

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

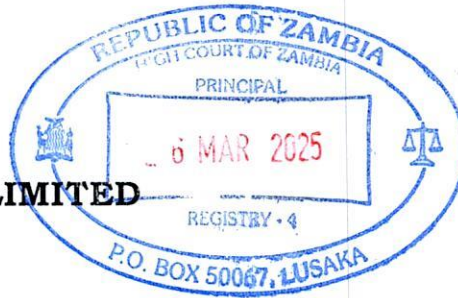
2023/HP/2250

BETWEEN:

DIAMOND TOUCH LIMITED

AND

FORLAN LOGISTICS



PLAINTIFF

DEFENDANT

Before the Honourable Ms. Justice S. Chocho, on 26th March, 2025.

For the Plaintiff:

Mr. C. Chilekwa of Messers C Chilekwa and Company

For the Defendants:

*Mr. D Kalima and Ms. C.Z Chifita of Messrs D Kalima
And Company.*

J U D G M E N T

Cases referred to:

- 1. Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) ZR
266***
- 2. Evia Luck (1992) 2 A.C 152***
- 3. Esquire Roses Farm Limited v Zega Limited Appeal No. 37 of
2009***
- 4. Export and Import Bank Limited v Mukuyu Farms Limited and
Others SCZ Judgement No. 9 of 1993***

5. *Zambia Revenue Authority v Shah SCZ Judgment No. 10 of 2001*
6. *Colgate Palmolive Zambia Inc v Chuka and Others Appeal No.181 of 2005*
7. *National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo Appeal No. 71 of 2001*
8. *Habuce Farms Limited v Tabisbhai Gulam Isap Hola Appeal No. 218 of 2020*
9. *Mwandezi v Lafarge Zambia PLC Appeal No. 187 of 2016*

Legislation referred to:

1. *Order 3 Rule 2 of the High Court Rules, Chapter 27 of the Laws of Zambia.*

1. **INTRODUCTION**

1.1. This Judgment is in respect of the Plaintiff's claim commenced by way of Writ of Summons and Statement of Claim dated December 8th, 2023 in which the Plaintiff claims:

- i) Damages for breach of contract;
- ii) Refund of the sum of US\$21,456.48 being the money paid to the Defendant under duress;
- iii) Interest;

- iv) Costs; and
- v) Any other relief the Court may deem fit.

1.2. The Defendant entered Appearance and filed a Defence on January 11th, 2024 in which it denied the Plaintiff's claim.

2. EVIDENCE/TESTIMONY

- 2.1. In aid of its case, the Plaintiff called one Witness and filed a witness statement deposed by one Sydney Mwansa on May 6th, 2024.
- 2.2. PW testified in chief that the Plaintiff purchased a cashew processing machine from Delhi India.
- 2.3. PW testified that on or about August 26th, 2021, the Plaintiff and the Defendant by way of oral agreement agreed that the Defendant would clear and move the cashew processing machine from Dar-es-Salam to Mongu at the cost of ZMW 85,800.00 and on conclusion of the oral agreement, the Defendant issued the Plaintiff an invoice of ZMW 85,500.00.
- 2.4. PW testified that the container carrying the cashew processing machinery arrived at the port on September 10th, 2021.

- 2.5. PW testified that it subsequently engaged its partners (Zambia Agri-Business and Trade Project) who paid the contract sum of ZMW 85,800.00.
- 2.6. PW further testified that despite the sum of ZMW 85,800.00 being paid to the Defendant, it still failed to clear and transport the machinery and claimed that it suffered currency exchange losses amounting to US\$700 as a result of the Plaintiff settling the invoice amount in Kwacha instead of United States Dollar.
- 2.7. PW testified that the Defendant issued further invoices in the sum of ZMW 81,686.36 as charges for rentals, storage, removal and demurrage which the Plaintiff paid.
- 2.8. PW testified that the charges in 2.7 above incurred by the Plaintiff are due to the Defendant's failure to go on the port on time as it only picked up the machinery on November 4th, 2021.
- 2.9. PW testified that the Plaintiff only agreed to the Defendant's conditions because it continued incurring expenses and to avoid further escalation of costs, it agreed so that the machinery could be cleared.
- 2.10. PW testified that the Plaintiff ended up paying US\$18,306.48 in unjustified fees which it should have not paid.

