Selected Judgment No. 48 of 2016

P.1704

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT NDOLA

Appeal No. 174/2016
SCZ/8/86/2016

(Civil Jurisdiction)

BETWEEN:

ZAMBIA BREWERIES PLC. **APPELLANT**

AND

BETTERNOW FAMILY LIMITED **RESPONDENT**

Coram: **Wood, Malila and Mutuna, JJS**
on the 6th December, 2016 and 12th December, 2016

For the Appellant: N/A (Messrs Tembo Ngulube & Associates)

For the Respondent: Mr. Gilbert Lungu, Messrs Muleza Mwiimbu & Company

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JUDGMENT

MALILA, JS, delivered the judgment of the Court

Cases referred to:

1. *Dawson's Limited v. Bonnin (1922) 2 AC 413.*
2. *Schuler (L) AC v. Wickman Machine Tools Sales Limited (1974) AC 235.*
3. *Chipango v. Attorney-General (1970) ZR 31.*
4. *Reville Independence LCC v. Anotech International UK Ltd. (2015) ED. 237.*
5. *Parker B in Robinson v. Harman (1848) 1 Exch. 850.*

6. *Cehave NV v. Bremer Handelge-Sellschaft MbH (1976) QB 44.*
7. *Rose and Frank Co. v. Crompton (Jr) & Brothers Limited (1925) AC 445.*
8. *Addis v. Gramophone (1909) AC 488*
9. *Swarp Spinning Plc v. Chileshe and Others SCZ Judgment No. 6 of 2002.*
10. *Mobil Oil Zambia Limited v. Ramesh M. Patel (1988 – 1989) ZR 12.*
11. *National Airports Corporation Limited v. Reggie Ephraim Zimba (SCZ Judgment No. 34 of 2002).*
12. *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co. (1915) AC 79.*
13. *Eastern Cooperative Union Ltd. v. Yamene Transport Ltd. (1988 – 1989) ZR 126.*

Legislation referred to:

1. *Competition and Fair Trading Act, chapter 417 of the Laws of Zambia.*
2. *Chitty on Contracts Vol. 1, 29th Edition, 2004 and Kim Lewson.*
3. *The Interpretation of Contracts, Fourth Edition, (London, Sweet & Maxwell 2007).*
4. *Law of Damages by Andrew MA Reed Elsevier (UK 2007 at page 379).*

The respondent applied for an annual distributor dealership of various products of the appellant at wholesale prices in Kaunda Square Township in Lusaka. The respondent held a series of consultative discussions with officials from the appellant company in the course of which some representations were made by those officials as to the territorial boundaries for distributorship

The respondent proceeded to erect a structure designed to suit the requirements of a dealership with the appellant. On completion of the structure, officials from the appellant company were called to inspect the same. The said structure was thereafter branded at the appellant's cost in the appellant's corporate colours. It was only after these developments that a draft distributorship contract was availed to the respondent which the respondent promptly signed and returned to the appellant for its signature. The appellant, however, never signed nor returned the contract to the respondent.

Meanwhile the respondent was advised by an official from the appellant to commence trading even before the signed contract was availed. The respondent paid the sum of K100,000,000 being a precondition to commencement of trading in the appellant's products. After trading for three months, the appellant terminated the supply of its products to the respondent in March, 2010 following a complaint from another distributor. The respondent alleged that prior to the termination of its distributorship, it earned an average income

of thirty-one million seven hundred and fifteen thousand one hundred and fifty-five Kwacha (K31,715,155.00) (unrebased) per month, which income the respondent claims it has been losing since the termination of the distributorship.

The respondent was prompted by these developments to report the matter to the Zambia Competition Commission which charged the appellant with anti-competitive trade practices contrary to section 7(2) of the Competition and Fair Trading Act, chapter 417 of the laws of Zambia as read with section 16(2) of the same Act. The appellant was found guilty of the charges.

On the 29th September, 2011 the respondent issued a writ of summons out of the High Court claiming damages for loss of business; damages for breach of contract; costs of erecting a building for the distributorship business, interest and costs.

The appellant opposed the claim, contending that it always ensures that dealers enjoy good market share in their

respective areas to warrant good business sense and in so doing, discourages more than one dealer operating within proximity. It further contended that erection of a building in any area is never a pre-requisite for dealership in the appellant's products. Moreover, the appellant provides containers to distributors. The appellant also revealed that during the whole period in issue, the respondent only bought a total of 5,778 and 3,444 cases of beer and other beverages respectively and thus earned a commission of K20,667,500 for that period.

