

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

2019/HP/0053

BETWEEN:

OMNIA FERTILIZER ZAMBIA LIMITED

PLAINTIFF

AND

C & C WORLD TRADE LIMITED
FRANK CHOLA

1ST DEFENDANT

2ND DEFENDANT

Before the Honourable Ms. Justice S. Chocho, in Chambers.

For the Plaintiff :

Mr. N. Nyirenda & Mr. M. Nzonzo of Messrs SLM
Legal Practitioners.

For the Defendants:

Ms. S.C. Mwanashinku Messrs M & M Advocates.

JUDGMENT

Cases referred to:

- i) *Associated Chemicals Limited V Hill and Delamain (Z) Limited and Ellis and Company (As A Law Firm) (1998) S.J. 7 (S.C.)*
- ii) *Dunlop Pneumatic Tyre Company Limited V Selfridge and Company Limited (1915) A.C 847*
- iii) *Attorney General V Seong San Company (Appeal 182 of 2010).*

Legislation referred to:

1. *High Court (Amendment) Rules Statutory Instrument No. 58 of 2020*

1. **INTRODUCTION**

- 1.1. This Judgment is in respect of the Plaintiffs' claim as against the 2nd Defendant. The record will show the Plaintiff's claims as follows:
 - 1.1.1 Payment of the sum of USD 547, 794.30 for the fertilizer purchased by the Defendant.
 - 1.1.2 Interest on the claimed sum.
 - 1.1.3 Costs of the action.
- 1.2. The record further shows that the Court entered Judgment on Admission in the sum USD 547,794.30 and costs as against the 1st Defendant on 18th July 2022.
- 1.3. The Plaintiff did issue writ of Fifa on 6th October 2022 and Sheriff's report shows recovery of K93,270.00.
- 1.4. In response, the 2nd Defendant entered appearance and filed amended defence into Court on 3rd May, 2022. By that defence the 2nd denied the Plaintiffs alleging that he is/was not a party to the contract between the Plaintiff and 1st Defendant but signed documents for and on behalf of the 1st Defendant

2. **TRIAL COURSE**

- 2.1. Matter was scheduled and heard for trial on January 16th 2024. Both Parties called one witness each having filed witness statements.
- 2.2. The Plaintiff called Irvine Chando, Financial Account at the company as Prosecution Witness.

- 2.3. The Plaintiff called testified in chief that, the Plaintiff and 1st Defendant entered into a FISP Evoucher Programme Agreement on the 17th October 2017. By the said Agreement, the 1st Defendant was appointed as the Plaintiff's authorized distributor of the Plaintiff's fertilizer products.
- 2.4. PW1 further testified that between 23rd October, 2017 and 25th January 2018, the Plaintiff sold on credit terms, various qualities of fertilizer stock to the Defendants and issued sales orders through its parent company.
- 2.5. PW1 testified that the Defendants made various payments towards their debt to the Plaintiff leaving an outstanding amount of USD 601,140.80 as at 28th February, 2018.
- 2.6. PW1 further testified that the 2nd Defendant on behalf of the Defendants acknowledged the outstanding date of USD 601,140.80 as at 28th February, 2018.
- 2.7. PW1 further testified that the 2nd Defendant by another acknowledgment letter dated 15th October, 2018 the 2nd Defendant acknowledged owing the sum of USD 625,000.00.
- 2.8. PW1 testified that the Defendant indebtedness to the Plaintiff stands at USD 547, 794.30 as at 26th November, 2018.
- 2.9. PW1 further testified that the Plaintiff has and continues to suffer loss and damages.
- 2.10. Under cross examination PW1 conceded that the FISP Evoucher Programme Agreement at page 1 of the Plaintiff's bundle of documents was executed between the Plaintiff and the 1st

Defendant and the 2nd signed/executed the same document for and on behalf of the 1st Defendant.