- 2.11. PW testified under cross examination that it paid the sum of ZMW 85,800.000 to the Defendant on September 21st, 2021.
- 2.12. PW conceded under cross examination that the amount stated in 2.11 above was not the amount stated on page 7 of the Plaintiff's bundle of documents.
- 2.13. PW testified that there is no receipt of the payment of the sum of ZMW 171,378.80.
- 2.14. PW testified under cross examination that he was the author of the letter on page 14 of the Defendant's bundle of documents in which he accepted the US\$150 charge per day after the first free three days and the Tanzanian parking charges.
- 2.15. PW testified under cross examination that the letter referred to in 2.14 above did not show any duress.
- 2.16. PW testified under cross examination that the Plaintiff paid the amount of US\$ 10,820 contained on the invoice dated December 3rd, 2021 and that there was no evidence before Court to show that the amount was paid under duress.
- 2.17. PW further testified under cross examination that the truck crossed into Zambia sometime in November 2021 and was parked in Lusaka

for sometime subsequent to which the Defendant insisted it would not move until payment of the invoice of the amount of US\$3510.

2.18. PW testified under cross examination that the invoice referred to above was as a result of the delays between Nakonde and Lusaka.

2.19. PW testified in re-examination that the Plaintiff indicated to the Defendant that it felt duress when in a letter dated December 17th, 2021 it stated to the Defendant that it felt extorted and that the claims had been unsubstantiated and that the Plaintiff were paying under duress, protest and would later contest that.

2.20. PW testified further in re-examination that when the truck arrived in Lusaka, it was directed by Zambia Revenue Authority to go to the Makeni yard for verification of goods after which PW and his former partner went and cleared it but the Defendant decided to park the truck at its yard on condition that the Plaintiff paid US\$ 3,510.

2.21. DW was one Penyesani Chibesa who filed a witness statement on May 6th, 2024 and testified in chief that on August 25th, 2021, the Plaintiff engaged the Defendant to clear and transport a 20ft container from Dar-es-Salaam to Mongu.

- 2.22. DW testified that the Defendant issued an invoice of ZMW 85, 800 (US\$5,200) with a pre-instruction to the Plaintiff that the Plaintiff was only to pay in United States Dollar to avoid exchange rate losses.
- 2.23. DW testified that the invoice on page 1 of the Defendant's bundle of documents provided three free clearing days at the Zambian boarder; thereafter, demurrage fee of US\$150 per day was applicable.
- 2.24. DW further testified that it was a condition of the agreement that 7 days were free for clearing and offloading after which the demurrage fee of US\$150 per day was applicable.
- 2.25. DW testified that the container was offloaded at the port on September 10th, 2021 and at this date, the Plaintiff had not paid the invoiced amount.
- 2.26. DW testified that on September 23rd, 2021, the Plaintiff paid to the Defendant the sum of ZMW 85,800.00 contrary to the Defendant's instructions to pay in United States Dollar thereby causing a loss of \$700.

- 2.27. DW testified that at the time payment was made, it was 13 days after the container arrived and demurrage had already started accumulating as per the invoiced issued.
- 2.28. DW further testified that the Plaintiff failed to issue the Defendant with the documents needed in order to start the process of clearing and the documents were only shared with the Defendant of September 24th, 2025 at 17:30 hours.
- 2.29. DW testified that on October 15th, 2021, the Defendant reminded the Plaintiff to pay the difference in exchange rates and the extra shipping line fees from September 18th, 2021 when the free days expired to October 19th, 2021.
- 2.30. DW testified that following the re-issuance of a revised invoice on October 19th, 2021 in the sum of ZMW 171,378.00, the Plaintiff and Defendant had a meeting where it was agreed that the Plaintiff would write a letter to the Defendant requesting them to clear the container, deliver it to Nakonde boarder and pay demurrage fees before the truck could cross over to the Zambian side.
- 2.31. DW testified that following the agreement in 2.30 above which was to the effect that the Plaintiff would pay the amount in the revised invoice, the container was loaded and picked up by the Defendant from Dar-es-Salaam and it left for Nakonde Boarder.

