

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

**2015/HP/0306**

**BETWEEN:**

**PHOENIX ZAMBIA LIMITED  
AND  
JABIR-HUSSEIN PATEL**



**PLAINTIFF**

**DEFENDANT**

**Before the Hon Mr. Justice Mathew L. Zulu in Open Court on  
the <sup>19th</sup> day of <sup>June</sup> .....2018**

*For the plaintiff : Mr. K. Wishimanga, A.M. Wood & Co*

*For the defendant: Mr. M. Sitali, Milner & Paul Legal Practitioners*

---

**J U D G M E N T**

---

Cases referred to:

1. Zambia Railways Limited v. Pauline S. Mundia and Brian Simuchimba (2008) ZR 287 (SC)
2. K.B. Davies and Company (Zambia) Limited v Musumu Appeal No. 181 of 2006
3. Attorney General v D.G Mpundu (1984) ZR 6 (SC)
4. Salomon v Salomon (1897) AC 22
5. Davis Contractors v Freham UDC [1956] A.C. 696
6. Fribrosa Spolka Akoyjwa v Hairbairn Lawson Combe Barbour Limited (1943) AC 32
7. National Drug Company and Zambia Privatisation Agency v Mary Katongo SCZ Judgment No. 79 of 2001



8. National Carriers Ltd. v Panalpina (Northern) Ltd (1981) AC 675
9. John Paul Mwila Kasengele v Zambia National Commercial Bank Limited (SCZ Judgment No. 11 of 2000)
10. Burton Construction Limited v Zaminco Limited (1983) Z.R. 20 (S.C.)
11. Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 179
12. Khalid Mohammed v the Attorney General (1982) ZR 49

**Legislation and Works referred to:**

1. The Sale of Goods Act, 1893
2. Gower and Davis, Principles of Modern Company Law, 8<sup>th</sup> edition
3. Halsbury's Laws of England, 5<sup>th</sup> edition, Vol. 9 (1)
4. Chitty on contracts, Vol. 1, 2008, 13<sup>th</sup> edition

The plaintiff commenced this action against the defendant by writ of summons and statement of claim for the following reliefs:

- (i) the sum of US\$75,000 being the sum due and owing to the plaintiff by the defendant pursuant to the oral agreement between the plaintiff and the defendant for the purchase of the plaintiff's Tata Tipper Truck and Roller Compactor ("the equipment");
- (ii) damages for breach of agreement to pay;
- (iii) alternatively, a return of the equipment;
- (iv) an order that the defendant be deemed to have hired the equipment;
- (v) an order for payment of the sum of US\$11,000 per month as hire charges for the equipment;
- (vi) interest on all sums found due;
- (vii) any other relief the court may deem fit; and



(viii) costs.

That facts of the case can be deduced from the pleadings. According to the plaintiff, the parties entered into an oral agreement sometime in January, 2014 whereby the plaintiff would supply and the defendant purchase a Tata Tipper Truck and a Roller Compactor (the equipment) at the price of US\$75,000. It was agreed that the defendant was to pay for the equipment within 180 days but not later than July, 2014. The defendant took delivery of the equipment and has been using it but failed to pay for it, giving rise to this suit. The plaintiff claims that it has suffered loss of use of the equipment and lost out on commercial rental proceeds estimated at US\$400 per day which it would have accumulated had the equipment been rented.

In his defence, the defendant agrees that there was an oral agreement for the purchase of the equipment but denies having breached the contract. According to the defendant, the contract was entered into in August, 2013 and not January, 2014 at the price was US\$70,000 and not US\$75,000 as alleged by the plaintiff and that the repayment period was 12 months and not 180 days. Therefore, the deadline should have been 30<sup>th</sup> September, 2014.

The defendant states that the failure to perform on his part was due to impossibility because he had been taken ill as a result of spinal code injury for which he underwent surgical operation in India such that he remained indisposed from November, 2013 to February, 2015.



