

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

2021/HP/1130



BETWEEN:

ENDRONE PETROLEUM CORPORATION LIMITED

PLAINTIFF

AND

MEZILAND INVESTMENT AND DISTRIBUTORS LIMITED DEFENDANT

Before the Hon. Mrs. Justice M.M. Bah-Matandala,

On the 20th day of May 2024.

For the Plaintiff: Mr. B. Mulungushi – Messrs Milner & Paul Legal Practitioners

For the Defendants: Mrs. S. Simachela- Messrs. Thandwe Legal Practitioners

J U D G M E N T

LIST OF AUTHORITIES REFERRED TO:

1. *Chitty on Contracts General principles, Vol.1, 20th edition*
2. *Halsbury's Laws of England/ Estoppel (Volume 16(2) (Reissue) / 1*

CASE LAW:

1. *Baltimore and Ohio R. v United States (1923) 261.U.S.592*
2. *Chombe v Chombe (1951) 1 ALL ER 767-770*
3. *Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited (1915) A.C 8973.*
4. *Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005*
5. *National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo SCZ Appeal No. 79/2001*
6. *Printing and Numerical Registered Company v Simpson 1875 LR19 464*
7. *Galaunia Farms Ltd v National Milling Company Ltd 2002*

1.0 INTRODUCTION

1.1 By a Writ of Summons dated 21st September, 2021, the Plaintiff claimed against the Defendant the following:

- a. Immediate release of US\$ 24,650.00 being money owed by the Defendant to the Plaintiff as construction costs;*
- b. Interest on the amount due in (1) above;*
- c. Any other reliefs the Court may deem fit;*
- d. Costs.*

2 STATEMENT OF CLAIM

2.1 In the accompanying Statement of Claim, it was averred that on 22nd December 2017, the Plaintiff entered into a Lease Agreement with the Defendant to rent a Filling Station at Plot No. 1648 Freedom Way in Kaoma, Western Province for an initial term of five years at the lease charge of US\$3,500 per month.

2.2 Further that it was agreed that the Plaintiff would finish the construction works at the Filling Station and the costs would be recovered from the lease charges at the rate of US\$1000.00 per month.

2.3 It was also averred that sometime in the year 2020 the parties reached an agreement to terminate the lease and for the Plaintiff to vacate the premises following the Plaintiffs notice of intention to vacate due to operational challenges.

2.4 It was also averred that at the time of vacating the premises, the Plaintiff's contribution towards construction stood at US\$39,000.00. It was further averred that the Defendant made further payments towards the construction costs leaving a balance of US\$24,650.00 and despite several reminders and demands from the Plaintiff, the Defendant has failed or neglected to settle the indebtedness.

3 DEFENCE

3.1 In Defence, the Defendant denied the assertion by the Plaintiff that they had reached an agreement with the Plaintiff for the immediate termination of the lease following the Plaintiff's issuance of six months' notice of its intention to determine the lease.

3.2 The Defendant however, agreed to have made a payment of ZMW100,000.00 to the Plaintiff towards the construction of the Filling Station but denied having committed itself to be paying ZMW100,000.00 per six months or that the construction cost stood at US\$ 39,000.00 and further denied owing the Plaintiff or having breached any contract.

3.3 It was further averred that the Plaintiff removed the Generator and the Compressor from the Filling Station at the value of US\$ 1,500.00.

4 **REPLY**

4.1 In Reply, the Plaintiff reiterated that the Defendant committed itself to liquidate the sum of US\$39,000.00 and that the parties agreed for the Plaintiff to immediately vacate the Filling Station before the expiration of the six months' notice as the Defendant had found someone who was to immediately occupy and did occupy the Filling Station.

4.2 It was further averred that the total construction cost as at February 2020 was at US\$46,000.00 from which the

value of the Generator, Compressor and the payments made towards construction by the Defendant were deducted bringing the balance to US\$ 24,650.00.