- 2.32. DW testified that on November 8th, 2021, the container arrived at Nakonde Boarder ready to be cleared and the Plaintiff was informed but the Plaintiff was not ready and this caused the Defendant to issue an invoice of US\$10,820 dated December 3rd, 2021.
- 2.33. DW testified that the Plaintiff proceed to make payment without economic duress.
- 2.34. DW further testified that the Defendant transported the container from Nakonde to Lusaka and instead of proceeding to Mongu, it was parked in Lusaka.
- 2.35. DW testified that the Defendant proceeded to issue an invoice at US\$3510 being demurrage for 15 days at US\$150 per day and container return fee of US\$90 per day.
- 2.36. DW testified that the Plaintiff on December 21st, 2021 paid the US\$3510.
- 2.37. DW testified under cross examination that pre- instruction to pay in dollar was given on the invoice issued.
- 2.38. DW testified under cross examination that the balances on the invoices are quoted in Kwacha.

- 2.39. DW testified under cross examination that a total of US\$5200 was paid to third parties but there is nothing before the Court to evidence the same.
- 2.40. DW testified under cross examination that the Plaintiff paid all invoiced amounts and there are no outstanding balances. Further, that the Plaintiff complained about paying some of the monies in a letter dated December 17th, 2021.
- 2.41. DW testified in re-examination that on loss of business, the truck on shipment papers was supposed to attend to another consignment from Nakonde to Congo but because of the delays, the Defendant had to engage another transporter.

3. LAW AND SUBMISSIONS.

- 3.1. Both Parties filed their written submissions. The Plaintiff filed on December 13th, 2024 and the Defendant filed on December 30th, 2024. I have read and considered the parties respective submissions and I will not reproduce them in their entirety as the same are on record.
- 3.2. The Plaintiff submits that going by the invoice at page 1 of the Defendant's bundle of documents, it is clear that the invoice is quoted in Kwacha there by entitling the Plaintiff to pay in Kwacha.

- 3.3. The Plaintiff submits that the invoice totals denote how much should be paid and is in fact an instruction to pay that amount.
- 3.4. The Plaintiff submits that the initial invoice should be construed using the ordinary meaning of the figures/numbers therein and that the invoice is clear and unambiguous in its meaning.
- 3.5. The Plaintiff further submits that in an event that the Court construes the invoice differently, the invoice as created by the Defendant creates ambiguity allowing for two contradictory interpretations and should be construed against the maker and placed reliance on the case of **Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) ZR 266¹**.
- 3.6. The Plaintiff in light of the above authority submits that if there is any doubt as to the currency of the contract, the Court is urged to find that it was Kwacha, in favour of the Plaintiff.
- 3.7. The Plaintiff submits that it paid the Defendant the sum of ZMW 85,800.00 by September 21st, 2024 and the Defendant was not at liberty to refuse to perform its obligations under the contract.
- 3.8. The Plaintiff further submits that there was no stipulation as to the due date of payment and if time as relates to payment was of essence to the contract, it should have been a term of the contract.

3.9. The Plaintiff submits that apart from being in breach, the Defendant failed to disclose information the Plaintiff was entitled to as related to the payments made to third parties and that the sum of US\$5,200 the Defendant claims to have paid to third parties is an afterthought.

3.10. The Plaintiff submits that besides the initial contract sum, the Plaintiff paid the total sum of US\$19,801.40 as demanded by the Defendant and that the Plaintiff is entitled to the refund of the sum of US\$19,801.40 as it was paid under duress.

