

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2015/HP/0876

BEWTEEN:

ROAD TRANSPORT AND SAFETY AGENCY

PLAINTIFF

AND

AROUND AFRICA LIMITED

DEFENDANT

**BEFORE HON MRS JUSTICE S.KAUNDA NEWA THIS 26th DAY OF
APRIL, 2017**

For the Plaintiff : Mr Aaron Tembo, in house counsel

For the Defendant : No appearance

J U D G M E N T

CASES REFERRED TO:

1. ***Morris V Baron and Co 1918 AC 1***

OTHER WORKS REFERRED TO:

1. ***Chitty On Contracts Volume 1, 13th Edition***

In this matter the plaintiff sued by way of writ of summons on 11th June 2015 claiming;

- i. *A refund of K54, 000.00 advance payment made in connection with the tender for the supply and delivery of ultra this laptops and portable hard disks*

- ii. *Damages for breach of contract*
- iii. *Interest on (i) above from 25th August 2014 when the initial claim for the refund was made to the date of judgment*
- iv. *Costs*
- v. *Any other relief that the court may deem fit*

The statement of claim filed shows that the parties entered into a contract on the 25th March 2014 where the Defendant was to supply ultra-thin laptops and portable hard disks at a total cost of K216, 000.00, inclusive of sixteen percent value added tax with the delivery period being three to four weeks.

That the Defendant had on 28th March 2014 requested for an advance payment equivalent to the contract price to enable it supply the goods ordered within the time required. However as the law only allows for the making of twenty five percent of the contract price as advance payment, the Plaintiff accordingly paid the Defendant K54, 000.00 being twenty five percent of the contract price.

Paragraph 6 of the statement of claim states that on 16th April 2014 the Defendant wrote to the Plaintiff requesting to deliver laptops of a lower specification as the laptops which were contracted for were ex-stock, or that they be granted a three weeks extension of the delivery period to allow the manufacturer to release the stock to the distributor in Dubai. That the Plaintiff granted the three week extension period for the delivery.

However the Defendant failed to deliver the laptops and on 4th June 2014 and wrote to the Plaintiff offering a newer and higher model of the ultra-thin laptops with higher specifications at no additional cost to the Plaintiff. That the Plaintiff on 6th June 2014 agreed to the said offer, but that to date the Defendant has failed, neglected or ignored to supply the laptops contracted for or the laptops with higher specifications.

On 29th June 2015 the Defendant filed a defence in which they state in paragraph 2 that the acceptance by the Plaintiff of the delivery of the newer and lighter model of the ultra-thin laptops with higher specification in the contract of 25th March 2014 was altered.

That there was no agreed time frame for the delivery of the newer and higher model of the ultra-thin laptops, and that the delay in the delivery of the same was due to the suppliers setting a future date for the release of the said laptops.

At the hearing the Plaintiff called one witness, and the Defendant did not attend the hearing. PW1 Janet Mbesha Mumba a Senior Procurement Officer employed by the Plaintiff testified that the Defendant was contracted to supply eight ultra-thin laptops and portable hard disks at a total cost of K216, 003.60. That the Plaintiff had issued an enquiry to invite quotations from suppliers for the said delivery on 10th February 2014, and the said enquiry closed on 14th February, 2014. She stated that the invitation to tender was on pages 1 to 3 of the Plaintiff's bundle of documents.

She stated that the Plaintiff received quotations from various suppliers among them the Defendant, and that after the evaluation process, a Local Purchase Order (LPO) was issued to the Defendant for K216, 003.60, with a delivery period of three to four weeks. It was PW1's evidence that the Defendant's name appears on that document as one of the companies that was invited to bid for the tender. That the specifications of the laptop are on page 2 of the document.

Further in her testimony PW1 stated that on 28th March, 2014 the Plaintiff received a letter from the Defendant requesting to be paid seventy five percent of the contract price as advance payment, and the Plaintiff had responded that it was against public policy to pay the seventy five percent, and that only twenty five percent could be paid, which in this case came to K54, 000.00.

The letter from the Defendant asking for the seventy five percent advance payment is on pages 5 of the Plaintiff's bundle of documents, and the response by the Plaintiff stating that it could only pay twenty five percent is on page 6 of the bundles.

PW1 further testified that on 4th April, 2014 the Defendant had submitted its bank details which are on page 7 of the Plaintiff's bundle of documents, and was paid the K54, 000.00. The advance payment guarantee is on page 8 while the voucher for the payment is on page 9. The receipt from the Defendant acknowledging payment is on page 10.

However on 16th April, 2014 the Defendant wrote a letter to the Plaintiff stating that their supplier had told them that the laptops contracted for were ex-stock, and could not be delivered within three to four weeks, but that there were laptops were of a lower speck than the ones submitted in the quotations. The letter also stated that the alternative was to wait for a further three weeks to get the laptops that the Plaintiff had ordered. PW1 identified the letter on page 11 of the Plaintiff's bundle of documents as the said letter.