5.0 HEARING

- 5.1 At the hearing of the matter, **PW1** was **David Kangwa Nkonde (Junior)** a manager at the Plaintiff's Company, relied on his witness Statement filed on 11th January 2022 which was admitted in evidence.
- 5.2 In his witness testimony at paragraphs 11 to 15, he states that as at February 2020, the construction cost stood at US\$46,000.00 and after paying the March rentals of US\$3,500 and the deduction towards the Generator of US\$ 3,500, the outstanding balance came to US\$ 39,000.00.
- 5.3 Further that the Defendant paid a sum of ZMW100,000.00 and ZMW30,000.00 towards the construction costs on 22nd April 2020 and 20th October, 2020 respectively which reduced the amount owed by the Defendant to ZMW 260,000.00.
- 5.4 The value of the compressor was then deducted from the balance bringing the total construction cost to US\$ 24,650.00
- 5.5 There was no cross examination for this witness.

5.6 **PW2** was **David Kangwa Nkonde (Senior)** the Managing Director at the Plaintiff's Company, who relied on his witness Statement filed on 11th January 2022 which was admitted in evidence.

5.7 The evidence of PW2 as can be deciphered from the witness statement on record it is essentially like that of PW1. PW2 has further added that the Defendant has never disputed or complained about the construction cost outstanding even before this matter commenced. He stated that it was acknowledged that the sum owed and even proposed how the outstanding sum will be settled.

5.8 There was no cross examination for this witness.

5.9 **PW3** was **Racheal Namposya** an Accountant at the Plaintiff's Company, relied on his witness statement filed on 11th January 2022 which was admitted in evidence.

5.10 In her witness statement, she said the outstanding balance for the construction as at 31st March 2020 when the Plaintiff vacated the Filing Station was at US\$46,000.00. Further that there were recoveries and or deductions made from the

Generator, Compressor and the March rentals leaving an outstanding balance of ZMW376,500.

5.11 It was further stated in her witness statement that the Defendant committed himself to liquidating the amount by installments of ZMW100,000.00 per six months but that to her surprise the Defendant only paid one installment for the first six months and ZMW30,000.00 for the second installment leaving the balance of **US\$24,650.00**.

5.12 **DW1** was **Kelvin Shula Maseka** a businessman of Kaoma who relied on his witness statement filed on 11th May 2022 which was admitted in evidence.

5.13 Under cross-examination, he confirmed that the lease between the Plaintiff and the Defendant was executed in 2017 and that the rentals were US\$3,500 per month. He also agreed that the Plaintiff wrote to him giving him 6 months' notice to terminate the lease agreement and that the reason given for termination was that they had challenges with the business.

5.14 He also confirmed that during the lease period the Plaintiff carried out construction works and it was agreed that the amount will be borne by the Defendant.

5.15 In Re-examination, he said that the Plaintiff did not clear the rental arrears for October, November, December 2019 and January, February and March 2020.

6.0 SUBMISSIONS

6.1 In the final submissions on behalf of the Plaintiff, it was submitted that the notice to vacate the Filling Station given by the Plaintiff herein dated 13th February 2020 was in accordance with the provisions of the law and clause 22 of the Lease Agreement.

6.2 It was further submitted that the Defendant owes the Plaintiff for the cost of construction works it incurred in completing the construction of the Filling Station. Reference was made to the case of **Baltimore and Ohio R. v United States (1923) 261.U.S.592¹** where it was held that:

“An Agreement founded upon a meeting of minds, which although not embodied in an express contract, is inferred, as a fact from the conduct of the parties showing in the light of

surrounding circumstances their tacit understanding.”

- 6.3 Other cases referred to were ***Chombe v Chombe (1951) 1 ALL ER 767-770²*** and that of ***Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited (1915) A.C 897³***.
- 6.4 In further submissions it was stated that in the letter dated 8th April, 2020 the Defendant clearly acknowledged that the outstanding amount for construction is ZMW390,000 which is equivalent to US\$39,000.00 at the agreed rate of K10 per dollar.
- 4.3 It was submitted for the Defendant that the letter dated 8th April 2020 which the Plaintiff is relying on was authored before the end of the 6-month notice period.
- 4.4 It was submitted that when the Plaintiff vacated the premises and the new tenant occupied the premises in July 2022, the Defendant paid the Plaintiff ZMW60,000.00. Further that the aforementioned amount was proposed by the Defendant; in the letter dated 6th March 2020 where the Defendant committed to settle through

upfront payments of six months by ZMW10,000.00; this brought the total amount of monies paid to the Plaintiff by the Defendant to ZMW190,000.00.

5 **ANALYSIS AND CONCLUSION**

5.1 From the evidence on record it is common cause that:

1. By a Lease Agreement dated 22nd December, 2017 the Plaintiff and the Defendant entered into a 5-year contract to rent a Filling Station at Plot 1648 Freedom Way in Kaoma, Western Province at a monthly rent of US\$ 3,500.
2. It was further agreed that the Plaintiff would finish the construction of the Filling Station and the construction costs would be recovered from the lease charges at the rate of US\$ 1000.00 per month.
3. The Plaintiff gave a notice to the Defendant of its intention to vacate the Filling Station due to operational challenges.
4. Further it is noted that it is not in dispute that the Plaintiff vacated the premises on 31st March, 2020.

5.2 Further from the evidence on the record the following issues are disputed;

1. The Plaintiff asserts that after issuing the notice of intention to vacate the Filing Station, the parties agreed to immediately terminate the lease. This assertion has been disputed by the Defendant.

5.3 I shall herein begin with the facts in dispute for obvious reasons. I have taken time to look at the letter captioned as *receipt of vacation notice*, dated 6th March 2020 written by the Defendant addressed to the Plaintiff. In the aforementioned letter, the Defendant made tabulations of the amount due to the Plaintiff at that time.

5.4 Furthermore, I wish to indicate that there is no evidence to show that the Defendant took steps to complain about the immediate vacation of the Plaintiff from the premises.

5.5 It is therefore my considered view that although there is no express statement stating that the parties agreed to terminate immediately, the Defendant accepted, as he did not pursue any breach proceedings.

- 5.6 In addition, there is undisputed evidence from the Plaintiff that the Defendant went ahead to put a new tenant on the premises immediately the Plaintiff vacated.
- 5.7 As to whether or not the Defendant owed the Plaintiff at the time of the six months' notice to terminate the lease, it is very clear that the Plaintiff stated an amount of US\$57,000.00 as owed at December, 31 2019.
- 5.8 Furthermore, the Defendant in the acknowledgment letter dated 6th March 2020 put the outstanding amount at ZMW460,000.00 and estimated the cost of equipment to be pulled out, which are, Generator, Compressor and fuel dispenser costed at ZMW98,000.00 thereby reducing the amount owed to the Plaintiff to ZMW362,000.00
- 5.9 The Defendant further stated that the rentals for the last month the Plaintiff was to be on the premises was to reduce the amount further to ZMW327, 000.00.
- 5.10 It is clear from evidence as analysed above that truly the Defendant owed the Plaintiff a sum of money for construction works done at the time of the six months' notice.

5.11 However, regarding the actual amount owed, the reading of the evidence herein will show that there are serious discrepancies from both parties. Therefore, the major question for determination is whether or not the amount owed by the Defendant to the Plaintiff was US\$24,650.00 at the time of the notice to terminate the lease.

5.12 In terms of the applicable law, the contract herein is governed by the general principles of contract. The case of **Colgate Palmolive (Z) Inc v Abel Shemu Chika and 110 Others Appeal No. 181 of 2005⁴** where the Supreme Court adopted a passage from **Printing and Numerical Registering Company v Sampson (1875) CA 19 EQ 462⁵** brings in the condition of the need for contracts to be entered in 'freely and voluntarily entered into' for it to be to be construed as the intention of the parties.

5.13 In the above case, the Court held that:

“If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracts and that contracts

when entered into freely and voluntarily, shall be sacred and shall be enforced by the Courts of justice...”

5.14 In the instant case the starting point is the contract itself.

It is clear from the Lease Agreement exhibited herein that the Plaintiff voluntarily entered into an agreement to rent a Filling Station at Plot No. 1648 Freedom Way in Kaoma, Western Province. Further that the Plaintiff would finish construction works at the Filling Station and the costs would be recovered from the lease charges at the rate of US\$1000.00 per month.

5.15 I also took time to look at clause 22 of the Lease Agreement which provides as follows: “***without prejudice to the provisions herein before contained the term hereby created shall be determined by either party hereto serving upon the other six (6) calendar month notice expiring on the last calendar day of the month.***”

5.16 From the above excerpt from the Lease Agreement, it is clear that the issuance of the six months’ notice was provided for in the initial agreement.

5.17 Furthermore, as already analysed above, it is not disputed that the Plaintiff carried out construction works at the Filling Station and that at the time of the notice to terminate, the Defendant owed him a sum of money in charges of the construction costs.

5.18 However, as already observed above, there is a serious dispute on how much was owed to the Plaintiff as the balance for the costs of constructing the Filing Station. Nevertheless, although the parties herein have advanced different and contradicting amounts as regards what the Defendant owes the Plaintiff in construction costs, the letter which appears on page 9 of the Plaintiffs Bundle of Documents is of help to resolve this issue and for clarity's sake it is reproduced below:

“taking into account that, the outstanding amount of three hundred and Ninety Thousand (ZMW390,000.00 after recovery of March rentals and pulling out the Generation which was spent towards the completion of the station prior to it being commissioned will be recovered

at the rate of One Hundred Thousand (ZMW 100,000.00) in intervals of six months.”

5.19 The caption from the aforementioned letter clearly shows that the Defendant acknowledged owing the Plaintiff the sum of US\$39,000 as at April 2020. The excerpt above also goes to confirm that the Plaintiff paid the March rentals for the year 2020 which went to reduce the amount owed by the Defendant bringing the balance to the aforementioned amount.

5.20 The Plaintiff has further demonstrated that following the payment made by the Defendant towards the cost of constructing the Filling Station, the amount reduced to US\$24,650.00 and when the said amount is converted at the then agreed exchange rate of ZMW10 per 1USD\$, it brings the outstanding debt to ZMW240,650.00.

5.21 I also looked at the case of ***National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo SCZ Appeal No. 79/2001***⁶ where it was held that:

“It is trite law that once parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract”

5.22 In another case of **Printing and Numerical Registered Company v Simpson 1875 LR19 464**⁷ it was decided that:

“if there is one thing more than another which public policy require, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice”.

5.23 It is my considered view in the instant case that the parties herein agreed freely and voluntarily that the Plaintiff should carry out the construction works and that the cost

would be reimbursed to it by the Defendant. Furthermore, the Plaintiff has demonstrated that at the time of termination of the lease the Defendant owed the Plaintiff a balance of US\$24,650.00.

5.24 In line with the foregoing and in conclusion, the reliefs sought by the Plaintiff are granted as prayed for and in the premises, the following orders are made:

- a. The Defendant to pay the sum of US\$ 24,650.00 being money owed by the Defendant to the Plaintiff as construction costs;*
- b. Interest on the amount due in (1) above;*
- c. Costs for the Plaintiff.*

6 Informed of the right to appeal

7 **COUNTERCLAIM**

7.1 In the Counter claim, the Defendant's claim as against the Plaintiff in the main action is for:

- 1. Damages for breach of contract;*
- 2. Payment of the unpaid rentals for six months in the sum of US\$15,000.00*

3. *Cost; and*

4. *Any other relief the court may deem fit.*

7.2 The gist of the Defendant's claim in the counterclaim is that the Plaintiff breached its duty to pay rentals/lease charges in the sum of US\$ 2,500 per month to the Defendants for the six months' notice period.

8 DEFENCE

8.1 In the Defence to counterclaim, the Plaintiff argued that the parties mutually agreed that the Plaintiff should immediately vacate the Filing Station in order to facilitate the new tenant by the name of Mount Meru to immediately occupy the Filling Station.

8.2 It was further averred that the Plaintiff vacated the Filing Station with the full consent of the Defendant and the Defendant did not raise any issue. Further that the Defendant has not suffered any damage and loss.

9 SUBMISSIONS FOR DEFENDANT ON THE COUNTERCLAIM

9.1 In the final submissions on the counterclaim, the Defendant submitted that the parties herein agreed

voluntarily and the Plaintiffs failure to pay rentals for six months amounts to breach of contract.