3.11. The Plaintiff further submits that a contract is voidable at law if it was made under duress and placed reliance on the **Evia Luck (1992) 2 A.C 152²** case in which it was stated as follows:

“it is now accepted that economic pressure may be sufficient to amount to duress... provided at least that the economic pressure may be characterised as illegitimate and has constituted a significant cause inducing the claimant to enter into the relevant contract”.

3.12. The Plaintiff submits that the Defendant's demand for payment of sums beyond the agreed upon ZMW 85, 800.00 constituted extortion of money by duress and was an unlawful demand for payment.

3.13. The Plaintiff submits that the payments were only made in view of the fact that if the payments were not made, the goods could have not been cleared. Further, that the pressure was also exerted with respect to moving the consignment as the Defendant demanded payment at every stage failure to which they withheld movement.

3.14. In response, the Defendant submits that the Plaintiff's claim that the payments were made under duress is unfounded as duress requires proof of illegitimate pressure that vitiates consent. In making this submission, the Defendant relied on the case of **Esquire Roses Farm Limited v Zega Limited Appeal No. 37 of 2009**³ in which the Court stated as follows:

“Duress involves illegitimate pressure, which includes threats that leave the victim with no practical alternative but to comply”.

3.15. The Defendant submits that all charges were as a result of the Plaintiff's non compliance and the Plaintiff has not proved any threats or unlawful actions.

3.16. The Defendant further submits that the Plaintiff voluntarily complied with the terms outlined in the letter dated October 28th, 2022 and that the said correspondence signified acceptance rather than coercion.

3.17. The Defendant submits that the money the Plaintiff claims to have paid under duress was a condition precedent of the agreement as the terms were amended during the execution of the life span of the contract and placed reliance on the Supreme Court case of **Zambia Export and Import Bank Limited v Mukuyu Farms Limited and Others SCZ Judgement No. 9 of 1993⁴** in which it was stated as follows:

“An agreement is signed freely if it is signed in the cause of business practice and the Respondent had a choice not to sign the offer of an additional loan in consideration for the conversion of an existing one and a valid enforceable agreement is created”

3.18. The Defendant submits that its actions were in accordance with the contractual framework, and all charges, including those related to demurrage and port fees were consistent with the terms agreed upon.

3.19. The Defendant further submits that the Plaintiff was liable for the demurrage fees, port charges and other charges paid to the Tanzanian Revenue Authority incurred due to delays in providing the original shipping documents.

3.20. The Defendant submits that it acted in accordance with industry practices, issuing revised invoices reflecting the Plaintiff's failure to meet the agreed timelines.

3.21. The Defendant further submits that payments made under a valid contract are not recoverable unless there is a failure of consideration. The Defendant placed reliance on the case of **Zambia Revenue Authority v Shah SCZ Judgment No. 10 of 2001⁵** in which the Court stated as follows:

“Payments made under a mistake of law or without coercion are not recoverable unless the underlying contract is void”.

3.22. The Defendant submits that the initial contract explicitly required payment in United States Dollar to avoid exposure to exchange rate fluctuations but the Plaintiff decided to pay in **Zambian Kwacha** against the agreement and occasioning the Defendant a loss of US\$700.

4. COURT’S ANALYSIS AND DECISION

4.1. I have considered the evidence on record and the Parties respective submissions. Having considered the arguments advanced by the parties, the issues for determination are as follows:

- i) Whether the Defendant was in breach of contract for its failure to perform its obligation and demanding further payment beyond the contractual price.
- ii) Whether the Plaintiff made further payment under duress.