It was stated that on 17th April, 2014 the Plaintiff had written back to the Defendant stating that they would not accept the laptops with the lower speck, and that it had therefore extended the delivery period by three weeks to obtain the laptops initially ordered. That thereafter in the month of May the Plaintiff had received about three letters from the Defendant stating that one of their suppliers Samsung had not yet issued the laptops ordered to the distributor in Dubai, and the Defendant was therefore unable to deliver the laptops on time.

The letter on page 12 is the response that the Plaintiff gave to the Defendant indicating that the delivery period had been extended for three weeks for the delivery of the laptops indicated in the bidding documents. That in the other letter the Defendant stated that they were some laptops of a higher speck that were available which they were able to deliver, but that these would entail an extra cost of K1, 200.00 for each laptop, which they would absorb. The letter further states that if the Plaintiff was agreeable to the same, the Defendant

would deliver them as soon as the Plaintiff sent the no objection. That the Plaintiff asked the Defendant to submit a specification of the laptops with the higher speck which they did.

The letter on page 13 of the Plaintiff's bundle of documents was identified as the letter in which the Defendant had indicated that they were ready to supply the laptops with the model which would cost K1, 200.00 more. That the letter on page 14 gives the specifications of the newer model of the laptop, with the said specifications being contained on pages 15-16 of the Plaintiff's bundles.

It was stated that the Defendant also wrote the letter on page 17 of the bundles of documents attaching specifications of the newer ultra-thin laptops being counter offered, with the specifications for the said laptop being attached, and which are on pages 18 and 19 of the Plaintiff's bundle of documents. The letter on page 20 is from the Defendant to the Plaintiff stating that the offer of the newer model would be at no cost, with specifications for the same on pages 21 and 22.

PW1 also testified that the Plaintiff thereafter on 5th June 2014 wrote to the Defendant informing it that it no objection to the delivery of the laptops with the higher speck. The letter on page 23 is the said letter. However by 21st July 2014 the delivery had not been made. The Plaintiff wrote to the Defendant inquiring why the delivery had not been made, and that the said delivery should be made by the month end of July 2014, otherwise the Plaintiff would

cancel the order. This letter is on page 24 of the bundle of documents.

It was stated that the Defendant wrote back to the Plaintiff stating that it was having problems with its distributor in South Africa hence the delay to deliver the laptops, stating that their Director would travel to South Africa to find out the reasons for the delay. The letter further states that the Director would also travel to South Korea to source for the same laptops, and requested for a further three weeks to deliver the laptops. The letter is page 25 of the bundle of documents.

Her evidence was that the Defendant waited until 25th August 2014 and then wrote a letter to the Defendant stating that further to the cancellation of the order due to non-performance, the Defendant should pay back the advance payment of K54, 000.00. This letter is on page 26 of the bundle of documents. That the Defendant did not respond to the letter, and the Plaintiff on 20th November 2014 wrote to the Defendant informing it that it would commence legal action, as the advance payment made to them had not been refunded. The letter is on page 27 of the bundle of documents.

I have considered the evidence. The Plaintiff as can be seen from page 1 of the bundle of documents invited tenders for the supply of eight ultra slim portable laptops and hard disk drives with the specifications contained on page 2 of the bundle of documents. The Defendant was awarded the tender, and it asked for an advance payment of seventy five percent of the contract price, so that it could procure the supply within the specified time.

However the Plaintiff could only make an advance payment of twenty five percent according to the regulations as stated in the letter on page 6 of the bundle of documents. The said twenty five percent payment amounting to K54, 000.00 was made on 8th May 2014, as can be seen on the payment voucher on page 9 of the Plaintiff's bundle of documents.

The Defendant issued a receipt for the payment, which is on page 10 of the said bundle of documents. Thereafter it wrote a letter to the Plaintiff on 16th April, 2014 which letter is on page 11 of the Plaintiff's bundle of documents advising that the laptops that were bade for were ex-stock, and offered to supply the feature 9 (screen type) which had a touch pad, if the Plaintiff was agreeable.

The Plaintiff in the letter dated 17th April, 2014 which is on page 12 of the bundles did not accept that offer, but extended the delivery period for the laptops specified in the bidding documents by three weeks.

The Defendant on 8th May, 2014 in a letter which is on page 13 of the bundles wrote advising that Samsung had not yet released the model that the Plaintiff had invited tenders for. They offered to supply a higher model which would cost K1, 200.00 more for each one, and that they were ready absorb the extra cost. The specifications of this laptop are on pages 15 -16 of the Plaintiff's bundles, and were attached to the letter dated 13th May 2014, and which is on page 14 of Plaintiff's bundle of documents.

The Defendant then wrote the letter on page 17 of the bundle of documents on 29th May, 2014 advising of a newer model of the ultra-thin laptop, and whose specifications are on pages 18-19 of the bundle of documents. On page 20 of the bundle of documents there is a letter dated 4th June, 2014 where the Defendant offers the Plaintiff a newer and higher model of the laptops being the 4th generation processor, whose specifications are on pages 21 and 22 of the Plaintiffs bundle of documents. The letter states that the newer model did not alter the price earlier quoted.