- 2.11. PW1 further conceded that the demand letter at Page 13 of the Plaintiff bundle of documents was addressed to the 1st Defendant and further that no demand letter was sent to the 2nd Defendant.
- 2.12. PW1 further conceded that document at page 11 of the Plaintiffs' bundle of documents was addressed to the 1st Defendant and not 2nd Defendant. The document was sent by the Plaintiff.
- 2.13. PW1 testified that document at page 13 of the Plaintiff's bundle of documents was addressed to a company known as Omnia Fertilizer Zambia limited who is not a party to the current proceedings or action.
- 2.14. Under re-examination PW1 explained that Omnia fertilizer Zambia Limited and Omnia Small Scale Limited are in fact one company. Further that all the letters were issued by Omnia Small Scale Limited.
- 2.15. The 2nd Defendant Frank Chola, a business man testified in aid of his case/defence.
- 2.16. DW1 testified in chief that he executed the FISP Evoucher Programme Agreement in his capacity as a Director of the 1st Defendant and the Agreement was between the Plaintiff and the 1st Defendant.
- 2.17. DW1 further testified that all payments to the Plaintiff were made by the 1st Defendant and he never made any payments in his personal capacity.

- 2.18. DW1 testified that the acknowledgment letter dated 28th March 2018 was done on behalf of the 1st Defendant. Further that the letter of 15th October, sent to a third party (Omnia Fertilizer Zambia Limited) was also signed on behalf of the 1st Defendant.
- 2.19. DW1 testified that the Plaintiff's demand letter dated 5th December 2018 is addressed to the 1st Defendant.
- 2.20. Under cross examination DW1 testified that he executed documents referred to in paragraph 3 of his witness statement, as Director of the 1st Defendant's Company and not in his capacity. Further that the 1st Defendants company and two directors -- himself and Elizabeth Chibwe.
- 2.21. DW1 further testified and conceded having executed document at page 1, 11 and 12 of the Plaintiff's bundle of documents.
- 2.22. DW1 conceded that he acknowledged the documents at page 11 and 12, particularly that document at page 12 he did not specify in what capacity.
- 2.23. DW1 conceded that there was a debt owed to the Plaintiff but not by him in his personal capacity.
- 2.24. DW1 testified that document at page 13 of the Plaintiff's bundle of documents was authored by Omnia Fertilizer Zambia Limited and he was forced to sign it. Further that he made a verbal query on the document that was stating a different legal entity.
- 2.25. DW1 further testified that had the document at page 13 come from/authored by the Defendant's it would have been on the 1st Defendant's letter head.

- 2.26. DW1 denied having authored the document at page 13 of the Plaintiffs' bundle of documents and also denied pledging any of his property as collateral stating that had he done that, he would have put the particulars of the motor vehicle and property and handed over the same.
- 2.27. Asked if he knew that the Plaintiff was a mere distributor of fertilizer produced by Omnia Fertilizer Zambia Limited, DW1 responded in the negative.
- 2.28. In re-examination, DW1 explained that he never signed my document nor pledge to pay the Plaintiff in his personal capacity.
- 2.29. DW1 Further explained that he never submitted anything/ property to the Plaintiff as collateral for debt, and that the record did not have his motor vehicle registration certificate/certificate of Title.
- 2.30. DW1 further testified that the amount as stated on page 12 and 13 of the Plaintiff's bundle of documents were different USD 601,148.80 on page 12 and USD 625, 000.00 on page 13.

3. LAW AND SUBMISSIONS.

- 3.1. The Parties filed written submissions for which I am grateful. I shall not re-state the contents of the said submissions as the same are on record.
- 3.2. The Plaintiff submits that the 2nd Defendant liability is secondary to the 1st Defendant's liability. That the 2nd is sued by reason that he is guarantor of the 1st Defendant's debt.

- 3.3. The Plaintiff relies and avers that document at page 13 of its bundle of documents, is an acknowledgment of debt and a guarantee by the 2nd Defendant of the 1st Defendant's debt to the Plaintiff.
- 3.4. The Plaintiff submits and agrees with the 2nd Defendant that a limited company is a distinct legal entity from its members as outlined in case of **ASSOCIATED CHEMICALS LIMITED V HILL AND DELAMAIN Z LIMITED**¹ but further submits that the 2nd Defendant is and was able to make a commitment to settle the 1st Defendant's indebtedness as a guarantee.
- 3.5. The Plaintiff submitted that the High Court (Amendment) Rules Statutory Instrument No. 58 of 2020 do not apply to the case in casu which was commenced in 2019, thus no demand letter was issued to the 2nd Defendant.
- 3.6. The 2nd Defendant submits that he cannot be held liable for the debts of the 1st Defendant and that he did not guarantee the 1st Defendant's debt, to the Plaintiff.