- 4.2. It is a trite principle of law that parties who freely enter into contracts are bound by the terms of the contract. The Zambian Courts in the cases of **Colgate Palmolive Zambia Inc v Chuka and Others Appeal No.181 of 2005⁶** and **National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo Appeal No. 79 Of 2001⁷** have upheld this principle.
- 4.3. In an event that a party fails to perform its obligations under a contract, the action amounts to breach of contract. Put differently, A breach of contract occurs when one party fails to fulfil their obligations under a contract.
- 4.4. The existence of a contract is not in dispute as both parties have agreed that there existed an oral agreement between the Plaintiff and the Defendant to clear and transport the cashew processing machine.
- 4.5. It is the Plaintiff's contention that despite the paying the contract sum of ZMW 85,800.00, the Defendant refused to perform its obligation under the contract on the premise that the money ought to have been paid in United States Dollar and not Zambia Kwacha.
- 4.6. The Defendant argues that there was an instruction on the initial invoice issued to the Plaintiff stating that all payments should made in Dollar. In response, the Plaintiff states that the invoice totals

were in Kwacha and therefore, the invoice total denotes how much should be paid and it is an instruction to pay that amount.

- 4.7. It can be seen from the invoices on pages 1 and 3 of the Defendants bundle of documents that the invoice amounts were quoted in Zambian Kwacha. The invoices have an instruction at the bottom saying "make all payments to our dollar account". This alone raises ambiguity as the instruction could also mean that the Plaintiff deposits the invoice total into the Defendant's dollar account.
- 4.8. The latin maxim "*Verba cartarum fortius accipiuntur contra proferentem*" is a principle of contract law which means that where there is doubt about the meaning of a contract, the words in the contract will be construed against the person who put them forward. This principle is known as the contra proferentum rule.
- 4.9. The Zambian Court in the case of **Indo Zambia Bank Limited v. Muhanga**¹ stated that where a document is capable of two interpretations, the contra proferentem rule requires that the ambiguity should be resolved against the party that drew up the document.
- 4.10. I therefore find that the invoices on pages 1 and 4 of the Defendant's bundle of documents should be interpreted to mean that the amounts and currency payable are those in the invoice totals. For

clarity, the Kwacha amounts. The Plaintiff is therefore, entitled to the refund of the sum of \$700.

4.11. The Defendant argued that its refusal to perform its obligations was based on the fact that the Plaintiff paid monies short of US\$700 and its non-production of the documents on time.

4.12. As it has already been established, the Plaintiff was in order when it paid the initial contractual sum of ZMW 85,800.00 in kwacha. Furthermore, as it can be gleaned from the evidence on record; the Defendant received documents from the Plaintiff on September 24th, 2021 but only started the clearing process after the Plaintiff paid the sums on the amended invoice, which was sometime after October 28th, 2021.

4.13. I therefore find that the Plaintiff was liable for the extra shipping line fee from September 18th, 2021 when the free days expired to September 24th, 2021 when the Plaintiff paid the contractual sum. The shipping line fees incurred thereafter are a fault of the Defendant. The Plaintiff is therefore entitled to the refund of the amounts paid for the days September 24th, 2021 to October 19th, 2021, being \$4050.

4.14. I am of the view that after this occurrence, the Plaintiff had an opportunity to avoid the contract and pursue the remedies available at law. Be as it may, the Plaintiff and Defendant on

October 27th, 2021 entered into negotiations subsequent to which the Plaintiff agreed to pay the extra charges as at that date and this can be evidenced by the letter dated October 28th, 2021 on page 14 of the Defendant's bundle of documents.

4.15. It appears to me that this amounted to variation of the contract terms. The Court of Appeal in the case of **Habuce Farms Limited v Tabisbhai Gulam Isap Hola Appeal No. 218 of 2020**⁸ at page 11 stated as follows:

“The key requirement for a Contract to be varied or modified in terms is that the parties thereto ought to mutually agree to the variations. The variations should however, be consummated by the fulfilment of the three basic foundations of a Contract namely; offer, acceptance and consideration”.

4.16. I am of the considered view that the elements above were met and therefore, the parties were bound to the new terms of the agreement. It became an obligation of the Plaintiff to pay the agreed upon fees.

