

IN THE HIGH COURT OF LESOTHO

In the matter between:-

JAKARANDA BUSDIENS (PTY) LTD

Plaintiff

and

HERBERT MOKOROSI

Defendant

J U D G M E N T

Delivered by the Honourable Mr. Justice J.L. Kheola
on the 18th day of September, 1989

In this action the plaintiff is claiming the delivery of a certain 1985 Mercedes Benz L 613 minibus by the defendant to him. Alternatively, payment of the amount of M70,000-00 and costs of suit.

It seems that on the 24th December, 1985 plaintiff's minibus described above was stolen from its depot in Bloemfontein. It is the plaintiff's case that the minibus now kept at the premises of the National Motors is its missing minibus. It is common cause that this bus was found in the possession of the defendant through his employees. He claims the vehicle and alleges that he bought it.

C.J. Greyling described himself as the traffic manager of the plaintiff. He testified that plaintiff's buses have three colours, namely, golden yellow, bahama (green blue) and burnt orange, and lately cream. The dominant colour is cream with the other colours sprayed in stripes. (He drew a sketch of plaintiff's bus which shows the colours on the buses). (Exhibit A). The bus had a tachometer. Seven cards are put into the tachometer to cover a week. A peculiar key is used to open the tachometer. The windows of the missing bus were made of a very special glass called polycarbonate lexan margard glass material. He stated that although the margard glass is readily available to the general public it is very expensive. The glass is unbreakable.

During August, 1986 he came to Maseru C.I.D. offices where he identified the plaintiff's missing bus. He was accompanied by Sergeant Groenawald, Detective Sergeant Thulo of the South African Police, plaintiff's workshop manager and some members of the Royal Lesotho Mounted Police. He opened the tachometer and found four cards. On one of the cards was written date, fleet number and kilometres. The handwriting was that of one of the plaintiff's tachometer clerks. He took out a knife and scraped off some paint from the body of the bus and the colours of the plaintiff's buses came out. The defendant remained silent.

Greyling deposed that the registration number of the missing bus was 08 60269, its chassis number was 634449, its engine number was 396900026024746. He admitted that when the bus was inspected

by the Court it was found that both the engine number and the chassis number were different from the original numbers the bus had when it went missing. He admitted that the official method of identification of a motor vehicle is by its engine number and chassis number. He was of the opinion that between 1986 and 1988 the bus was re-sprayed and that was the reason why he could no longer find and show the Court the spot on the bus where he had scraped off the paint revealing plaintiff's colours. He also noticed that the engine number and the chassis number had been tampered with. He saw file marks or grinding stone marks on the engine block and the chassis.

The second witness called by the plaintiff was Christian Marx. He is a district manager of the Mercedes Benz in charge of the Free State and the Northern Cape. He is in charge of the records of his company. His evidence is to the effect that he received a certified copy of a computer print-out from Pretoria which showed the particulars of the plaintiff's missing bus. (It was handed in Court and marked Exhibit B). He was given engine number 394900005001976. He fed the number into the computer and the computer print-out revealed that that engine number belongs to a bus which was sold to one Thabo Ntobe of P.O. Box 91, Mafeteng. (The computer print-out in respect of this bus was marked Exhibit C). Under cross-examination Marx admitted that he received Exhibit C from Pretoria on the previous day.

The evidence of this witness was admitted on condition that the plaintiff would call someone from Pretoria to come and tell

the Court that he fed the information in the computer. This was not done and it follows that his evidence must be expunged from the record.

P.J. De Meyer is the group engineer of the plaintiff. His duties included the purchasing of buses. The bus in question was one of the five buses which he bought in 1985. He bought them from John Williams which is an agent of Mercedes Benz in Bloemfontein. The engine number was 396 900 024 746 and the chassis number was 634449. The body was later built by Millers of Pretoria according to the specifications prepared by him. The specifications consisted of twenty points as follows:

- 1) Tapered front dome incorporating a destination box.
- 2) Pneumatic control aluminium jack-knife saloon door.
- 3) Two roof four-way hatches.
Front unit off set to off side and rear unit to near side.
- 4) Round type interior saloon lamps - Hella OBEN made in Germany.
- 5) Short roof carrier over rear wheels with detachable ladder.
- 6) Square rear end incorporating a drop frame luggage boot, twin Trucklite model 40700 rear lamps and rear tow bar.
- 7) Body painted
Basic background: Linen
Strips: Golden Yellow, Bahama Green and Light Orange
- 8) Polycarbonate Lexan Margord window material in 6 mm. with 1/3 opening sliders. Sena windows
- 9) Plywood floors with tuff tread on two units

