cause that the Defendants ought to be paid a deposit for any repairs to be done on a vehicle that would require replacing of damaged parts. I therefore do not agree with the Plaintiff's contention that he was under no obligation to pay any deposit. Had the insurance company not

paid the Plaintiff this money, they would have paid it in its entirety to the Defendants directly. It is only logical, in my view, that any person wishing to repair their vehicle pays a deposit to enable the person repairing purchase the necessary spare parts otherwise it would not make economic sense to run such a business.

Therefore, because the Plaintiff did not fulfill its part of the contract, which in this case was verbal, it was a variation of the term requiring the Defendants to have the vehicle repaired within six weeks. I call in aid Lord Denning's holding in the case of ***Charles Rickards Ltd v Oppenheim (1950) 1KB 616*** where it was held as follows:

> *If the defendant, as he did, led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance does not matter. It is a kind of estoppel.* ***By his conduct he evinced an intention to affect their legal relations (Emphasis mine)***.

In that case a buyer of a Rolls-Royce motor chassis agreed for a body to be built upon it by a fixed date. The body was not completed by that date, but after pressing for delivery, he gave a notice that unless delivery of the car with a completed body was effected within four weeks he would cancel the contract. The car was not delivered within the period of four

weeks. However, thereafter the plaintiffs sought to deliver the car and, when delivery was not accepted, they sued for the sum due to them under the contract.

While the facts may be different from the present case I find of aid the fact that in the present case there was a waiver of the six weeks period by the Plaintiff when he only paid the first installment four months after the vehicle was taken in for repairs.

I also find this statement by Lord Cairns CJ in the case of ***Hughes v Metropolitan Railway*** **(1876-77) LR 2 App Cas 439** to be quite helpful. He stated that:

> *"It is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results - certain penalties or legal forfeiture -* ***afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties*** *(Emphasis Mine)."*

Similarly in this case, it is evident that even at the term stating that the vehicle would be repaired within six weeks could not be enforced in a Court of equity because the Plaintiff did not fulfill his term of the contract to pay the requisite 50% deposit for the works to commence. This to me was a clear variation of the terms of the contract for which the Defendants cannot be held accountable for.

Further, even at the point when the first installment was made, the same did not meet the requisite 50% deposit required bearing in mind the amount of damage that the vehicle suffered, it was unreasonable to expect the works to be concluded without paying the entire agreed deposit amount. Equity demands that *'he who comes to equity must come with clean hands'*. The Plaintiff's hands are not clean in this case because he did not also fulfill his end of the agreement

Having said this, I will now address the issue of whether the Defendants ought to refund the Plaintiff the amount paid for the repairs. The evidence on record from the Defendants is that the Plaintiff paid the balance of K28, 217.60 on 21st November, 2011 but because the required parts had since gone out of stock, there was a delay in concluding the repairs. It was also their evidence that the Plaintiff, with the help of the police, ensured that an agreement dated 27th January, 2012 was signed between himself and the Defendants that the vehicle would be ready by 3rd February, 2012. However, when the Plaintiff was called to inspect the vehicle he was not happy with certain arrears which the Defendant redid at their expense. Still not happy and after

previous violent attacks the Defendant allege to have refunded the Plaintiff the sum of K8, 000 which the Plaintiff in cross examination did not dispute.

The vehicle was then taken to DW2's garage who confirmed that the vehicle had been repaired and he was just engaged to work on a few areas of which the 1st Defendant paid him about K2, 500 for the same. This evidence was also not challenged by the Plaintiff.

Having outlined the above, I am satisfied with the evidence of DW1 which was corroborated by DW2 that the repairs were concluded but for a few touch ups the Plaintiff was not happy about. Therefore, having satisfied myself that the Plaintiff was refunded the sum of K8,000 and that the repairs were concluded but taken to DW2's garage for touch ups that the Plaintiff wanted to be worked on, I find no merit in the claim that the Defendants should refund the Plaintiff the amount paid for the repairs.

Lastly, with regard to the issue of the loss of business, this claim borders on the time factor which I have dealt with. I have already found that the Plaintiff by his own actions varied the terms of the agreement to have the motor vehicle repaired with six weeks because he firstly delayed in making a deposit and even he did it did not meet the requisite 50% threshold. The 50% threshold was only met by the payment of the final installment in November, 2011, eleven months from the date the vehicle was taken in. The vehicle according to the record was thereafter ready by 3rd February 2012. The vehicle was then taken to DW2's garage for other works.

I agree with the submissions by the Defendants' counsel that the Defendants had discharged their obligations and anything that happened after the Plaintiff started transacting with DW2 could not be attributed to the Defendants henceforth.

I accordingly find no merit in the Plaintiff's claim for the loss of business because the delay in repairs was largely due to his own actions and any delays that followed after the vehicle was taken to DW2's garage could not be attributed to the Defendants.

Having considered the totality of the evidence before this Court, I find no merit in the Plaintiff's claim and find that he has failed to prove his claims on a balance of probability. I accordingly dismiss this action and order that each party bears its own costs.

Leave to appeal is granted.

Delivered under my hand and seal this..25th.... day of July, 2017

Mwila Chitabo, S.C.

Judge