The defendant denies that he has been using the equipment or that the plaintiff is entitled to hire charges because hire charges were not agreed to and are, in any event, speculative.

The defendant further states that it was an express term of the agreement that the defendant was to supervise the construction of 25 houses for the plaintiff in Lilayi and that the cost of the equipment was to be offset by the plaintiff from money payable in respect of the construction works. However, the construction works did not proceed because he was taken ill.

In his counterclaim, the defendant alleges that he carried out some works which included renovations, plastering, provisions of new screed and partitioning of office space for the plaintiff valued at US\$18,000. In that regards, the defendant claims the following reliefs:

- (i) *a right of set off of the said sum of US\$18,000;*
- (ii) *interest; and*
- (iii) *costs.*

In its reply and defence to counterclaim, the plaintiff asserts that the defendant has admitted his indebtedness to the plaintiff. The plaintiff maintains that the contract price was US\$75,000. Further, that the explanation for illness as the reason for defaulting entails that the defendant admits liability.

At trial, the plaintiff called its managing director, Ashok Singh, to testify on its behalf as PW1. His testimony was that sometime in



January, 2014, he entered into an oral agreement with the defendant to sell him the equipment, a Tipper Truck and a Compactor, at US\$75,000.00 payable over 180 days. The defendant did not make any payment and several reminders were sent but to no avail. The plaintiff proposed that the defendant commits to a rental charge after the expiry of 180 days. By a letter written in December, 2014, the defendant wrote to the defendant to discuss the commitment. According to PW1, the commercial rental value for both equipment was about US\$400.00 per day but they offered the defendant US\$200.00 per day. He testified that the defendant has had possession of the equipment since January, 2014.

With regard to the defendant's defence that the plaintiff engaged him to construct 25 housing units in Lilayi and that the cost of works would be offset from the purchase price of the equipment, PW1 responded that the plaintiff does not own land in Lilayi. No agreement was reached and no work was done at Lilayi by the defendant. He added that the discussions were between himself and the defendant in their individual capacity as the land belongs to him personally and not the company.

As regards the counter-claim, PW1 testified that sometime in 2013, the plaintiff made an agreement with Sumij Investments Limited to construct an office block by the end of the first quarter of 2013. Invoices were raised and paid for in full. He referred to the invoices on pages 1 and 2 of the plaintiff's bundle of documents with cheque numbers on them showing that the invoices were settled by cheque.



He stated that the works referred to by the defendant relating to renovating the warehouse, plastering and partitioning of office space were covered by the two invoices. Further, that the works were not completed and at some point the building collapsed due to poor workmanship. As a result, the plaintiff asked Sumij Investments Limited to stop works and it engaged another contractor to redo and complete the work. He referred to invoices on pages 3,4,5,6 and 7 as proof of payment for the works totaling K245, 000.00.

Under cross examination, PW1 reiterated that the purchase agreement was oral. The equipment was not brand new and were kept at the plaintiff's premises before the defendant bought it. The plaintiff had a choice of selling or renting it out. The rent option was communicated to the defendant at the rate of US\$200.00 per day. He emphasized that the plaintiff's claim is for the purchase price and rental arrears from the date the repayment period lapsed. After 180 days, there was a grace period of 6 months. Further, that the rent was subject to negotiation.

That was the plaintiff's case.

The defendant, Jabir Hussein Patel, gave oral evidence as DW1. His evidence was that the plaintiff requested for a quotation for construction works along Kafue Road and Lilayi. The works were to be carried out simultaneously. He provided the quotations and commenced the works. The defendant completed the Lilayi project and was paid by the plaintiff, then, he moved to the Kafue Road site



where he was contracted to construct a showroom and a warehouse. There, he noticed a Tipper Truck and Compactor stored. He requested to buy it. The plaintiff offered the equipment to him to purchase but he said he had no money. The plaintiff then asked him to construct 16 housing units at Lilayi for US\$100,000.00 out of which US\$70,000.00 was to be offset as payment for the equipment. He then collected the equipment.