- 10) Interior padded parcel racks covered in brown vinyl.
- 11) S.L.2 high back 3 x 2 seats in brown vinyl and corner hand grips.
- 12) Blaupunkt Heidelberg radio/tape combination with six x 20 watt Pioneer speakers in ceiling.
- 13) Driver's protection partition with polycarbonate window material.
- 14) Driver's seat hinged to allow easy access to the batteries and secured with spring loaded catches.
- 15) Fire extinguisher bracket to suit 2.5 kg. extinguisher securing base +/-150 mm x 150 mm tube section +/-200 mm in height x 110 mm. tube opening.
- 16) Ratchet type air cleaner informer attached to intake manifold.
- 17) Eight-day tachograph type TCO 15-7/11.
- 18) Anti-theft device in fuel tank neck.
- 19) Tyre code branding of tyres "TNT".
- 20) Rear inner wheel fitted with rubber valve extensions.

During the inspection in loco it was found that the ladder in item 5 was missing, the paint item 7 was changed, items 12, 13, 15, 16, 18, 19 and 20 were missing.

Sergeant Jacob Groenawald is a member of the South African Police attached to the branch dealing with theft of motor vehicles. On the 24th December, 1985 he received a report concerning the theft of the plaintiff's Mercedes Benz bus. Subsequent to that report he came to Maseru accompanied by one Greyling. He found Sergeant Thulo of the South African Police here in Maseru. The Royal Lesotho Mounted Police was represented by Major Setloboko and

the defendant was also present. He was shown a bus and made his investigations on it. He found that the engine number had been tampered with; the surface on the engine block where the number is imprinted was uneven and there were marks of grinding. When the vehicle leaves the factor the surface is usually as smooth as glass. The numbers are stamped upright but in the present bus he found that the digits in the engine number leaned to the right or left.

He scratched some paint on the outside of the bus and the colours of the plaintiff's buses came out. Mr. Greyling opened the tachometer and a card dated 24th December, 1985 was found. He (Greyling) identified it as his employer's card. He regarded himself as an expert but did not use the etching test to find out if there had been tampering with the engine number.

Sergeant Thulo confirms that the tachometer was opened and one card was found in it. He did not carefully examine the card but saw that it had a number on it and something like a signature. He also confirms that when Sergeant Groenawald scratched the outside of the bus plaintiff's colours came out.

The evidence of Warrant Officer Mokeretla of the Royal Lesotho Mounted Police was to the effect that he seized the bus in question at Maseru bus rank and drove it to the C.I.D. offices. He was given a registration certificate by the defendant and compared it with the engine number and chassis number of the bus. He found out that the numbers appearing in the defendant's registration certificate tallied with those on the bus. The bus was released

to the defendant because he obtained a court order to that effect. He last saw the docket relating to the bus when it was taken to the magistrate's court by another policeman.

The defendant testified that he bought the bus from one Ntabe who is now living in Botswana. He bought it in March, 1984 and registered it in March, 1986 because he did not have enough money to pay for sales tax. He paid M65,000-00 for the bus. The payment was made in two equal instalments. He denies that any cards were found in the tachometer. He admits that plaintiff's employees scraped off some paint from the body of the bus but no plaintiff's colours came out.

In cross-examination the defendant stated that he has no receipts for the money he paid to Ntabe because he is his friend. (He handed in court a registration certificate marked Exhibit E). The bus in question is a 1983 model and not a 1985 model as alleged by the plaintiff.

It is common cause that the official identification marks of a motor vehicle are its engine number and its chassis number. In the present case these official identification marks tally with the defendant's registration certificate. The procedure before registration is that the police examine the vehicle and issue a clearance certificate by which the buyer of the vehicle is authorised to register the vehicle in his name. The registering authority cannot register a motor vehicle unless the change of ownership documents are accompanied by a police clearance certificate showing, inter alia,

that the vehicle is not stolen according to their records of motor vehicle reported stolen. It was therefore incumbent upon the plaintiff in the present case to bring expert evidence to show that although the numbers of the chassis and the engine tally with those appearing in the defendant's registration certificate, they are not the original numbers. In other words, he had to prove that the numbers had been tampered with.

