

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

2023/HP/1144



BETWEEN:

SOKOTELA INVESTMENTS LIMITED

AND

SUPERDEAL INVESTMENTS LIMITED

DEFENDANT

BEFORE THE HONOURABLE MRS. JUSTICE M. C. KOMBE

For the Plaintiff:

No appearance

For the Defendant:

*Mr. B. Lusango - Messrs. Steven Osborne
Advocates.*

R U L I N G

Cases referred to:

1. **Habib Industries Limited v. Amish Industrial Products Limited and Another (2012/HP/ 1427) (Unreported).**
2. **Maila Rodger Chilele v. Patson Mbao and another (Appeal No. 88/2021).**
3. **Sanat Limited v. Shaileshkumar Suryakant Amin (Appeal No. 205/2022).**

Legislation and materials referred to:

1. **The Rules of the Supreme Court of England 1999 Edition.**
2. **The Statute of Limitations of Actions of 1939.**

1. INTRODUCTION

- 1.1 This ruling is in respect of an application by the Defendant to dismiss the matter on a point of Law.
- 1.2 The application is made pursuant to Order 14A Rule 1 of the Rules of the Supreme Court 1999 Edition.

2. AFFIDAVIT IN SUPPORT

- 2.1 The Defendant's affidavit filed in support was deposed by **GUIHENG LUO** the Managing Director in the Defendant Company.
- 2.2 The deponent deposed that the Defendant and Plaintiff executed an agreement where it was agreed that the Plaintiff would continue to pay hiring charges for the hire of the Defendant's Front End Loader Model, LG856 with an option to purchase the said machine if the Plaintiff made payment of the purchase price on specific days as stated in the agreement. Produced and marked "**GL1**" was a copy of the payment.
- 2.3 The deponent added that he had been advised by counsel that the Plaintiff's action herein was statute barred as the agreement that gave rise to the Plaintiff's action was executed in 2010, which was against the time frame prescribed for

commencement of action of this nature under the Limitation Act of 1939.

- 2.4 The deponent further deposed that the parties herein had litigated the same issue under cause 2012/HPC/0271, the same was dismissed in 2016 more than seven years ago and against the provisions of the Limitation Act. The deponent produced copies of the writ of summons and statement of claim, defence and counter-claim and Order of the High Court dismissing the matter which were marked as “**GL2**”.
- 2.5 The deponent asserted that the matter was improperly before this Court and that unless the court dismissed the action, the Defendant was likely to suffer injustice.

3. AFFIDAVIT IN OPPOSITION

- 3.1 The affidavit in opposition was deposed by **DAVID CHIKOPA**, a Director in the Plaintiff Company.
- 3.2 The deponent disputed that any agreement was signed with the Plaintiff. The deponent explained that the agreement that was signed was drawn by the Defendant’s management and was titled “Agreement of sales the 856 Front End Loader” that was signed on 10th February, 2010. The agreement was

signed on behalf of the Defendant by B. Luo the Chief Executive Officer of the Defendant at the material time and was witnessed by Wang Can. The deponent signed on behalf of the Plaintiff and was witnessed by Dalison Chikopa, a Director in the Plaintiff Company. Produced and marked **“DC1”** was a copy of the agreement that was signed for the sale of the Front End Loader.

3.3 The deponent further explained that contrary to the false assertion that the purchase of the Front End Loader was an option, the agreement produced as **“DC1”** provided that during the time of the payment of the purchase price, the Front End Loader would be on hire to the Plaintiff, and that the payment for the hire charges should be separate from the payments for purchase. The payments for both were made by the Plaintiff in compliance with its part of the contract which evidence of the same was part of the evidence in the matter before this Court.

3.4 The deponent further deposed that the action by the Plaintiff was not statute barred. He explained that on 12th June, 2023, on the instructions of the said **GUIHENG LUO**, in an effort to

comply with the agreement for sale of the Front End Loader, voluntarily and without coercion, handed over a Front End Loader, LG855G to the deponent and the bailiff who had been sent to collect the one purchased. The same was handed over and parked for safety at Kasanda Police Station in Kabwe Central Province because the purchased Front End Loader was at a far location and he was asked to accept an alternative. Produced and marked “**DC2**” were photographs of the alternative Front End Loader and specifications.

