

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL No. /344/2023

HOLDEN AT NDOLA

(Civil Jurisdiction)

BETWEEN:

SKAB MERCHANTS LIMITED:

SERGE KABEYA'MWANA:

AND

EMILMARK CONSTRUCTION & CONSULTANCY LTD:

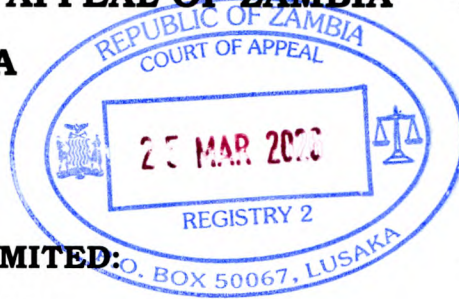
BENSON MARTIN MUSUKWA:

1ST APPELLANT

2ND APPELLANT

1ST RESPONDENT

2ND RESPONDENT



CORAM: SIAVWAPA JP, CHISHIMBA & PATEL JJA

On 17th and 25th March 2026

FOR THE APPELLANTS: NOT IN ATTENDANCE

FOR THE RESPONDENTS: NOT IN ATTENDANCE

J U D G M E N T

SIAVWAPA JP delivered the Judgment of the Court

Cases referred to:

- a) *Yingstar Investment Company Limited v Netur Plex Investment Limited CAZ Appeal No 55 of 2024*
- b) *Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd [1991] 1 Q.B.564*
- c) *JZ Car Hire Limited v Malvin Chola and Another SCZ Judgment No 26 of 2002*

Legislation referred to:

- a. *Sale of Goods Act 1893*

Other Works referred to:

B. A. Garner (Ed), *Black's Law Dictionary*, 2004, West Publishing

1.0 INTRODUCTION

- 1.1 This is an appeal against the Judgment delivered by the Honorable Mrs. Justice Irene Zeko Mbewe on 24th July 2023 in the Commercial Division of the High Court.
- 1.2 By the said Judgment, the learned Judge ordered the rescission of the contract for the supply of Zinc Ash between the 1st Appellant and 2nd Respondent and dismissed all of the Respondents' counter-claims.

2.0 BACKGROUND

- 2.1 Sometime in December 2021, the 1st Respondent, through its Operations Director, the 2nd Respondent, agreed to purchase from the 1st Appellant through its Executive Director, the 2nd Appellant, 200 tonnes of Zinc Oxide (Zinc Ash).
- 2.2 According to the results of the tests conducted by the Appellants in September and October 2021, the grade of Zinc Oxide in the Zinc Ash was found to be above 40%.
- 2.3 Following the agreement, the Respondents sought to re-test and move the Zinc Ash, which was situated at Durban Port in South Africa as at 28th December 2021, to Mersin Turkey.
- 2.4 On 10th January 2022, the 1st Appellant issued a company named Damla Madencilik Insaat San.Tic. Ltd Sti (Damla) and the 1st Respondent with a pro-forma invoice and demand letter, respectively. The Appellants demanded the payment of US\$49,152.60 as the purchase price for 126 tonnes of Zinc Ash.

- 2.5 On or about 10th February 2022, the Zinc Ash was shipped to Mersin Port in Turkey, with Damla cited as consignee.
- 2.6 On or about 14th February 2022, the 2nd Respondent travelled to South Africa and submitted samples of Zinc Ash to a company named Intertek for re-testing.
- 2.7 On 3rd March 2022, Intertek provided a report relating to the results of the re-test to the 2nd Respondent. In the report, the grade of Zinc Oxide in the sample submitted was found to be 23.07%. Meanwhile, the Zinc Ash arrived in Turkey on 15th March 2022.
- 2.8 The Respondents, having received test results showing that the grade of Zinc Oxide in the Zinc Ash was less than shown in the Appellants' reports, refused to pay the purchase price quoted by the Appellants.
- 2.9 Instead, the Respondents invited the 2nd Appellant to Mersin, Turkey to re-test the consignment of Zinc Ash at their expense so as to adjust the purchase price according to the grade of Zinc Oxide in the consignment. This offer was rejected by the Appellant.
- 2.10 Having failed to find a resolution to the dispute on the purchase price, the Respondents, by a letter dated 14th June 2022 wrote to the Appellants to rescind the purchase agreement. The Respondents then commenced an action against the Appellants in the Court below.