The Plaintiff on 6th June 2014 accepted this offer as seen on page 23 of the bundle of documents. From the evidence it is clear that the offer to supply the laptops whose specifications are in the tender documents on pages 1-3 of the Plaintiff's bundle of documents, which was accepted by the Defendant and an advance payment of K54, 000.00 made towards the same was not fulfilled, as the Defendant did not supply the said laptops.

The Plaintiff did not terminate that contract as a result of the breach, and the Defendant made several counter offers to supply laptops of various specifications, and the Plaintiff accepted to buy the 4th generation processor. The letter on page 20 of the bundle of documents states that the offer price for the laptops initially tendered for would be the price that the 4th generation processor laptops would be bought at. The letter does not specify a period of delivery of the same.

The Plaintiff's acceptance letter on page 23 does not state when the Plaintiff expected delivery of the same. However the letter on page

24 dated 21st July 2014 which was written by the Chief Executive Officer of the Plaintiff to the Defendant noted that the contract for the supply of the laptops was signed on 25th March, 2014, with the delivery period being three to four weeks from the date of signing the same.

That following the agreement to supply the laptops of a higher specification on 6th June, 2014 there had been no delivery, and the said letter advises that if the laptops were not delivered by the month end of July 2014, the contract would be terminated for non-performance in accordance with the Public Procurement Act No 12 of 2008.

The Defendant in the letter dated 29th July, 2014 which is on page 25 of the bundle of documents wrote to the Plaintiff asking for an extension of two to three weeks to make the delivery. However the Plaintiff on 25th August 2014, which letter is on page 26 of the bundle of documents advised the defendant that the LPO had been cancelled, and asked to be paid the advance payment of K54, 000.90. A further demand letter was written to the Defendant for the refund of the K54, 000.90, as seen on the letter on page 27 of the bundle of documents.

Lord Dunedin in the case of **MORRIS V BARON AND CO 1918 AC 1** stated that a distinction needs to be drawn between rescission and variation and that the test for determining the same is in variation *if in the first case there are no such executory clauses in the second arrangement as would enable you to sue upon that alone if the first did not exist; in the second you could sue on the second arrangement*

alone, and the first contract is got rid of either by express words to that effect or because the second dealing with the same subject matter as the first but in a different way, it is impossible that the two should be both performed.

From the evidence it is clear that after the initial contract was signed between the parties, there was a variation on the type of laptops to be supplied under the contract from the 3rd generation processor to the 4th generation processor as evidenced on the letter on page 23 of the Plaintiff's bundle of documents, and that the 4th generation processor laptops would be supplied at the initial contract price.

Therefore in order for the Plaintiff to sue on the second agreement, it would have to refer to the price of the first agreement, as well the delivery period stipulated in the first agreement. Thus the initial contract was varied and not rescinded. It can be seen after the contract was varied the laptops had not been delivered by the time the action was commenced.

The Defendant in paragraph 5 of its defence argued that no period was fixed for the delivery of the laptops, and in paragraph 5 of the defence asserts that the Plaintiff prematurely terminated the contract despite having agreed to the variation of the contract with agreed time for delivery. The letter on page 24 written by the Chief Executive Officer of the Defendant company on 21st July, 2014 after the varied terms of the contract were agreed by the parties makes reference to the delivery period having been three weeks from the date of the contract, and that after the variation of the contract the

Defendant had given verbal assurances on the delivery of the laptops to no avail.

I do note that the communication encompassing the variation did not make reference to the delivery period. Chitty on Contracts Volume 1, 13th Edition at paragraph 21-001 states that the general rule is that a party to a contract must perform exactly what he undertook to do. Paragraph 21-013 of the said Chitty on Contracts provides that where the parties have expressly stipulated in their contract that the time fixed for the performance must be complied with or that time is to be of the essence, then time is of the essence.

In this case the original contract stated the delivery period for the laptops was three to four weeks. Therefore time was of the essence in that contract. It would therefore be reasonable to infer that even when the contract was varied, time was still of the essence, despite the variation not stating the period of performance. The contract was varied on 6th June 2014 and if one goes by the delivery period stated in the initial contract of three to four weeks, the Defendant should have delivered the laptops on or about 6th July, 2014.

The letter on page 24 of the Plaintiff's bundle of documents reminding the Defendant that the initial period of delivery was three weeks from the date of the contract was written on 21st July 2014, which is a period of almost three weeks from when the delivery was expected. The Defendant not having delivered the laptops three to four weeks after the contract was varied, breached the said contract, and the Plaintiff was at liberty to terminate it. The contract having been breached, the Plaintiff was equally entitled to

demand a refund of the advance payment made to the Defendant in the sum of K54, 000.00. The evidence on record shows that to date the laptops have not been delivered.

The Plaintiff has therefore proved its case on a balance of probabilities that it is entitled to be paid the advance payment made to the Defendant, and I accordingly enter judgment in its favour for the sum of K54, 000.00. The judgment sum shall carry interest at the average short term deposit rate from the date of the issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

The Plaintiff is also awarded costs to be taxed in default of agreement. Leave to appeal is granted.

DATED THE 26th DAY OF APRIL, 2017

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE