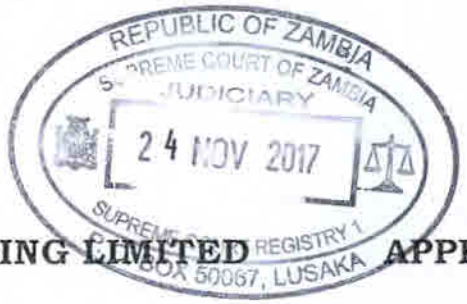
IN THE SUPREME COURT FOR ZAMBIA **Appeal No. 30/2013**

HOLDEN AT KABWE
(Civil Jurisdiction)



BETWEEN:

ULTIMA ENGINEERING LIMITED **APPELLANT**

AND

CHIBULUMA MINES PLC **RESPONDENT**

Coram: MWANAMWAMBWA, DCJ, MUYOVWE AND KAOMA, JJS
On 11th August, 2015 and 2nd June, 2017.

For the Appellant: Mr. F. Besa, Messrs Besa Legal Practitioners

For the Respondent: Mr. I. Imonda, Messrs Imonda and Associates

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J U D G M E N T

MUYOVWE, JS, delivered the Judgment of the Court

Cases referred to:

1. **Nkhata and Others vs. The Attorney General (1966) Z.R. 124**
2. **Storer vs. Manchester City Counsel (1974) 3 All E R 824**
3. **The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) vs. The Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109**
4. **Eddie Christopher Musonda vs. Lawrence Zimba SCZ No. 41/2012**
5. **Wilson Masauso Zulu vs. Avondale Housing Project (1982) Z.R. 172**

Legislation referred to:

1. The Sale of Goods Act

This is an appeal against the judgment of the High Court sitting at Kitwe, which dismissed the appellant's claim for US$304,191.09 in respect of hire charges for a Rocket Boomer 281 drill rig.

Briefly, the facts are that the respondent expressed interest to purchase the Rocket Boomer drill rig and on 19th May, 2009 the appellant issued a quotation for the sale of the equipment at the price of US$380,000 to the respondent. Prior to the purchase, the respondent insisted to run trials on the equipment and the appellant delivered the equipment to the respondent which was for the period starting from the 28th May, 2009 to 14th June, 2009. The respondent made an upfront payment of US$25,000 on the agreed rate. The appellant claimed that although a contract was executed, a copy was not availed to them. On the 15th June, 2009 the respondent issued a purchase order for the purchase of the equipment at the price of US$380,000, out of which

US$263,245.89 was to be paid to African Banking Corporation (hereinafter referred to as " the Bank"), while US$116,754.11 was to be paid to the appellant. Contemporaneously with the issuance of the purchase order, the Bank confirmed ownership of the equipment in exercise of its rights under a Finance Lease Facility Agreement entered into between the Bank and the appellant following the appellant's default in the payments towards the facility. The equipment remained at the respondent's mine from the 15th June, 2009 to September, 2009 which is the period, according to the appellant, the respondent allegedly failed to pay the hire charges amounting to US$262,233-70 net or US$304,191-09 exclusive of VAT. These are the hire charges at the heart of this action.

It is alleged that following the failure by the respondent to pay the hire charges, the appellant in July/August 2009 decided to take back their equipment but the respondent resisted. The appellant strongly denied that the equipment was taken to the respondent for test runs although it was admitted that this was the initial agreement. The respondent purchased the equipment in

September, 2009 and the Bank acknowledged responsibility for the delay in the purchase of the equipment by the respondent.

The record shows that the Bank was on the 31st August, 2010 joined as 2nd defendant in the court below by consent of both parties. The Bank had availed the appellant with a term facility to buy earth moving equipment and also to assist the appellant to settle the balance on its purchase of the drill rig in contention. The Bank denied interfering with the contract between the appellant and the respondent and denied being a party to the agreement between the parties or inducing the breach of the contract. However, before trial ended in the court below, proceedings against the Bank were discontinued.

In his judgment, the learned trial judge found as a fact that although there was a lot of correspondence between the parties over the equipment, there was no agreement with regard to hiring of the equipment. The learned trial judge found that the appellant's claim could not be sustained and dismissed it with costs. We intend to address in detail the judgment of the lower court later in this judgment.

Mr. Besa, learned Counsel for the appellant has advanced three grounds of appeal. Firstly, Counsel questions the learned trial judge's finding that the appellant was not entitled to claim hire charges for the equipment prior to the payment of the purchase price; secondly, Counsel questioned the learned trial judge's finding that the payment of US$25,000 was a one off payment, and thirdly, Counsel took issue with the holding by the lower court that from inception, the respondent intended to buy the equipment.

At the hearing of the appeal, Mr. Besa, relied on the appellant's heads of argument.

The gist of Counsel's argument in ground one is that it is not in dispute that the proposal of the rate of hiring the rig came after a meeting between the parties and this is confirmed in the email dated 17th February, 2009 which we will refer to in due course in this judgment. It was strongly argued that the absence of a formal agreement on the hiring rate cannot totally and completely deprive the appellant of consideration for the use of the equipment by the respondent from June 2009 to October 2009 when the equipment was finally purchased. In the same breath, Counsel argued that

there was a hire agreement whose rates were communicated by the appellant to the respondent in their letter dated 23rd July, 2009 titled "Rocket Boomer 281 Drilling contract rates."