- 3.5 It was further deposed that a disagreement arose on the alternative Front End Loader as it was a dilapidated one and that he went to collect a different one that did not belong to the Defendant.
- 3.6 As a result of the Defendant giving an inappropriate Front End Loader in 2023, the Plaintiff commenced this action to compel the Defendant to hand over the correct Front End Loader through an order for specific performance on the part of the Defendant by handing over a Front End Loader which had been purchased.

3.7 The deponent added that the previous matter was dismissed due to the absence of the parties and there was no judgment on the claim.

3.8 The deponent was advised by counsel having conduct on behalf of the Plaintiff that the Defendant had refused and neglected to perform its part of the agreement and an order for specific performance was what was being sought since the Defendant handed over an inappropriate alternative.

4. AFFIDAVIT IN REPLY

4.1 The Defendant filed an affidavit in reply which **GUIHENG LUO** the Managing Director of the Defendant Company deposed to. The deponent alleged that the date of 10th February, 2010, was not included in the copy that he found in the records of the Defendant. The deponent confirmed that he was not present at the time of execution of the contract, but that he spoke to the records that he found at the Defendant Company and in consultation with Mr. **LOU BIN** the former Chief Executive Officer of the Defendant Company who was his father.

4.2 The deponent alleged that the Plaintiff's claims were false and calculated by stating that they had paid for the Front End

Loader in full. The deponent wondered why possession of the same was not taken if it was paid for in full. That what was paid for were merely hiring charges and not the purchase price.

4.3 The deponent further deposed that he was advised by counsel that the Plaintiff's action was statute barred having being litigated on and dismissed in 2016, more than seven years ago and that the Plaintiff's cause of action arose not later than 2012, when the parties first had a disagreement. That what the Plaintiff did on 12th June, 2023, was to attempt to forcefully take away the Defendant's Front End Loader without any lawful authority by using police men and Court bailiffs with no court authority to take the Front End Loader. The Front End Loader a Shantui 5L50WN 2010 was not a subject matter of the agreement between the Plaintiff and the Defendant.

4.4 It was further deposed that the Defendant had taken out an action in the High Court under cause No. 2023/HP/1180. As shown by the writ of summons and statement of claim marked **"GL1"**.

4.5 The deponent claimed that the Front End Loader LG855G was forcefully taken by the Plaintiff using threats in the presence of the police and a bailiff who stated that they were investigating a possible crime and hence the parking of the Front End Loader at Kasanda Police Station in Kabwe.

5. HEARING

5.1 At the hearing of the application, there was no appearance on behalf of the Plaintiff but learned counsel Mr. B. Lusungo from Messrs. Steven Osborne Advocates was present on behalf of the Defendant.

5.2 As no reasons were advanced for the Plaintiff's advocates absence, I proceeded to hear the Defendant's application because there was proof of service and counsel was in attendance when the matter was adjourned.

5.3 In making his application, Mr. Lusungo relied on Order 14A of the Rules of the Supreme Court 1999 edition that is couched as follows:

“(1)The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or

matter at any stage of the proceedings were it appears to the court that –

(a) Such question is suitable for determination without a full trial of the action; and

(b) Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2) An application under rule 1 may be made by summons or motion or (notwithstanding Order 32 rule 1) may be made orally in the course of any interlocutory application to the Court”.

5.4 Mr. Lusungo further relied on section 2 of the Limitation Act 1939 which provides:

“The following actions shall not be brought after the expiration of 6 years from the date on which the cause of actions accrued, that is to say:

a) Actions founded on simple contract or on tort.”

5.5 In view of the forgoing, counsel submitted that it was clear from the facts as outlined in the affidavit in support that the agreement was entered into in 2010 which was at least thirteen years ago.

5.6 It was also submitted that the issue had been litigated upon and was dismissed in 2016. That even assuming 2016 was the

last time the issue was discussed, it was still more than six (6) years and hence the matter was statute barred.

5.7 He prayed that the action be dismissed.

5.8 Although counsel for the Plaintiff was not in attendance, he had filed skeleton arguments in opposition.

5.9 Mr. Sambo submitted in his written arguments that this action was brought due to the fact that the Plaintiff had complied with its part of the contract for the sale of a specific Front End Loader. That on 12th June, 2023, the Defendant in a bid to comply with its part of the agreement handed over to the Defendant a different and dilapidated Front End Loader from that sold in accordance with the agreement of sale.

5.10 Mr. Sambo submitted that the Defendant relied on section 2 of the Limitations Act 1939 but did not appreciate the entire section, particularly subsection (7) which provides as follows:

“(7) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the court by analogy in like manner as the corresponding enactment repealed by this act has therefore been applied.”