However, before he could complete the showroom, he was taken ill of a spinal cord injury but his team continued working on the site. A few days later, the plaintiff asked his team to leave the site and told them that he would call them later. His team left material worth approximately US\$18,000. A few days later, he learnt that another contractor had been engaged to complete the showroom.

He later called the plaintiff's representative, PW1, to enquire about the housing project who said he would tell him the way forward later. He claims that he was ill for a long period and as such, he requested the plaintiff to bear with him for the nonpayment since the equipment was obtained on the basis that he would pay for it using proceeds from the housing project.

In cross examination, DW1 conceded that he did not produce any documents in Court to show that he had completed the works. There is no evidence of the works done regarding the 25 housing units referred to in his defence. He stated that he was not aware that the property in Lilayi belonged to PW1.



DW1 testified that the quotations in the plaintiff's bundle of documents showing receipt of payments do not mention the equipment. There is no document to show that the price of the equipment was US\$70,000.00. He maintained that the US\$70,000.00 was to be deducted from the payment for the housing units.

DW1 agreed that he had not brought any document to show that he suffered a spinal cord injury.

When questioned about the current location of the equipment, DW1 said the equipment was at his friend's yard. Further, that the hire charges would be US\$130.00 for each machine.

Further in cross examination, DW1 conceded that he had not produced proof that the plaintiff owes him US\$18,000.00. He also said he was not aware that the structure his team built collapsed.

DW1 also gave evidence that the invoices on pages 1 and 2 of the plaintiff's bundle of documents were issued by a company called Sumij Investments Limited and not under his name.

In re-examination, DW1 explained that the rental arrangement had not been agreed upon. In addition, that the quotations he was referred to in cross examination were for construction works and not the equipment which is why there is no mention of the US\$70,000.00.



Further, that the invoices on pages 1 and 2 of the plaintiff's bundle of documents were under his company, Sumij Investments Limited, under which the works were carried on by his team.

That was the evidence adduced by the defendant.

After the close of the trial, the plaintiff's advocates filed written submissions in support of the plaintiff's case.

It was submitted that according to the authority of **Zambia Railways Limited v. Pauline S. Mundia and Brian Simuchimba**<sup>1</sup>, the plaintiff was duty bound to prove its case on a balance of probability. The plaintiff's claim is founded on contract. The plaintiff offered the equipment to the defendant who accepted and the offer and undertook to pay for it and collect it. However, the defendant has not paid the purchase price which he has admitted. In addition, he has failed to show that the price was US\$70,000.00 and not US\$75,000.00.

Counsel submitted that the defendant had no evidence to show that the contract was tied to the construction of the housing units. That in doing so, the defendant stated that he did not know that the Lilayi property did not belong to the plaintiff. Counsel relied on Gower and Davis, Principles of Modern Company Law, 8<sup>th</sup> edition at page 33 on corporate personality to show that a company is a separate legal entity from its members. Thus, PW1 and the plaintiff are two different persons at law. The defendant could not, therefore, say that the payment was tied to the construction contract which was entered into with Sumij Investments Limited and not him.



Citing the case of **K.B. Davies and Company (Zambia) Limited v Musumu<sup>2</sup>**, counsel argued that the lacuna left in the defendant's evidence as regards evidence of sickness should be resolved in favour of the plaintiff. Since he did not produce evidence of sickness, the defendant could not claim that he had been taken ill. The defendant is clearly in breach of the contract. As such the plaintiff should be awarded general damages for breach. Counsel relied on the case of **Attorney General v D.G Mpundu<sup>3</sup>** and a passage from Chitty on Contract on the consequences for breach of contract and general damages.

It was submitted that in the event that the defendant is unable to pay the debt, he must return the equipment to the plaintiff and ordered to pay rent at commercial rates of US\$400.00 per day. He argued that this position was agreed to by the defendant in his letter on page 11 of the plaintiff's bundle of documents. The court was referred to Halsbury's Laws of England, 4<sup>th</sup> edition at paragraph 687 that **"the general rule is that a person is stopped by his signature thereon from denying his consent to be bound by the provision contained in that deed or other document."** Since the defendant did not deny his signature on the letter, he is bound by his consent to pay rental charges from January, 2014 until the return date.