3.0 MATTER IN THE COURT BELOW

3.1 By writ of summons accompanied by a statement of claim dated August 2022, the Respondents claimed the following reliefs:

- i. The sum of ZMW 500,000,00 being the amount spent on transport, lodging and shipping the zinc oxide from Durban port to Mersin port in Turkey;*
- ii. An order of rescission of the contract for misrepresentation*
- iii. Damages for breach of contract;*
- iv. Interest on the sums due;*
- v. Any other order the Court may deem fit; and*
- vi. Costs of and incidental to this action*

3.2 The facts were that the parties had agreed to the following formula for setting the purchase price of the product; the grading percentage of the zinc oxide in the product times the total tonnage supplied times \$8.3 US Dollars.

3.3 In view of the variance between the percentage of Zinc Oxide in the Appellants' report and that in the re-test by Intertek, the 2nd Respondent asked the Court to rescind the contract for misrepresentation and the 2nd Appellant's refusal to travel to Turkey to re-test the Zinc Ash.

3.4 The Appellants on the other hand contended that the terms of the agreement between the parties were that the 2nd Appellant would deliver the product to Durban South Africa Free on Board (FOB) while the 2nd Respondent would bear the cost of shipping it to Turkey.

3.5 Regarding the purchase price, the Appellants stated that it was as stated in Commercial invoice No SMLEX.0021/72022 and not as determined by the said formula.

3.6 The Appellants in turn counter-claimed as follows:

- i. *Dismissal of the Respondents' claims with costs*
- ii. *The immediate payment for the goods as per the agreed terms on the invoice and on the bill for collection or*
- iii. *Immediate return of the goods to the port of origin, Durban*
- iv. *Payment for the loss of Profits from 25th February 2022 with 6% monthly interest*
- v. *Any other order the court may deem fit, and*
- vi. *Costs of and incidental to this action.*

4.0 DECISION OF THE HIGH COURT

4.1 After considering the pleadings, the learned trial Judge summed up the issues for determination as follows:

- I. *Whether it was a term of the supply and purchase agreement to have the Zinc Ash graded and whether the sale was by description.*
- II. *Whether the pricing of the Zinc Ash was dependent on the grading percentage*
- III. *Whether the Respondents are entitled to the claimed sum incurred on transportation, lodging costs and other expenses incurred for the shipping of the Zinc Ash from Durban to Mersin Port, Turkey.*
- IV. *Whether the parties agreed that the Respondents would be responsible for shipping the Zinc Ash to Mersin*
- V. *Whether the contract should be rescinded*

4.2 The learned trial Judge found that the contract between the parties was oral and that its terms could be construed from the evidence on the record.

4.3 On the first and second issues the learned Judge found that because of the correspondence between the parties the quality of the Zinc Ash was an implied term of the oral contract and that the grade of the Zinc Ash had an effect on the purchase price.

4.4 According to the learned trial Judge, the test results showing the grading of the Zinc Ash submitted by the Appellants

induced the Respondents to purchase the Zinc Ash, thereby making the transaction a sale by description.

- 4.5 On the third and fourth issues, the learned Judge found that the Respondents had not adduced any evidence to support their claim to the sum of ZMW500, 000.00 transportation and other costs because the contract with the Appellants was FOB Durban.
- 4.6 On the fifth and final issue, the learned Judge found that the 2nd Appellant had made a representation relating to the grade of the Zinc Ash and that as a result the Respondents had a ground to rescind the oral contract.
- 4.7 Further, the learned Judge found that the Appellants had breached the oral contract and awarded nominal damages amounting to ZMW30, 000.00 to the Respondents. The learned Judge however, declined to grant all the Appellant's counterclaims.

5.0 THE APPEAL

5.1 Displeased with the Judgment of the Court below, the Appellant has appealed to this Court on four grounds:

1. *The Court below erred in law and fact when it held that the contract of sale was a sale by description contrary to the totality of the evidence before the Court.*
2. *The Court below erred in law and fact when it rescinded the oral contract between the Appellants and the Respondents on the basis of breach of contract by misrepresentation when no misrepresentation was properly established by the evidence before the Court.*
3. *The Court below erred in law and fact when it awarded nominal damages to the Respondent in the absence of a proper showing of breach of contract by the Appellants*
4. *The Court below erred in law and fact when it failed to award the Appellants loss of profit for the time the goods were shown by evidence to have been in the possession of the Respondents.*