In the alternative, we were urged to order that the respondent pays hiring charges at the rate of US$6.50 per metre from the time the equipment moved on site to the time when the purchase price was paid.

In support of ground two, it was argued that there was no evidence before the court below to show that the payment of US$25,000 was a one off payment; that the only evidence available is the discussion relating to the hire of the equipment and the hire rates showing that the US$25,000 was part payment towards the hire charges. Counsel submitted that the learned trial judge erroneously accepted that the US$25000 was a one off payment and ignored the evidence on record pointing to the intention of the parties to enter into a hiring agreement of the equipment. Relying on the case of **Nkhata and Others vs. The Attorney General**[1] we were urged to reverse this finding by the learned trial judge.

In relation to the third ground of appeal, it was argued that the respondent used the appellant's equipment from June 2009 to October 2009 before finally purchasing it. That the intention of the parties was to enter into an agreement to hire the equipment but with an option to purchase if the respondent was satisfied with its performance. To support his argument, Counsel relied, *inter alia*, on the case of **Storer vs. Manchester City Council** [2] where Lord Denning stated that:

> **"In contracts you do not look into the actual intent in a man's mind. You look at what he said and did. A contract is formed when there is, to all outward appearances, a contract. A man cannot get out of a contract by saying "I did not intend to contract," if by his words he has done so."**

It was submitted that the respondent's desire is to escape liability on the ground that the formal contract was not executed.

At the hearing of this appeal, Mr. Imonda, learned Counsel for the respondent, also relied on the respondent's heads of argument filed herein. In his written response, Counsel merely referred us to the evidence on record and agreed with the learned trial judge's

findings and decision. We were invited to also consider the submissions filed in the court below on behalf of the respondent.

We turn briefly to examine the submissions by the respondent in the court below. First of all, Counsel tackled the issue of whether there was an agreement to hire the equipment. It was submitted that although there was a discussion between the parties regarding the hire of the Rocket Boomer drill rig, no agreement was reached on the same. Counsel referred us to an email from the appellant to the Bank dated 2nd June, 2009 advising them that the respondent who was initially interested to hire the equipment was now interested in buying it from the appellant. According to Counsel, it was clear from this correspondence that the parties were now focused on the sale/purchase of the equipment. He insisted that there was no agreement to hire the equipment.

Counsel then addressed his mind to the next question: whether there was a sale or purchase agreement between the parties. He argued that the correspondence produced in the court below reveals that the equipment was taken to the respondent for trials with a view to purchase it after the trial proved successful.

After successful trials, the respondent issued a purchase order thereby accepting the appellant's offer in the quotation. This led to the appellant issuing a tax invoice dated 1st July, 2009 in the sum of US$440,800.00 (inclusive of VAT).

It was submitted that the tripartite arrangement (between the parties and the Bank) which was initiated by the appellant in the email dated 14th May, 2009 shows that the Bank was to finance the purchase of the Rocket Boomer drill rig. That there was evidence in the court below to show that the Bank advised the respondent not to deal with the appellant over the equipment and that if the appellant had any claims over the equipment, it should deal with the Bank.

Counsel submitted that the appellant's claim for hire charges could have been ignited by the alleged delay in the payment of the purchase price. Counsel argued that under Section 49 of the Sale of Goods Act, the remedy for delayed payment is an action for the price with interest and costs. That the appellant had no right to sue for hire charges without evidence of a hire agreement and the action should be dismissed with costs.

We have considered the arguments by the parties and we intend to deal with all the grounds of appeal together.

We note from the outset that the three grounds of appeal attack findings of fact made by the learned trial judge and we have been invited to reverse the learned trial judge on his findings of fact: that the appellant was not entitled to claim hire charges for the equipment; that the payment of US$25,000 was a one off payment and that from inception the respondent intended to buy the equipment. The main issue in this appeal for our determination is whether the learned trial judge was on firm ground when he found that there was no hire agreement between the parties to hire the equipment. Once the main issue is determined all other issues raised by the appellant will fall away.

It is not in dispute that the parties in this appeal agreed to have the drill rig moved to the respondent's mine. The learned trial judge addressed his mind to the emails passing between the parties, starting with the email from the appellant's Director Administration Mr. Felix Nonde dated 17th February, 2009 addressed to Mr. Roux of the respondent mine with an

attachment confirming the rates for plant hire for the rig and the 50 ton Crane. The learned trial judge found that there was no confirmation of acceptance of the hire charges by the respondent after the email dated 17th February, 2009. We refer to the email dated 21st May, 2009 by the respondent's Mr. Dereck Olivier to the appellant's Felix Nondo. It reads as follows:

> **"Felix, please note that we are very interested in purchasing your drill rig, but as we don't know its current condition we would like to offer your company the opportunity to bring this rig to site and do some support drilling for us at a proposed rate of $6.50 per meter. The trial period to be one (1) week. Should the machine operate reliably and without any major breakdown and able to do the required long hole support drilling as requested, we will proceed with the possible sale of this machine. While we do the week's trial, we will commence discussions with ABC. Please note that this trial does not mean that we will purchase this machine and should the drill rig meet the criteria we will proceed with the option to purchase this drill rig, based on Metorex approval.**
>
> **Please advise your acceptance to trial this machine at Chibuluma for one (1) week**
>
> **Regards**
>
> **Derek".**

The key words here are "*trial period*". It was clear to the learned trial judge that the discussion between the parties centred on the question of the trial period and/or purchase of the equipment. The Bank came into the picture and there was evidence in the email dated 17th June, 2009 from the Bank that the respondent had signed the term sheet for financing the purchase of the equipment. Prior to this, is the letter dated 8th May, 2009 from the appellant to the Bank, in which the appellant confirmed to the Bank that the respondent who was initially interested to hire the Rocket Boomer drill rig, was now interested to buy it from them. The learned trial judge noted that the parties, including the Bank, expected to finalise the sale quickly in order to free the appellant from its obligations to the Bank. The learned trial judge found as a fact that the appellant failed to produce the hire agreement; that the trial of the equipment was successful and the respondent raised a purchase order dated 15th June, 2009 based on the quotation from the appellant dated 19th May, 2009; on the 1st July, 2009 the appellant raised the tax invoice for US$380,000 exclusive of VAT and the learned trial

judge rightly accepted that this was evidence of a valid contract of sale of the equipment which was already at the respondent's mine.

In arriving at the finding that there was a valid contract between the parties, the learned trial judge applied Section 1 and 10(1) of the Sale of Goods Act and noted that the time as to when title would pass was not stipulated. The lower court noted Rule 1 of Section 18 of the Act which provides that:

> **"Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."**

The finding of the learned trial judge was that although the appellant's invoice read "cash on delivery," it was not the intention of the parties to make prompt payment as the purchase was to be financed by the bank.

We agree with the learned trial judge's findings. It is clear that as of the 15th June, 2009 there was already a valid contract and it is inconceivable that at the same time, for the same period, there could be a hiring agreement between the same parties for the same equipment. We are of the view that looking at the conduct of the parties and the nature of the transaction, we can deduce that there was no intention of hiring the equipment because after the trial period ended on 14th June, 2009, the respondent issued a purchase order the following day and on the 17th June, 2009 the Bank issued correspondence to the effect that the respondent had signed the term sheet for financing the purchase of the equipment. In the case of **The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) vs. The Lusaka City Council and Zambia National Tender Board**[3] we held, *inter alia*, that:

> **...What is regarded as an important criterion is for the court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the contract of the parties as a whole.**

Therefore, the learned trial judge concluded and rightly so, that there was no evidence of a hire agreement between the parties from the date of contract of sale and date of payment, hence the appellant was not entitled to claim any hire charges prior to the payment of the purchase price.

Further, we find that the learned trial judge was on firm ground when he found that the appellant, who claimed to have been raising monthly invoices for hire charges, only produced one invoice dated 17th February, 2010 which went to show that the issue of the hire agreement was only raised after settlement of the lease between the respondent and the bank was delayed.

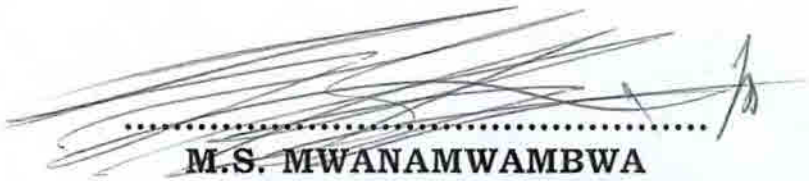
All in all, we do not find any reason to disturb the findings of fact made by the learned trial judge, who considered the evidence from both sides and he rightly believed the evidence of the respondent against that of the appellant. It was up to the appellant to prove its case and it is clear to us that the appellant lamentably failed to prove its case to the required standard, hence

the dismissal of its case in the lower court. As we stated in the case of **Eddie Christopher Musonda vs. Lawrence Zimba,**[4]

> **"It is a well established principle that the learned trial judge is a trier of facts, he has the advantage of observing the demeanour of witnesses to determine as to who was telling the truth in the trial. Bearing that in mind, we cannot upset his findings....."**

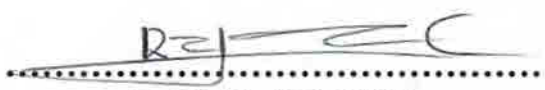
Having considered all the grounds of appeal in light of the evidence and judgment of the court below, we take the view that this appeal was against findings of fact and as we held in the case of **Wilson Masauso Zulu vs. Avondale Housing Project**[5] we cannot reverse findings of fact made by a trial court unless we are satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. The trial court cannot be faulted as he addressed all issues in controversy.

In conclusion, this appeal is devoid of merit and it is dismissed with costs to the respondent, to be taxed in default of agreement.



M.S. MWANAMWAMBWA
DEPUTY CHIEF JUSTICE

E.N.C. MUYOVWE
SUPREME COURT JUDGE



R.M.C. KAOMA
SUPREME COURT JUDGE