On the counter-claim, counsel submitted that the basis of the counter-claim is a contract which was given to a company called Sumij Investments Limited. The invoices appear in the name of



Sumij Investments Limited which is separate from the defendant. Counsel relied on the case of **Salomon v Salomon**<sup>4</sup>. In any event, the defendant admitted that there is no evidence that the sum of US\$18,000.00 was indeed due from the plaintiff to Sumij Investments Limited. Therefore, the counter-claim is bereft of merit.

The defendant's advocates filed written submission in response to the plaintiff's advocate's arguments.

On the authority of **Davis Contractors v Freham UDC**<sup>5</sup>, counsel submitted that although a contract contains express clauses relating to the agreement by the parties, the court ought to examine the circumstances that the parties had in mind when contracting. It is argued that during negotiations, the defendant expressed non-availability of funds so that it was agreed that he would pay suing proceeds from the construction contract. Unfortunately, he was taken ill and the contract was terminated by the plaintiff.

Since the understanding that the payment would come from the construction contract, the contract was frustrated and at an end when the defendant fell ill and was unable to perform his obligations. The parties were thus discharged from their obligations. Chitty on Contracts at page 1311 and the case of **Fribrosa Spolka Akoyjwa v Hairbairn Lawson Combe Barbour Limited**<sup>6</sup> were cited as authority on the doctrine of frustration.

It was counsel's reasoning that the fact that the letter on page 11 indicates that the parties could agree on the rental charge after the equipment had been returned meant that the parties did not reach



an agreement for the hire of the equipment as there was merely a desire by the defendant to have the period for the use of the equipment deemed as hire. The plaintiff cannot be entitled to hire charges as claimed.

As regards the US18, 000.00, counsel contended that the parties had an agreement whose provisions are binding on both parties. Consequently, the plaintiff cannot avoid liability for the works done at their Kafue Road site. He referred the Court to the case of **National Drug Company and Zambia Privatisation Agency v Mary Katongo**<sup>7</sup> to the effect that once parties have freely and voluntarily entered into a legal contract, they become bound by the terms of the contract and their role is to give efficacy to the contract.

I have considered the pleadings, the evidence on record and the submissions by counsel.

It is not in dispute that in January, 2014 the parties entered into an oral agreement for the plaintiff to sell and the defendant to buy the equipment. The transaction was a credit sale because it was a term of the agreement that the defendant was to pay for the equipment at a later stage. The defendant took possession of the equipment and has had possession ever since. The defendant failed to pay for the equipment and has not advanced any payment towards the purchase price to date. The plaintiff contends that the defendant is indebted to it for breaching the contract by failing to



pay for the equipment. The defendant contends that the contract was rendered impossible to perform due to his illness.

Therefore, the issues that arise for determination are whether-  
the defendant is in breach of the contract;

- 1. The contract was frustrated and the parties consequently discharged from their obligations;***
- 2. The plaintiff is entitled to the reliefs sought; and***
- 3. The defendant is entitled to the reliefs in the counter-claim.***

It is common cause that the contract between the parties is oral and relates to the sale of the equipment, a Tata Tipper Truck and Roller Compactor. The learned authors of Halsbury's Laws of England, state that in the ordinary case, the law does not require a contract to be made in any particular form, nor according to any particular formalities, it is sufficient that there be a simple contract. Such a contract may be validly made either orally or in writing, or partly orally and partly in writing. Chitty on contracts at paragraph 4-0001 also states that the general rule of English Law is that contracts can be made quite informally as no writing or other form is necessary. The contract between the parties falls within the ambit of section 1(1) of the Sale of Goods Act 1893. Hence, the contract is governed by the Sale of Goods Act 1893 (the Act).