On the 28th November, 1988 Mr. Waner, counsel for the plaintiff, applied that members of the South African Police be allowed to conduct a test on the vehicle in question to establish the original numbers of the engine and the chassis. Although Mr. Nthethe, attorney for the defendant, strongly opposed the application I allowed it on two conditions that Mr. Nthethe was free to attend the test and he was also free to call his client's experts to conduct their own test if he so wished. Earlier the plaintiff's attorneys had filed a Notice to call expert witnesses and in that Notice the experts were Warrant Officer Oehley and Warrant Officer De Waal. It was alleged they were experts on vehicle theft and engine and chassis tampering.

Despite the Notice to call expert witnesses and the formal application which was made before this Court, no such evidence was led until the plaintiff closed its case. I ^{am} completely at a loss why the plaintiff's counsel decided not to lead such vital piece of evidence to plaintiff's case. Sergeant Groenewald attempted to give evidence on tampering and told the Court that the engine and chassis numbers of the vehicle in question had been tampered with. He is

not an expert on tampering and never conducted a scientific test on the vehicle to form the opinion that there had been tampering.

Sergeant Groenewald testified that the area where the engine number is imprinted was uneven and there were obvious marks of grinding. He said that the digits in the engine number were slanting and not upright as they ought to be if there had not been any tampering. During the inspection in loco I had the chance to look at the engine number and found that the digits were upright except "1" which slightly slanted to the right. I found that the surface was even except that the paint on the numbers had been removed. I am of the opinion that if the engine number I saw has been tampered with, the work was done by experts and they did their work so well that a person who is not an expert cannot make any distinction. The plaintiff ought to have led expert evidence.

The evidence of Christian Marx was admitted on condition that the plaintiff would call ^{a person} who fed in the relevant information in the computer. In other words the computer print-outs were admitted on condition that the person or the clerk who computerised the books of Mercedes Benz of South Africa would come and testify that the information he put into the computer was accurate and tell the Court from where he obtained it.

In S. v. Volschenk, 1970 (3) S.A. 502 (T.P.D.) at p. 504 Boshoff, J. said:

"A banker's books are from their very nature at best only secondary evidence of the original transactions from which they are compiled and which they purport to reflect. On the general principles relating to the law of evidence, the contents of a banker's books cannot be used testimonially in a court of law unless the contents thereof have been properly proved with the evidence of the person or persons who have direct knowledge of the transactions reflected therein. Computerised books are in no better position because they are compiled in the same way, the only difference being that a machine is used to record the transactions."

Section 37 of the Evidence in Civil Proceedings Proclamation No.72 of 1830 reads as follows:

"Entries in ledgers, day-books, cash-books and other books of any bank shall be admissible in all legal proceedings as prima facie evidence of the matters, transactions and accounts therein recorded, on proof being given by the affidavit in writing of one of the directors, managers or officers of such bank, or by other evidence, that such ledgers, day-books, cash-books, or other account-books are or have been the ordinary books of such bank, and that the said entries have been made in the usual and ordinary course of business, and that such books are in or come immediately from the custody or control of such bank."

Although the Volschenk's case and the Proclamation refer specifically to banker's books I do not find any reason why the principle should not apply to the books of any company which wants to prove the contents of a computer print-out coming from its own computer.

I am of the opinion that one of the senior managers of the M. Benz ought to have made an affidavit in terms of section 37 of Proclamation 72/1830. The certificate on Exhibit B made by one

W.T.J. Wenhold who is the Executive Assistant to the Management Board of Mercedes Benz of South Africa, falls far short of what is required by section 37. Exhibit C has also not been certified in accordance with the law. It is not accompanied by any affidavit.

For the reasons stated above I come to the conclusion that the two computer print-outs (Exhibit B and C) handed in Court by Christian Marx are inadmissible. The entire evidence of Marx must be rejected because he relied on the two computer print-outs which are inadmissible.

The evidence of Petrus Jacobs De Meyer was on the bus body specification which was prepared by him. He commissioned Millers of Pretoria to build the body. He gave his evidence looking at a document to which I shall refer as Exhibit X. The documents showed twenty items of specification. I must say that Exhibit X looked so new that it could have been prepared on the day preceding the day on which he gave his evidence. I am saying this because on the last day of his giving evidence, Mr. De Meyer brought another elaborate document to which I shall refer as Exhibit Y. The two documents contain the same number of items of specifications but Exhibit Y gives more details. These two documents are not the original copies of the specification which Mr. De Meyer allegedly commissioned Millers to build. They are both original copies which were prepared by him but the Court has not been told where he got that information. If he got it from a copy in his files, assuming that the original copy went to Millers, why

has he not brought his copy from his file? The copy from his file would have more evidential weight than these original copies which he prepared from undisclosed sources.