4. COURT'S ANALYSIS AND DECISION

- 4.1. The clear and undisputed facts in this case are as follow: -
 - i. That the Plaintiff and 1st Defendant entered into a contract for distribution and sale of fertilizer.
 - ii. That the 1st Defendant owes the Plaintiff sum of USD 547,794.30 monies due and owing under the contract in (i) above.

- iii. Judgment on Admission was entered against the 1st Defendant in the sum of USD 547,794.30 and costs on 14th July, 2022.
- 4.2. The disputed fact in casu is whether or not the 2nd Defendant did guarantee payment of the debt between the Plaintiff and 1st Defendant.
- 4.3. It is clear from the record that the Plaintiff places full reliance of its claim against the 2nd Defendant on the document appearing on page 13 of the Plaintiff's bundle of documents filed on 20th June, 2023.
- 4.4. The 2nd Defendant insists that he did not author the document at page 13 of Plaintiff's bundle and further that he signed the same under protest or duress as he was forced to do so by Omnia Fertilizer Zambia Limited (the author of the document).
- 4.5. I opine that there is need to examine and determine particular position of the document in question.
- 4.6. The document on the face of it appears to be a guarantee of debt by the 2nd Defendant. The document further purports that the 2nd Defendant sent in or handed over a Nissan Patrol V8 and a Title Deed which would be collected once the debt is liquidated.
- 4.7. The document in question is addressed to a company known as Omnia Fertilizer Zambia Limited. I note from the record that the named Omnia Fertilizer Zambia Limited was struck out of the proceedings and in its place the Plaintiff joined by Ruling (dated 1st November 2021) of the District Registrar. The originating process was thus amended on 3rd December, 2021.

4.8. It is trite law that only parties to an agreement can sue and be sued arising from particular agreement. The document at page 13 of the Plaintiff's bundle is one to which the Plaintiff is not a party. I place reliance on the authority in **DUNLOP PNEUMATIC TYRE COMPANY LIMITED V SELFRIDGE AND COMPANY LIMITED (1915) A.C 847²** and **ATTORNEY GENERAL V SEONG SAN COMPANY (APPEAL 182 OF 2010)³**.

4.9. By ruling dated 1st November 2021, Omnia Fertilizer Zambia Limited was misjoined from the proceedings and it is place Omnia Small Scale Limited joined as Plaintiff.

It is clear in my mind that the two companies though related are separate and distinct legal entities capable of suing /be sued in their own individual capacity. Unless expressly sated one cannot be considered an Agent/Principal of the other in contractual relationships with third parties.

4.10. I find for a fact that this document (without addressing my mind to whether/not the 2nd Defendant actually drafted it) is between Omnia Fertilizer Zambia Limited a company that is not party to these proceedings. It follows then that the Plaintiff cannot rely on the document to show or prove that the 2nd Defendant guaranteed any debt between the Plaintiff and the 1st Defendant. The Plaintiff is not privy to any rights if any accruing from within the four corners of the document.

4.11. Following from paragraph 4.7 and 4.8 above. i shall find that the Motor Vehicle and Title Deed in fact never moved to the possession of the Plaintiff nor any other party. This makes me believe the 2nd

Defendant's testimony that he did not author the document that the Plaintiff purports to be a guarantee.

4.12. The document that the Plaintiff claims /alleges to be a guarantee does not disclose details of the debt nor terms and conditions of the guarantee. It does not even particularise the motor vehicle or land in question. No registration details/possession of the Motor Vehicle or Certificate of Title by the company Omnia Fertilizer Zambia Limited.

4.13. The 2nd Defendant's submission/claim that the Plaintiff's action must fail on the basis that no demand letter was issued, is bereft of merit. This action was commenced prior to the High Court (Amendment) Rule Statutory Instruments No. 58 of 2020 came in effect.

5. CONCLUSION

5.1. For the foregoing reasons and on a balance of probability, I find that the plaintiff's case fails in its entirety.

5.2. The Plaintiff's case is dismissed with costs to the 2nd Defendant, to be taxed in default of agreement.

5.3. Leave to Appeal is granted.

Delivered at Lusaka on 22nd May, 2024.



**S. CHOCHO
HIGH COURT JUDGE**