5.11 Mr. Sambo argued that in this matter the Plaintiff sought an order of the Court to compel the Defendant to fulfil its obligation under the sale agreement i.e. specific performance of its part of the agreement of sale of a specific front end loader. Mr. Sambo disputed that the matter had been litigated upon as the Defendant had commenced an action which it failed to prosecute and led to the matter being dismissed. There was no judgment either in favour or against any party.

6. DECISION OF THE COURT

6.1 I have carefully considered the parties' affidavit evidence and submissions herein.

6.2 This is the Defendant's application to dismiss this action on a point of law pursuant to Order 14A of the Rules of the Supreme Court 1999 edition. This Order reads as follows:

“(1) The Court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that –

(a) Such question is suitable for determination without a full trial of the action; and

(b)Such determination will finally determine (subject only to any possible appeal) the entire cause or matter or any claim or issue therein.

(2)Upon such determination the Court may dismiss the cause or matter or make such order or judgement as it thinks just”.

6.3 The two conditions that must be satisfied before determining any question of law are that the question must be suitable for determination without the need for a full trial and secondly, that the determination must be one that would finally determine the entire cause or matter or any claim or issue in the matter.

6.4 This was stated in **Habib Industries Limited v. Amish Industrial Products Limited and Another** ⁽¹⁾ where Sitali J. stated:

“On the other hand, Order 14A of the RSC Edition empowers the court to determine any question of law of construction of any document arising without full trial of the action whether it appears to the court that such a determination will finally determine the proceedings or an issue in the proceedings.”

- 6.5 The Defendant contends that this action is statute barred as the agreement giving rise to the Plaintiff's action was executed in 2010, which was against the time frame prescribed for the commencement of action of this nature under the Limitation Act of 1939.
- 6.6 The Plaintiff on the other hand has denied that its action is statute barred. The Plaintiff contends that on 12th June, 2023, on instructions of the deponent, Guihenj Luo in an effort to comply with the agreement for the sale of the Front End Loader, voluntarily and without coercion handed over a Front End Loader LG 855G to David Chikopa and the bailiff who had been sent to collect the one purchased.
- 6.7 It is contended that a disagreement arose on the later alternative Front End Loader as it was a dilapidated one and another one was collected but it turned out that it belonged to someone else.
- 6.8 As a result of the Defendant giving an inappropriate Front End Loader, the Plaintiff commenced this action to compel the Defendant to hand over the correct Front End Loader through an order of specific performance.

6.9 What is clear from the foregoing is that the parties are not agreed when the cause of action accrued. The Court of Appeal in the case of **Maila Rodger Chilele v. Patson Mbao and another**⁽²⁾ stated that where the parties have not agreed when the cause of action accrued, it is a triable issue that needs further investigation.

6.10 I am ably guided by what the Court of Appeal stated in the above case and I hold the view that the issue needs to be interrogated at trial considering the fact that both parties have alluded to different agreements which they entered into which I take were aimed at maintaining their business relationship.

6.11 For these reasons, I find that the issue is not suitable for determination without a full trial. At trial, regard will also be had to the other issue raised by the Plaintiff in opposition that the Limitation Act of 1939 does not apply to a claim for specific performance.

6.12 The other limb of application by the Defendant is that the matter under cause Number 2012/HPC/0271 in relation to the same claim herein was dismissed. And therefore, this matter is improperly before this Court. I have examined the

order marked “**GL2**. It is an order dismissing the matter for want of prosecution having been struck off the active cause list. It is therefore clear that the matter was not decided on its merits but was dismissed because the Defendant herein (Plaintiff on the other cause) failed to restore the matter to the active cause list within the stated time.

6.13 Given the foregoing, I find that the Plaintiff herein also filed a counter-claim in the other cause and commenced this action as the dismissal was not on merit.

6.14 I am fortified in making this finding by what the Court of Appeal stated in the case of **Sanat Limited v. Shaileshkumar Suryakant Amin**⁽³⁾ that:

“As explained by the Supreme Court in the Gaedonic Automotive Limited case, the effect of a dismissal is that no further action can be taken under that cause by the High Court Judge. However, a new action can be commenced under a different cause.”

7. CONCLUSION

7.1 In the result, I find no merit in the application made by the Defendant for the reasons highlighted above and it is accordingly dismissed.

7.2 Considering the circumstances of the case, I make no order
as to costs.

DELIVERED AT LUSAKA THIS 30TH DAY OF SEPETMBER, 2025