After hearing the parties' witnesses and considering the evidence deployed before him, the learned High Court judge was satisfied that a valid contract had come into existence which the appellant had breached.

On the respondent's first claim for damages for loss of business, the learned judge held that the respondent had not adduced any evidence to support that claim. He accordingly dismissed it.

In respect of the claim for damages for breach of contract, he awarded the respondent a total sum of K285,436,395 (unrebased) representing an average commission of K31,715,155.00 (unrebased) per month for 9 months, being the remainder of the one year contract period which he discerned from the unsigned contract, as evincing the intention of the parties. He also awarded interest at Bank of Zambia lending rate from 29th September, 2011, being the date of the writ to the date of judgment; thereafter at short term bank deposit rate until full payment.

With regard to the cost of erecting the building for the distributorship business, again the learned judge held that no documentary evidence as to the expenses incurred by the respondent was provided. He dismissed the claim accordingly. He awarded costs to the respondent.

Disenchanted by the High Court judgment, the appellant appealed fronting three grounds couched as follows:

"Ground One

The learned judge erred in law and fact in holding that there was an intention between the parties to enter into a binding business relation without taking into account that the aforesaid binding business relations was subject to a condition precedence, vis: A concluded feasibility study (sic!).

Ground Two

Corollary to ground one, the learned trial judge misconstrued the principle laid down by this Honourable Court in *Revile Independence LCC v. Anotech International* (UK) Ltd (2015) ED and in holding that the aforementioned case was on all fours with the case in casu, the appellant was not only contending the lack of a binding contract on account of a want of a proof of execution but rather that the conditional precedence (sic!) had not been performed.

Ground Three

Assuming without conceding that thre was a binding contract, the learned trial judge misconstrued the principle of *restitutio in intergrum* in awarding the respondent the sum of ZMW 285,396.00 as damages for breach of contract when the contract only provided for a month's notice on termination of the contract.

At the hearing of the appeal, Mr. Lungu, learned counsel for the respondent, drew our attention to the appellant's Notice of Non-appearance filed on 3rd October, 2016. We were, therefore, content to proceed in the absence of the appellant.

P.1711

In the heads of argument, filed by Messrs Tembo, Ngulube & Associates on behalf of the appellant, it was contended in respect of ground one that the learned trial judge fell into error when he held that there was an intention between the parties to enter into a binding business relationship without taking into account the fact that a business relationship was subject to a condition precedent, namely a concluded feasibility study. The contention of the appellant is that from the evidence of the appellant's sole witness, Panji Banda, for an individual to become a distributor for the appellant there were a number of conditions that needed to be satisfied. These included a feasibility study, which could take as long as six months to conclude. Prior to the conclusion of the feasibility study, according to the learned counsel for the appellant, a prospective distributor would be allowed to trade as a way of testing the market and how other distributors and wholesalers would be affected. This trial period does not form part of a binding contract between the prospective distributor and the appellant. In the case of the respondent the trial period leading

to the conclusion of the feasibility study coincided with the festive period and hence the adoption by the appellant of a relaxed attitude towards the respondent in allowing it to undertake sales.

The gist of the appellant's argument under ground one is simply that it was inappropriate for the trial court to hold that there was an intention to enter into a binding contract when the whole process leading to a distributorship agreement was dependent on satisfaction of prescribed benchmarks including a satisfactory feasibility study. Counsel cited numerous case authorities regarding a condition precedent and its effect on contract. These include **Chitty on Contracts** and Kim Lewson's **The Interpretation of Contracts**.

The cases of **Dawson's Limited v. Bonnin**[1] and **Schuler (L) AC v. Wickman Machine Tools Sales Limited**[3] were also cited. More purposely perhaps, the learned counsel cited the case of **Chipango v. Attorney-General**[2] and quoted a passage therefrom as follows:

P.1713

"It is true that in the case of a contract, breach of a condition precedent prevents the contract from ever becoming operative. Whereas breach of a condition subsequent need not render the contract void but may be answerable in damages only"(sic!).

