

**IN THE SUBORDINATE COURT
OF THE FIRST CLASS
FOR THE LUSAKA DISTRICT
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

CAUSE: 2016/CRMP/856

BETWEEN:

DAVID MWENDA NAKENA

AND

NELSON CHONGO



PLAINTIFF

DEFENDANT

JUDGMENT

The Plaintiff claims the sum of K29, 000.00 being money owed by the Defendant on account of the purchase of a new engine by the Plaintiff to replace one damaged by the Defendant. He also claims costs of K408 and interest.

The suit was commenced by way of a Default Writ supported by an affidavit dated 11th July, 2016 on which the Plaintiff relied at the hearing. There was no appearance by the Defendant at the hearing on 18th November, 2016.

In that affidavit in support of the Default Writ, in so far as is relevant, the parties by a contract dated 23rd December, 2015 (exhibited as "DMN 1") agreed to have the motor vehicle bearing registration Mark BAA 8182 belonging to the Plaintiff (hereinafter "the motor vehicle") hired out to the Defendant at a consideration of K600=00 per day for a term of five days. It was an express term in the contract that whatsoever damages on the car were to be a full responsibility of the Defendant.

Three days into the term of the contract the Defendant reported to the Plaintiff that the motor vehicle had its engine damaged and was parked at his residence. On 26th February, 2016 the Plaintiff had the motor vehicle repaired by way of replacing the engine after protracted engagements with the Defendant for the repair of the motor vehicle.

Although the defendant did not make appearance at the hearing as earlier stated, he did file an affidavit in opposition to the affidavit in support of the default writ earlier on 19th August, 2016 together with the form of admission, defence and counter claim in which he disputed the claim and counter claimed K11, 500 for loss of use of the motor vehicle. In his affidavit the defendant stated that the motor vehicle was not being taken for routine service, a situation that caused a mechanical fault resulting into the breakdown.

By and large the foregoing are the material facts.

The gist of the plaintiff's claim as I see it is the term of the contract for repair of damages on the car. The said term reads:

“Damages on the vehicle Nil and that whatsoever damages on the car, I Nelson Chongo promise to be fully responsible in as repairing the mentioned car above.”

From the wording of that term of the contract it is apparent that both parties inspected the vehicle and were satisfied that it had no damages and that any damages that may be found on the vehicle during or at the

expiration of the term of the contract was to be the responsibility of the Defendant.

Be that as it may, the question is what sort of damages were contemplated in that term of the contract since no such damages were detailed?

I should think, and I hold the view here, that this term must be taken to include all such damages as may be the result of the Defendant's improper use of the motor vehicle, negligence such as the consequence of an accident and other such similar damages.

Now, in the present case, the damage complained of is a mechanical failure, namely, a seized engine. The question is whether this type of damage was or is included in the term to which I referred above or indeed could be contemplated?

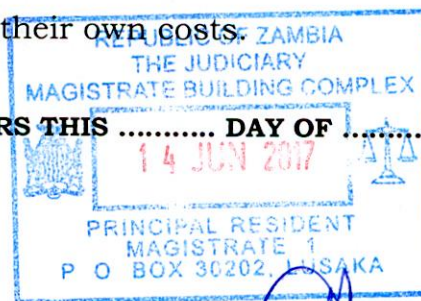
I should think not. In that term of the contract a mechanical fault can clearly not be contemplated. In fact, and I take Judicial notice of this, that in transactions of this nature it is an implied term of the contract that mechanic faults are a responsibility of the owner of the motor vehicle unless evidence is shown that the defendant acted grossly negligent in the use of the motor vehicle resulting in the mechanical failure. These are risks that the owner of the business or plaintiff as in this case carries on together with the business and cannot in my view be transferred to a client or Defendant as at present.

On the balance of probabilities I find the Defendant not liable for the damage on the said motor vehicle and dismiss the Plaintiff's claim accordingly.

Since the Defendant did not prosecute his counter claim and the statements in his affidavit being insufficient for me to make a reasoned judgment, I hereby dismiss the counter claim.

Both parties will bear their own costs.

DELIVERED IN CHAMBERS THIS DAY OF 2017 AT LUSAKA




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HON. DAVID. G. SIMUSAMBA

PRINCIPAL RESIDENT MAGISTRATE