9.2 It was further submitted that the Defendant is entitled to damages because the Plaintiff terminated the Defendant's accrued right to the completion of the lease period to the defendant's detriment. Reference was made to the case of ***National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo SCZ Appeal No. 79/2001*** which I have already referred to above and that of ***Jacob Nyoni v The Attorney General (2001) ZR 65*** on the principles of sanctity of voluntary agreements and the principle of accrued rights respectively.

10 Submissions by the Plaintiff against the Counterclaim

10.1 The gist of the Plaintiff's Submissions in opposition is that the Defendant has failed to prove by evidence that the Plaintiff was in arrears of rentals both before and during the notice period.

11 **DETERMINATION AND CONSIDERATION**

11.1 I am indebted to both parties for the spirited arguments rendered in the counterclaim.

- 11.2 As regards the counterclaim, the facts of common cause are as in the main claim above.
- 11.3 The main question for determination in the counterclaim is whether the Plaintiff breached the agreement under the six months' notice and also whether or not the Plaintiff is entitled to the refund of US\$15,000 as rentals for the 6 months' notice period.
- 11.4 In evaluating the questions above, I shall still consider the principles governing the law of contract as outlined in the case of ***Printing and Numerical Registered Company v Simpson 1875 LR19 464*** already referred to in the main matter.
- 11.5 The evaluation of the evidence herein will show that although there was no written evidence to show that the Parties herein agreed to terminate the contract immediately before the expiration of the six months' notice, the conduct of the parties herein speak to the conclusion that they actually agreed to terminate.
- 11.6 Firstly, in the letter dated 8th April 2020 already referred to in the main claim, the Defendant acknowledged owing

the Plaintiff the amount of US\$39,000.00 after considering the March 2020 rental payments.

11.7 Secondly, the Defendant did not raise any issue as regards breach of contract and the need for the Plaintiff to pay the six months' notice rentals.

11.8 As if that is not enough, there is an undisputed fact that the Defendant immediately engaged a new tenant and in fact paid the Plaintiff part of the money owed towards the construction cost thereafter. The above facts lead to an inference and I am inclined to come to an inescapable position that the parties had in fact agreed to terminate the lease agreement immediately after the six months' notice before completion of the notice period.

11.9 Furthermore, I draw comfort from the principle of 'Estoppel' as espoused by the learned authors of ***Halsbury's Laws of England/Estoppel (Volume 16(2) (Reissue))/1. Nature, Classification and Principles of Estoppel 951*** where it was stated that:

'Estoppel' has been described as a principle of justice and of equity which prevents a person

who has led another to believe in a particular state of affairs from going back on the words or conduct which led to that belief when it would be unjust or inequitable (unconscionable) for him to do so. The person making the statement, promise or assurance is said to be estopped from denying or going back to the original agreement because he has led the Plaintiff to believe in a particular state of affairs on it.

11.10 Furthermore, I am persuaded by the decision of my learned Justice colleague in the case ***Galaunia Farms Ltd v National Milling Company Ltd 2002***⁸ when it was stated that:

“The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct.”

11.11 In the instant case the conduct of the Defendant truly shows that the parties herein voluntarily and freely

entered into a further agreement to immediately terminate the contract after the six months' notice but before the expiration of the notice period, the Defendant is therefore estopped from going back on the words or conduct which led to that belief because he has conducted himself in such a way to show that such an agreement truly existed or he ratified the action by the Plaintiff.

11.12 The Defendant has not demonstrated in the counterclaim by way of evidence that the Plaintiff breached the agreement in the six months' notice or that he is entitled to payment of the corresponding monthly rentals for the aforementioned period.

11.13 I am further fortified by the holding in the case of in the case of **Galaunia Farms Limited v National Milling (2004) ZR1⁹** the Supreme Court guided that;

“A plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment.”

11.14 In the counterclaim herein, the burden of proof lies upon the party who substantially asserts the affirmative of

the issue. In sum, I find that the Defendant has failed to prove the claims alleged in the counterclaim. The counterclaim therefore fails in its entirety.

12 Each party to bear its own costs.

13 Informed of the right to appeal within thirty (30) days.

Dated at Lusaka, this 20th day of May 2024.



M.M. BAH-MATANDALA
HIGH COURT JUDGE.