We fully appreciate the thrust of the submission and the case and other authorities cited by the learned counsel. We do not think, however, that any useful purpose will be served by our discussing those authorities.

The next point taken up by the appellant's counsel in their heads of argument has to do with the construction by the respondent of a building by the respondent to be used in distribution of the appellant's products. It was contended that it was never at any time a pre-requisite for any dealer to own a building in any area of its choice to hold a distributorship right of the appellant's products. The appellant does provide containers to distributors for that purpose. The erection by the respondent of a building was not, according to counsel for the appellant, a relevant factor in determining whether or not there was an intention to create a binding contract between the parties. The short point made by counsel is that the learned

trial judge erred in taking into account the fact that there was a building constructed by the respondent in determining the intention of the parties.

The appellant's grievance with the trial judge in regard to ground two stems from the portion of the judgment in which the learned judge, after considering the case of **Reville Independence LCC v. Anotech International UK Ltd.**[4] stated as follows:

> **"This case is on all falls (sic!) with the present one where, for three months, the Defendant was supplying its products to the Plaintiff and the Plaintiff was paying for them ..."**

Counsel criticized the trial judge for the statement as in his view the two cases are clearly distinguishable in that in the **Reville case**[4] the contention was whether or not there was a binding contract between the parties in light of the fact that the Deal Memo was not signed by the claimant. The court in that case held that the signature of the parties to a contract was not a condition precedent to the existence of a contractual relationship as a contract can equally be concluded by the

conduct of the parties. By contrast, the respondent in the present case signed the contract in question. The appellant on the other hand did not sign on account of absence of the feasibility study which was still on going. According to the learned counsel, the two cases are distinguishable on that basis. It is for this reason that counsel contended that the **Reville Independence case**[4] is not on all fours with the present case notwithstanding that the appellant had been supplying its products to the respondent and the respondent was paying for them over a period of three months.

Under ground three, the appellant's counsel made a short pointed legal argument, namely that the award of damages for breach of contract by the learned trial judge was contrary to established principles. More specifically, counsel contended that if there was any contract in the present case, which counsel argued there was not, then breach of that contract could only attract an award of damages determinable with reference to the notice period for termination, that is to say, one

month. The learned counsel quoted a passage from the judgment of **Parker B in Robinson v. Harman**[5] that:

> **"The rule of the common law is that where a party sustains loss by reason of breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed."**

The appellant's counsel also quoted a passage from the **Law of Damages** by Andrew MA Reed Elsevier to buttress the submission that damages are conventionally reckoned with reference to the notice period. The trial judge in the present case, according to the learned counsel, employed a formula outside the acceptable principles and in the result awarded damages which were far in excess of any reasonable estimate of the loss the respondent suffered.

We were beseeched to uphold the appeal on all these grounds.

We have already stated that Mr. Lungu relied on the heads of argument filed in court on 21st November, 2016.

P.1717

In response to ground one of the appeal the learned counsel defended the finding of the learned trial judge that there was an intention between the parties to enter into binding legal relations. Counsel contended that there is nothing on the record which suggests that the appellant could enter into a contract with the respondent on condition that a feasibility study needed to be concluded first. Even if that were the case, the alleged feasibility study was conducted by the appellant who was satisfied with the structure put up by the respondent. We were referred to the evidence of the sole witness of the respondent where he testified that the appellant's officials considered the building erected by the respondent fit for the intended purpose and immediately branded it in the appellant's corporate colours at the appellant's cost. This, according to the learned counsel, was sufficient confirmation that a feasibility had been conducted.

In further supporting the holding of the trial judge, counsel referred to the case of **Cehave NV v. Bremer Handelge-Sellschaft MbH**[6] where the judge stated that:

P.1718

> **"I think the court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations."**

Counsel for the respondent submitted further that there was no feasibility study needed to be undertaken before the respondent could commence trading and there was no mention in the contract that the respondent had to undergo a trial period. We were implored to dismiss ground one of the appeal for lacking merit.

In respect of ground two of the appeal, Mr. Lungu's submissions were not targeted at defending the trial court's finding that the case of **Reville Independence**[1] was on all fours with the current case. He instead reiterated the submissions he made under ground one regarding the feasibility study and the condition precedent. More pointedly, however, the learned counsel referred us to the case of **Rose and Frank Co. v. Crompton (Jr.) & Brothers Limited**[7] where the House of Lords held that:

> **"the 1913 agreement was not binding on the parties, but that is so far as the agreement had been acted upon by the defendant's**

acceptance of orders, these orders were binding contracts of sale."