6.0 ARGUMENTS IN SUPPORT

- 6.1 In support of the first ground, the Appellants argue that the contract to sell Zinc Ash to the Respondents was not a sale by description because the terms of the said contract did not contain a term requiring the Zinc Ash to be tested.
- 6.2 The Appellants further argue that the Respondents should be bound by the contract because they failed to raise the issue of the Zinc Ash before it was transported to Durban.
- 6.3 In ground two, the Appellants argue that contrary to the finding by the Court below, there was no misrepresentation by the Appellants because the Respondents were aware that the terms of the contract were that the Zinc Ash should be of a certain tonnage and not of a particular grade.
- 6.4 In the third ground, the Appellants argue that there was no breach of contract and the Respondents should not have been awarded damages.
- 6.5 In ground four, the Appellants argue that the Court below failed to consider the evidence before it that despite not being in breach, the Appellants lost profits during the time the consignment was in the possession of the Respondents and incurred a huge loss in transporting it.
- 6.6 Finally, the Appellants submit that the Respondents must bear the cost of transporting the Zinc Ash back to Durban from Mersin.

7.0 ARGUMENTS IN OPPOSITION

7.1 The Respondents did not file heads of argument and both parties did not attend the hearing.

8.0 OUR ANALYSIS AND DECISION

8.1 In ground one, the question for determination is whether the sale was by description. The Record of Appeal does not contain a written contract. However, there is pro-forma invoice No SMLEX.0021 dated 10th January 2022, at page 109 of the Record of Appeal addressed to DAMLA MADENCILIK INSAAT SAN.TIC. LTD STI (DAMLA).

8.2 It further states the sale condition of the Zinc Ash as FOB Durban Port with the purchase price for the product set at US\$ 49 152.60.

8.3 As regards the pro-forma invoice, Black's law dictionary at page 142, defines it as a document provided in advance to describe items, predict results, or secure approval.

8.4 On page 110 of the Record appears a demand notice for payment of quotation No SKABEX012.021 dated 10th January 2022. The notice is addressed to the 1st Respondent from the 1st Appellant and it is signed by both parties.

8.5 It is noted that the pro-forma invoice and the demand notice were issued on the same date and reflect the same amount of money, US\$ 49, 152.60 as the purchase price for the consignment.

- 8.6 What is not in dispute is that there was an agreement between the parties for the sale and purchase of Zinc Ash even without a written contract of sale.
- 8.7 In the case of Yingstar Investment Company Limited v Netur Plex Investment Limited¹, we guided that to establish or prove an oral contract or agreement, clear evidence must be adduced of the intention of the parties to create legal obligations by exchange of words or by conduct, and terms consistent with contemporaneous documents.
- 8.8 The learned trial Judge found, from the evidence before her, that the agreement between the parties was partly contained in letters, oral exchanges and conduct as time went on. She therefore, concluded that there was an oral contract between the parties.
- 8.9 In holding that the price of the consignment was as per the formula and not the price on the pro-forma invoice, the learned Judge considered the email exhibited at page 106 of the Record of Appeal dated 28th December 2021.
- 8.10 The email makes a request for the FOB price per ton as well as the rate for moving the goods to Mersin, Turkey. According to the learned Judge at page 26 of the Record of appeal, from line 15 to 20, the 1st Appellant sent a document set out as follows;
- “Total Goods Value: ZN Grade X USD8.30 X Total No of dry tons (ZN grade and No of dry tonnes is according to the quality report”*
- 8.11 We have however, failed to find this response on the Record of Appeal after a diligent search for it. That notwithstanding,

we note that the request for the price per ton at page 106 was followed by an email dated 6th January 2022, exhibited at page 107 of the Record of Appeal in which the author states that it had been waiting for an invoice.

8.12 In apparent response to the email of 6th January 2022 referred to in paragraph 7.11 above, the 1st Appellant, issued the pro-forma invoice occurring at page 109 and the demand notice at page 110 of the Record of Appeal, both dated 10th January 2022.

8.13 The pro-forma invoice is addressed to DAMLA MADENCILIK INSAAT SAN.TIC. LTD STI, the intended consignee of the goods at Mersin, Turkey, while the demand notice for Payment is addressed to the 1st Respondent.

8.14 On 7th February 2022, the 1st Appellant issued a commercial invoice to the Turkish Consignee in the same amount of US\$ 49, 152. 60 stated as payable by the 1st Respondent.

8.15 The 1st Respondent raised the issue of the grade of the Zinc Ash for the first time in response to the first letter of demand, by letter dated 23rd March 2022 as appears at page 138 of the Record of Appeal. This was triggered by results of a test that was conducted later which graded the Zinc Oxide content at 23% against the earlier submitted test result of above 40%.