4.17. In light of the foregoing, I find that the Defendant is not liable in breach of contract as its actions were ratified by the Plaintiff by virtue of the subsequent agreement evidenced by the letter dated October 28th, 2021. Therefore, the Plaintiff's claim for damages for breach of contract fails.

4.18. The question I shall now determine is whether the Plaintiff paid the sums under economic duress. Economic duress in contract law occurs where a party to a contract threatens to cancel a contract unless the other party agrees to their demands. It is a threat to a person's financial interest.

4.19. The Supreme Court in the case of **Mwandezi v Lafarge Zambia PLC Appeal No. 187 of 2016**⁹ had the following to say on economic duress:

“The Privy Council had occasion to lay down a test similar to the one in the preceding paragraph in the case, of Pao On v Lan Yiu Longs. In that case the Claimant had threatened not to complete the main contract for the purchase of shares unless subsidiary agreements were met including a guarantee and an indemnity. The Defendant was anxious to complete the main contract as there had been a public announcement of the acquisition of shares and did not want to undermine public confidence in the company and the consequent effect on shares prices. The Defendant could have sued for specific performance of the agreement but this would have delayed matters and damaged the company's reputation. The Defendant had taken legal advice in all these matters before agreeing to the guarantee and indemnity. The Claimant then sought to enforce the guarantee and the Defendant sought to have the agreement set aside for economic duress. The Privy Council found that there was

no economic duress and in doing so identified four factors to be considered in assessing whether economic duress was present as follows:

50.1 did the person claiming to be coerced protest?

50.2 did that person have any other available cause of action?

50.3 was he independently advised?

50.4 after entering into the contract did he take steps to avoid it?

We are persuaded by these English authorities and as such, are of the view that in contending economic duress the Appellant ought to have led evidence to prove that the test as set out by the Privy Council had been met”.

4.20. I am guided by the decision in the **Mwandezi v Lafarge**⁹ case and on perusal of the record I am satisfied that the only element the Plaintiff has proved is the requirement for protest. The Plaintiff's protest can be seen from the letter dated December 17th, 2021 at page 20 of the Defendant's bundle of documents.

4.21. In relation to the other elements, the Plaintiff has not produced evidence to prove the test in 4.19 above. Furthermore, the evidence on record does not show that the Plaintiff was coerced but rather acceptance of the terms premised on free will and voluntariness.

4.22. In light of the foregoing, the Plaintiff's claim that the monies paid beyond the initial contractual sum of ZMW 85,800.00 were paid under economic duress fails.

4.23. I have taken note that the Defendant claims to have paid some charges to third parties but has failed to adduce evidence to prove the amount that was paid. I am of the considered view that the Defendant owes the Plaintiff a duty to account and by virtue of **Order 3 Rule 2 of the High Court Rule, Chapter 27 of the Laws of Zambia**; I order that the Defendant renders an account to the Plaintiff failure to which the Defendant must refund the Plaintiff the sums claimed to have been paid to the third parties.

5. **CONCLUSION**

- 5.1. For the foregoing, I Order that the Plaintiff's claims for damages for breach of contract and refund of the sum of US\$21,456.48 being money paid to the Defendant under duress fails.
- 5.2. The Plaintiff is only entitled to refund of the sum of \$4750 in light of the findings in 4.10 and 4.13 above.
- 5.3. I Order that the Defendant renders an account of the monies paid to the third parties within 30 days of this Judgment, failure to which the full amount claimed to have been paid to the third parties should be refunded to the Plaintiff.
- 5.4. Interest to be paid on the sums found due at the short-term deposit rate from the date of the Writ to the date of Judgment and thereafter

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the lending rate determined by the Bank of Zambia up to the date of payment.

5.5. Each party should bear its own costs.

5.6. Leave to appeal is granted.

Delivered at Lusaka on 26th March, 2025.



S. CHOCHO
HIGH COURT JUDGE