In the present case, the appellant supplied its products to the respondent and the respondent accepted and paid for those goods and proceeded to trade those goods. These actions were enough to evince an intention to create a binding contract.

In terms of ground three Mr. Lungu defended the judgment of the trial court on the principle employed for the award of damages. Quoting from **Chitty's Law of Contracts,** he submitted that:

"damages for a breach of contract committed by the defendant are a compensation to the plaintiff for the damage, loss or injury he has suffered through that breach. Damage, loss or injury includes any harm to the person or property of the plaintiff and any other injury to his economic position. He is as far as money can do, to be placed in the position as if the contract had been performed."

Submitting further on the primary purpose of damages for breach of contract, the learned counsel quoted a passage from the case of **Addis v. Gramophone**[7] as follows:

P.1720

"contract law seeks to put the parties in the position they would have been in had the contract been performed."

Mr. Lungu argued that the appellant prematurely terminated the contract by stopping the supply of its products to the respondent. He submitted that it was appropriate to employ the 'expectation measure' of damages in this case so as to place the respondent in the position he would have been in had the contract been properly performed. It was counsel's contention that the trial court's assessment cannot be faulted given the real prospects that were demonstrated before the trial judge that the respondent would make a profit.

We were urged to dismiss this ground of appeal too.

At the hearing of the appeal, we engaged the learned counsel with a view to seeking clarification on two issues: first on what the notice period for termination of the agreement would be if its terms were to be taken to be those set out in the unsigned document. Mr. Lungu pointed to the clause for termination in the unsigned document which provided for thirty days. Second, ignoring the unsigned document but proceeding

on the premise that there was nonetheless a contract, we asked Mr. Lungu what notice period would determine such a contract. He stated that six months' notice would be appropriate. He, however, failed to give us any proper justification.

Asked how long the contract in the present case is assumed to exist between the parties was, he mentioned one year. We inquired whether it was reasonable for a contract of one year to be determinable by a notice of six months. Mr. Lungu usefully conceded that it was not, and added that termination by one month's notice would be reasonable.

We have paid the closest attention to the documents on the record of appeal as well as the heads of arguments filed by the parties. We are also grateful to the learned counsel for the respondent for the magnanimous concession he made, namely that if there was indeed a contract between the parties, such contract would be determinable by thirty days notice, and that the notice period for determination of a contract was the best established basis for reckoning the quantum of damages where there was breach.

In our view, ground one and ground two of the appeal deal with one overaching question whether there was a contract between the parties or not. The issue of intention to enter into binding contractual relations is, of course, but part of what goes to determine the existence of a contract.

We propose, therefore, to deal with grounds one and two together and ground three as a stand alone ground.

There is no argument in the present case that both parties contemplated entering into a distributorship contract. The uncontroverted fact that the appellant handed to the respondent a copy of the standard operator of Zambrew products (distributorship) agreement to sign, and the respondent did sign and return the said agreement, speaks volumes about what the parties had set out to do. The evidence on record by the respondent's witness regarding his exchanges during consultations with officials from the appellant, stands unchallenged. That the parties had contemplated some distributorship arrangement where each had responsibility towards the other, cannot be denied. The real question is

whether, despite the appellant not having signed its part of the distributorship agreement, a contract nonetheless came into effect. This was indeed the question that preoccupied the learned trial judge as is evident from his judgment. At J14 the learned trial judge stated as follows:

> **"I have considered the evidence on record, the written submissions filed by both counsel and the authorities cited in support of their contentions. The first question for consideration is whether there was a valid contract between the parties."**

The learned trial judge then unpacked the evidence adduced before him and subjected it to a qualitative and quantitative evaluation as is clear from his judgment and found that the only reasonable inference to be drawn from that evidence regarding the conduct of the parties, was that there was indeed an intention to enter into a distributorship agreement.