As earlier outlined in this Judgment, the first issue I shall consider is whether the plaintiff has proved its case on a balance of probability that the defendant breached the contract. The defendant had an obligation to pay the plaintiff the price of the equipment as agreed. Section 27 of the Act provides that it is the duty of the seller to deliver the goods, and of and buyer to accept and pay for them, in accordance with the terms of the contract of sale. The defendant took delivery of the equipment and according to his testimony during trial, he has had the equipment since then. As earlier disclosed, the defendant has not honoured his side of the bargain to date contrary to section 27. In addition, section 28 states that-

***Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to conditions say, the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods.***

The expectation is that the defendant should have paid the plaintiff the money when he collected the equipment. This he did not do. The defendant has failed to pay any amount of money towards the purchase price despite having taken possession of the equipment. Payment of the purchase price is long overdue.

I have considered the fact that the parties have expressed difference regarding the price and the payment period. According to the plaintiff, the agreed price was US\$75,000.00 while the defendant asserts that the price was US\$70,000.00. The plaintiff also claims



that the money should have been paid within 180 days from January, 2014 while the defendant claims that he had 12 months within which to make the payment from that date.

A careful perusal of the documents on record shows that the defendant's claim that the price was US\$70,000.00 and not US\$75,000 is an afterthought. The demand letter from the plaintiff's advocates to the defendant on page 10 of the plaintiff's bundle of documents shows that the plaintiff's initial demand as at 26<sup>th</sup> November, 2014 was for payment of US\$75,000.00. The letter also states that the agreed payment period was 180 days from January, 2014. The defendant endorse the letter as received. He then responded on 8<sup>th</sup> December, 2014 by the letter on page 11 of the plaintiff's bundle of documents. The defendant's reply doesn't not dispute the price or the payment period but begs for more time to liquidate the debt. I, therefore, find the plaintiff's version of events more believable than that of the defendant that the price was US\$75,000.00 and the initial payment period was 180 days from January, 2014. Even assuming the agreement was that the repayment period was 12 months as contended by the defendant, the defendant is still out of time. Consequently, I find that the defendant has failed to honour his side of the bargain and breached the contract.

As regards the second issue, the defendant claims that the contract was frustrated and performance made impossible due to the illness he suffered which resulted in the construction contract being given



to another contractor. It is necessary to understand what the doctrine entails and see whether it is applicable. The authors of Chitty on contracts at paragraph 23-103 quote the test for frustration as enunciated by Lord Simon in **National Carriers Ltd. v Panalpina (Northern)**<sup>8</sup> as follows:

*Frustration of a contract takes place when there supervenes an event (without default of either party and for which the contract makes no sufficient provision) which so significantly changes the nature (not merely the expense or onerousness) of the outstanding contractual rights and / or obligations from what the parties could reasonably have contemplated at the time of its execution that it would be unjust to hold them to the literal sense of its stipulations in the new circumstances; in such case the law declares both parties to be discharged from the further performance.*

On the facts of the present case, it is clear that the doctrine does not apply. The contract between the parties is one for sale of goods and not a personal one that it must be frustrated because the defendant had been taken ill. He has pleaded in his defence that he had been taken ill as a result of spinal cord injury for which he underwent surgical operation in India such that he remained indisposed from November, 2013 to February, 2015. Flowing from that, his argument is that he could not complete the construction project the plaintiff awarded him from which he was to set off the purchase price for the equipment. I note that the contracts were awarded by the plaintiff to Sumij Investments Limited. As ably



argued by the plaintiff's advocates, on the strength of **Salomon v Salomon**<sup>4</sup>, the company, Sumij Investment Limited is a different person at law and exist independently from its members, even though as a metaphysical entity, it acts through human agents. That is the whole essence of incorporation. The defendant contracted the debt for the equipment in his individual capacity and there is no evidence on record that the parties agreed that the money to pay for the equipment would be offset from the money due to the defendant, if any, so that the termination of the contract with Sumij Investments Limited could affect his financial capability to settle his debt to the plaintiff. There is also no evidence adduced to the effect that it was the company Sumij Investments Limited that entered into the sale of goods contract to purchase the equipment.