If the applicant seriously wanted to convince this Court it would have called a witness from Millers who would probably bring an original copy of his commission by the plaintiff. Such a witness would probably even tell the Court that as a bus body builder plaintiff's specification was peculiar. As the evidence stands now there is nothing to show that all those features described in the specification are peculiar to the plaintiff.

There is overwhelming evidence that when plaintiff's employees first came to Maseru to identify their missing bus, they scraped off some paint on the body of the bus and that plaintiff's colours came out. There was also evidence that when the tachometer was opened four cards - some witnesses say one card - came out. It had the bus fleet number of the plaintiff and the signature of plaintiff's clerk. It is alleged that the card or cards was or were given to Major Setloboko of the Royal Lesotho Mounted Police who was not called as a witness. It is now alleged that the docket regarding the vehicle in question is missing and cannot be found. This is a sad and unfortunate state of affairs because valuable evidence cannot now be produced before this court to enable it to come to a just decision.

At the inspection in loco of the bus in question the witnesses failed to show the Court the area where paint had been scraped off. They were of the opinion that the bus had been

re-sprayed because it is common cause that after they had identified the bus it was subsequently released to the defendant by order of Court which he had obtained against the police. It seems to me that it is possible that the bus was re-sprayed, but it is also possible that the bus now in question is not the bus which plaintiff's employees identified when they first came to Maseru. I am saying this because the features by which the plaintiff is now trying to identify the bus are not peculiar to it. For instance, a tachometer was shown to the Court but the witnesses conceded that it could be found in all buses of that model and make. In other words the tachometer was not a specification made by Mr. De Meyer to Millers.

It was submitted on behalf of the plaintiff that the bus which the defendant bought had a four - cylinder-engine, but the bus before Court has a six - cylinder-engine. This is the plaintiff's missing bus and that the engine number and the chassis number were tampered with and changed. Mr. De Meyer's evidence was that the "6" in the engine number (396) refers to a six - cylinder-engine; and that the "4" in the engine number (394) refers to a four-cylinder-engine. I must point out that Mr. De Meyer may have a good knowledge of Mercedes Benz bus engines however he is not an expert in that field. One would have expected such evidence to have come from somebody from Mercedes Benz of South Africa. Mr. Marx is a motor mechanic with five years experience with Mercedes Benz engines. I think he is the right person who would have enlightened the Court on this aspect of the case.

It is common cause that Thabo Ntabe bought a bus from John Williams Motors, Bloemfontein in 1982. The defendant alleges that he bought the bus in question in March, 1984 and registered it two years later in March, 1986 because he did not have enough money to pay the sales tax. Mr. Waner submitted that the evidence before Court is that the bus is a 1985 model and that it had not been manufactured in 1983 when it was allegedly sold to the defendant. On the other hand the defendant alleges that according to its change of ownership papers the bus is a 1983 model.

It seems to me that the police and the registering authority accepted that the bus was a 1983 model; the former issued a clearance certificate and the latter registered it and issued a registration showing that it was a 1983 model. This issue would have been easily resolved if the plaintiff proved that the engine number and chassis number appearing in the registration certificate and on the bus were false and did not belong to the bus which was sold to Thabo Ntabe in 1982.

There was a dispute as to whether the numbers appearing on the gear-box, front axle and rear axle are serial numbers or part numbers. The plaintiff alleges that they are serial numbers which have been given to those particular parts. The defendant denies this and alleges that they are part numbers. In giving evidence on this point the plaintiff's witness relied on the computer print-outs which has been excluded from the record because

they have not been accompanied by a proper affidavit. On that ground alone the evidence regarding the gear-box number, the front and rear axle numbers must be rejected.

For the reasons given above I grant absolution from the instance with costs to the defendant including costs of storage of the vehicle at National Motors Garage.

J.L. Kheola
J.L. KHEOLA
JUDGE

18th September, 1989.

For Plaintiff - Mr. Waner
For Defendant - Mr. Nthethe.