8.16 The lingering question is whether, on the totality of the documentary evidence, it can be said that the Respondents were induced to buy the Zinc Ash by the grade of over 40% communicated to them earlier.

- 8.17 What we discern from the pleadings and documents on the Record of Appeal is that the issue of the grading of the Zinc Ash was not part of the negotiations for the contract of sale.
- 8.18 It is common cause that the Zinc Ash in issue originated from Kabwe and that the 1st Respondent's representatives visited the 1st Appellant's warehouse on or about 4th December 2021. At the time of the visit, the Zinc Ash was still in the warehouse but schedule for transportation to Durban.
- 8.19 The evidence indicates that by the time the negotiations, which were largely conducted via phone conversations and WhatsApp messages, were concluded, the Zinc Ash had already been delivered to Durban.
- 8.20 It is therefore, curious that the Respondents would accept to purchase goods that were already outside jurisdiction without confirming whether they met the minimum grade they needed.
- 8.21 We have not seen anything to suggest that the Respondents at any time made it a condition of the sale that the grade of the Zinc Ash they required ought to be above 40%. The initial test results grading the Zinc Oxide Ash at 41% and 49%, were volunteered by the Appellants and not upon demand by the Respondents.
- 8.22 In our view, the email at page 106 of the Record of Appeal, speaks volumes about one cardinal term of the contract, the pricing criterion for the Zinc Ash. In that email, the Respondents requested for the price per ton of the goods on FOB terms as was the case with the other clients.

8.23 In that regard, there are invoices and quotations exhibited at pages 97 and 100 of the Record of Appeal in which the price of Zinc Ash is quoted per ton. We assume these are the other clients the Respondents were referring to in the email at page 106 of the Record of Appeal.

8.24 Section 13 of the Sale of Goods Act 1893 provides as follows:

“Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description”.

8.25 Black’s law dictionary, at page 477, defines a description as an explanation of something by an account setting forth the subject’s characteristics or qualities.

8.26 In the case of Harlingdon & Leinster Enterprises Ltd v Christopher Hull Fine Art Ltd², Lord Nourse guided that in a sale by description:

“The description must have a sufficient influence in the sale to become an essential term of the contract and the correlative of influence is reliance. Indeed, reliance by the buyer is the natural index of a sale by description”.

8.27 We do not think that section 13 of the Sale of Goods Act applies to this case. As stated, the argument that it was a sale by description is defeated by the request for the price per ton like was the case with other clients. It would have been different if the grade was also mentioned in the request.

8.28 In view of the foregoing, ground two, must succeed as the alleged misrepresentation relates to the purported sale by description which was not the case.

8.29 In ground four, the Appellants argue that they should have been awarded loss of profit for the period of time the goods were in the possession of the Respondents.

8.30 To prove that the goods were in the possession of the Respondents, the Appellants referred us to pages 133 to 134 of the Record of Appeal.

8.31 On this score, the learned trial Judge found that the Appellants had failed to specifically plead and prove that they were entitled to special damages as guided in the case of JZ Car Hire Limited v Malvin Chola and Another³.

8.32 We have perused the Appellants' complaint against the Respondents exhibited at pages 133 and 134 of the Record of Appeal and find that it does not in any way aid the Appellants' claim for loss of profit. This ground must fail.

8.33 As regards the cost of transporting the Zinc Ash back to the Appellants' warehouse, the same was based on the order by the learned Judge below rescinding the contract of sale for misrepresentation.

8.34 However, in the view we have taken, that the sale was not by description and therefore, that the Appellant was not liable in misrepresentation as to the grade of the Zinc Ash, this limb of the argument becomes otiose.

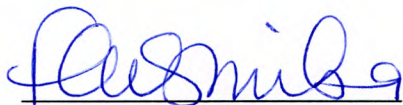
9.0 CONCLUSION

9.1 In the view we have taken, this appeal substantially succeeds on all grounds except ground four on special damages. We therefore, order as follows;

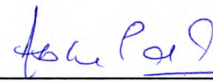
1. The Contract of Sale remains valid
2. The Respondents to pay the contract sum as set out in the Commercial Invoice with interest
3. Costs will be for the Appellants to be taxed in default of agreement.



M. J. SIAVWAPA
JUDGE PRESIDENT



F. M. CHISHIMBA
COURT OF APPEAL JUDGE



A. N. PATEL SC
COURT OF APPEAL JUDGE