It is unfortunate that the defendant has not been in good financial standing to settle his indebtedness to the plaintiff. The defendant has simply failed to pay his debt and his excuses do not absolve him from liability. As the Supreme Court has enunciated in **John Paul Mwila Kasengele v Zambia National Commercial Bank Limited**<sup>9</sup> the ability or inability to pay is not and has never been a defence. The contract cannot be frustrated simply because he has no money to pay for the equipment. As, Lord Radcliffe held in **Davies Contractors Ltd v Fareham UDC**<sup>5</sup>, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. In the circumstances, I find that the defendant's defence of frustration is untenable.



As regards the third issue on the remedies available to the plaintiff, the plaintiff has prayed for payment of US\$75,000, damages for breach of contract. In the alternative, the plaintiff seeks to a return of the equipment, an order that the defendant be deemed to have hired the equipment and payment of the sum of US\$11,000 per month as hire charges for the equipment. However, section 49 (1) of the Act 1893 is categorical on the remedy available to the plaintiff as the seller. The plaintiff is entitled to the price for breach of the contract. Section 49 (1) provides that-

***Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods***

The property in the equipment ought to have passed before the plaintiff could maintain an action for the price. Section 18 of the Sale of Goods Acts makes provision for ascertaining intention as to when property passes to the buyer seeing that there is no written agreement specifying the intention. The default provision of particular interest is Rule 1 which states 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.***



In view of the above, I find that the property in the equipment passed when the contract was made, that is, sometime in January, 2014 and it is immaterial that the parties agreed that the payment would be made later. The plaintiff is, therefore, entitled to recover the price for the equipment.

The plaintiff has pleaded in the alternative for the return of the equipment and the recovery of rental arrears or damages for loss of use of the equipment. I note that this was not a Hire Purchase Agreement. It was a credit sale because the intention was to transfer the property for a money consideration to be paid at a future date. I have perused the record and find no evidence that the parties agreed to a hire agreement. I agree with the defendant that hire charges were not agreed upon, neither has the rate of US\$11,000 per month been proved as the applicable rate. The plaintiff sold the property and the defendant took delivery. The equipment must be deemed to have been sold to the purchaser without any reservation as to the ownership thereof on credit at a price. I am fortified by the Supreme Court case of **Burton Construction Limited v Zaminco Limited**<sup>10</sup>.

The Act is categorical that the remedy available to the plaintiff as seller is the price for the equipment. In my considered view, the delay in payment would then have to be covered by an award of interest.

As for the counter-claim, I find that the defendant has not adduced sufficient evidence to prove that the plaintiff owed him the sum of




US\$18,000.00. The documentary evidence for construction works relates to Sumij Investments Limited which is a limited liability company separate from the defendant. There is no proof to show that the plaintiff engaged the defendant personally to carry out some works upon which he can base the claim for the sum of US\$18,000.00 as being the cost of the material left on site. The defendant has failed to prove his case on a balance of probability. It is trite law that the person who alleges must prove. I am fortified by the cases of **Wilson Masauso Zulu v Avondale Housing Project**<sup>11</sup> and **Khalid Mohammed v the People**<sup>12</sup>.

The net result is that the plaintiff has proved its case on a balance of probabilities that the defendant purchased the equipment on credit and failed to pay the price. I order that the defendant pays the plaintiff the price for the equipment in the sum of US\$75,000.00 with interest at the Short Term Deposit rate from the date of the Writ to the date of the Judgment and thereafter at the current Bank of Zambia Lending rate until full and final payment.

I award costs to the plaintiff to be taxed in default of agreement.

Delivered at Lusaka this 19<sup>th</sup> day of June 2018.

  
\_\_\_\_\_  
**MATHEW L. ZULU**  
**HIGH COURT JUDGE**