We are of the confirmed view that besides being meticulous in his treatment of the evidence before him, the learned judge was quite methodical in his approach. His

observations based on the evidence before him is, in the circumstances, impeccable. On the specific question whether or not there was a contract, the learned trial judge pithily observed in a passage of great moment (at J14) as follows:

> **"The defendant contrived to deny the existence of a contract between the parties by contending that the plaintiff was allowed to order products because it was during the festive period and this did not mean that the defendant had accepted the plaintiff's order. In his evidence which does not support this contention, DW stated that the plaintiff was allowed to trade as a way of testing how the market and any existing distributors would be affected by the plaintiff and that the test or trial period cannot be considered as forming part of a distributorship agreement that would only result from a successful assessment of the market. In my view, the defendant's contention and evidence are a mere red herring intended to extricate the defendant from liability."**

For our part, we fully endorse the trial judge's view. On a proper conspectus of the evidence on record, we form the inescapable view that there was indeed a distributorship agreement between the parties which arose from their conduct. We also agree with the trial judge that, that contract was wrongfully terminated by the appellant, thus giving the

respondent the right to recover damages for breach of contract from the appellant. In our view, therefore, ground one and two of the appeal are bereft of merit and they are dismissed.

As regards ground three dealing with the quantum of damages due to the respondent for breach of contract, the learned trial judge found that at an average commission of K31,715,155 (unrebased) per month the respondent would have earned K380,581,850.00 (unrebased) for 12 months. He noted that the agreement only ran for three months leaving a balance of nine months. He then multiplied the K31,715,155.00 (unrebased) by nine months to find K285,436,396.00 (unrebased) which he awarded as damages for breach of contract.

We are of the firm view that this computation was wrong in principle and overlooked at least two critical considerations: relating the of damages to the notice period for termination of contract and the need to mitigate losses.

The contract that resulted from the conduct of the parties was for one year. As Mr. Lungu usefully conceded, it was determinable by reasonable notice, that in this case being thirty days notice. Any damages awarded should have taken the notice period for determination of the agreement into account. As we stated in **Swarp Spinning Plc v. Chileshe and Others**[9] in assessing damages to be paid and which are appropriate in each case, the court should not forget the general rule which applies. This is that the normal measure of damages applies and will usually relate to the applicable contractual length of notice or the notional reasonable notice, where the contract is silent.

In **Mobil Oil Zambia Limited v. Ramesh M. Patel**[10], we stated that where the contract breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option. We carried the same sentiments in **National Airports Corporation Limited v. Reggie Ephraim Zimba**[11]. There we held, among other things, as follows:

P.1727

> **"Admittedly, the notice clause was not invoked but as we reaffirmed in *Mobil Oil Zambia Ltd. v. Patel*[9], where the contract breaker had a contractual option to terminate the contract, the court should assess the damages on the footing that the party in breach would have exercised the option. In this case, the damages should relate to the period of three months of salary ... accrued ... over that period. We find and hold the phrase invoked so as to pay damages as if the contract had run its full course offends the rules which were first propounded as propositions by Lord Dunedin in *Dunlop Pneumatic Tyre Co. v. New Garage and Motor Co.*[12] especially that the resulting sum stipulated for is in effect bound to be extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach."**

On the basis of the foregoing authorities we think, with utmost respect to the learned trial judge, that the award of damages to the respondent on the basis of the unserved portion of the contract was a wrong estimate of the loss that the respondent could possibly have incurred, and flies in the face of the guidance we have repeatedly given to trial courts.

In any case, the learned trial judge did not take into account the need to mitigate. In **Eastern Cooperative Union Ltd. v. Yamene Transport Ltd.**[13] we pointed out that it is always the duty

of the plaintiff to minimize his loss and where the plaintiff fails to do so he cannot expect the court to award damages which will be limitless both as to time and extent. The aspect of mitigation should have exercised the learned trial judge's mind if he believed that this was a proper case in which to award damages beyond those calculable with reference to the notice period for termination.

In the result, we hold that ground three of the appeal succeeds. The respondent is entitled to be paid damages for breach of contract equivalent to the notice period for termination of the contract, that it to say, one month at the rate determined by the learned trial judge, namely K31,715,155.00 (unrebased). The said amount shall carry interest at the short term deposit rate from the date of the writ of summons until the date of judgment and thereafter at the average lending rate as determined by the Bank of Zambia up to the date of payment.

P.1729

The appeal having partially succeeded, we order that each party bears its own costs.

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A. M. WOOD
SUPREME COURT JUDGE

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M. MALILA, SC
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE