

IN THE COURT OF APPEAL OF ZAMBIA

APPEAL NO. 85 OF 2021

HOLDEN AT NDOLA

(Civil Jurisdiction)

B E T W E E N:

MULUCHI INVESTMENTS LIMITED

AND

ZESCO LIMITED

APPELLANT

RESPONDENT

CORAM: SIAVWAPA JP, CHASHI and BANDA-BOBO, JJA

ON: 21st February and 26th April 2023

For the Appellant:

*K. Mwiche, Messrs. Christopher and
Frighton Legal Practitioners, Standing in
for Messrs. Katongo and Company*

For the Respondent:

*K. Mweemba and V. Kalapa (Ms), In-
House Counsel*

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. *National Drug Company Limited and Zambia Privatization Agency v Mary Katongo – SCZ Appeal No. 79 of 2001*
2. *Shogun Finance Limited v Hudson (2004) 1 AC, 919*
3. *Jaffico Limited v Northern Motors Limited (1971) ZR, 78*
4. *Leaf v International Galleries (1950) 2 KB, 86*

5. *Bernistein v Pamson Motors (Golders Green) Limited* (1987) 1 All ER, 220
6. *J Evans and Sons (Portsmouth) Limited v Andrea Merzaria* (1976) 2 All ER, 930
7. *Attorney General v Marcus Achiume* (1983) ZR, 1
8. *Ford v Beech* (1848) 11 BC, 852
9. *Mohammed v Attorney General* (1982) ZR, 49
10. *Phinate Chona v Zesco Limited – CAZ Appeal No. 66 of 2019*
11. *Mercantile Bank of Sydney v Taylor* (1891) 12 LR (NSW) 252
12. *Holmes Limited v Buildwell Construction Company Limited* (1973) ZR, 77
13. *Hoyt's Pty Ltd v Spencer* (1919) 27 CLR, 133

Legislation referred to:

1. *The Sale of Goods Act, 1893*
2. *The Court of Appeal Act, No. 7 of 2016*

1.0 INTRODUCTION

1.1 This is an appeal against the Judgment of Honourable Mrs. Justice A. Patel, delivered on 1st February, 2021.

1.2 In the said Judgment, the learned Judge dismissed the Appellant's claims against the Respondent and found

that the ladders supplied by the Appellant to the Respondent, were not of merchantable quality.

2.0 BACKGROUND

2.1 The brief facts are that the Respondent, by way of a tender document and under the simplified bidding process, invited the Appellant and other suppliers to submit quotations for the supply and delivery of ladders and live line testers. Attached to the tender document was the Respondent's minimum specifications for the ladders.

2.2 The Appellant, being the successful bidder, was awarded the tender and a Purchase Order was issued to that effect. The Appellant accordingly supplied and delivered the ladders to the Respondent sometime in May 2019. However, the Respondent refused to pay for the ladders on account that after conducting a physical examination, the ladders were found to be unsuitable for use on overhead power lines, as according to the Respondent, they were wobbly and sagging.

2.3 The Appellant then commenced an action against the Respondent by way of Writ of Summons and Statement of Claim dated 10th September 2019 seeking the following reliefs:

- (i) Order of payment of K348,000.00 being moneys due for the supply of ladders by the Appellant to the Respondent;**
- (ii) Damages for breach of Agreement;**
- (iii) Damages for consequential loss;**
- (iv)**
- (v)**

2.4 In the attendant statement of claim, the Appellant averred that, sometime in May 2019, it delivered the ladders and live testers in accordance with the specifications contained in the Purchase Order and the same were accepted by the Respondent. The Appellant thereafter issued a tax invoice in the sum of K348,000.00.

2.5 That having delivered the ladders, the Respondent has since refused or failed to sign the delivery note and

refused to make payments for the ladders. As a result, the Appellant has failed to service other orders with other institutions, thus depriving it of income.

2.6 In its defence filed on 8th October, 2019, the Respondent averred that the ladders supplied by the Appellant were unfit for the purpose. That it had made it known to the Appellant in its technical specifications that the ladders had to be heavy-duty and suitable for use on overhead power lines. However, a physical inspection of the ladders revealed that, when extended to their full length, the ladders were wobbling and sagging and as a result, they were unsafe for a linesman to use.

2.7 These concerns were brought to the attention of the Appellant and informed that the Respondent was rejecting the ladders for being unsuitable for their intended purpose.

2.8 At trial, the Appellant called one witness who relied on his witness statement which reiterated the averments in the statement of claim. However, he added that in

response to the Respondent's request for suppliers to submit quotations, the Appellant submitted a quotation which included various brochures with different ladders of different specifications.

2.9 However, the Purchase Order issued by the Respondent had an Annexure with specifications distinct from those contained in the Appellant's quotation. That it is for this reason that the Appellant proceeded to procure the ladders based on the specifications contained in the Purchase Order and Annexure. That the Respondent has to date refused to pay for the ladders.

2.10 The Respondent called one witness who also relied on the witness statement which reiterated the averments in the defence. It was averred that the Appellant by its quotation indicated that it could offer ladders that were fit for use on overhead power lines and were heavy duty. In addition, the Appellant's quotation also contained better specifications on the weight and height of the ladders.

2.11 That the Tender Evaluation Committee met on 7th December, 2019 and approved the Appellant's quotation based on the specifications provided by the Appellant and this formed the basis of the contract between the parties. However, the ladders that were delivered were unfit for the purpose and were not in accordance with the specifications as contained in the approved quotation.

2.12 It was further contended that in addition to informing the Appellants that the ladders were unfit for the purpose, the Appellant and Respondent agreed to have a confirmatory test at the Copperbelt University to determine the material that was used to manufacture the ladders. However, before the confirmatory test could be done, the Appellant commenced this action.

3.0 DECISION OF THE LOWER COURT

3.1 After considering the pleadings and the arguments, the learned Judge was of the view that the whole action rested on a single issue whose determination would settle all corollary issues, which was:

What document(s) constituted the contract that was entered into between the parties?

- 3.2 In resolving the issue, the learned Judge was of the view that it would be prudent to consider the Purchase Order and its genesis. The learned Judge began by looking at the Respondent's tender document which requested suppliers to submit quotations. Attached to the tender document, was the Respondent's minimum technical specifications for the 9, 10 and 12 metres aluminum extendable ladders with SPMS Article Codes **370803-0009**, **370803-0012** and **370803-0004** respectively in Schedule A and Schedule B which had to be completed by the suppliers as well as to provide their technical specifications of the product of offer.
- 3.3 The learned Judge thereafter looked at the Purchase Order and formed the view that the column in the Purchase Order under the heading *item code* referred to the item codes **370803-0009**, **370803-0012** and **370803-0004** for the 9, 10 and 12 metre ladders

respectively. That reference to the three item codes in the purchase order could only have meant that the documents were to be read together and not in isolation. That reference to the item codes related to the tender document and the quotation provided by the Appellant. The learned Judge then rejected the Appellant's narrative on extrinsic evidence on account that it was not relevant to the facts.

3.4 Further the learned Judge found that the following sentence in the tender document under the heading award of Contract namely that "*the terms of the accepted offer shall be incorporated in the supply order*" lends credence to the finding that the documents ought to have been read together with the Purchase Order.

3.5 The learned Judge was of the view that the Appellant, having submitted its quotation for the very same item codes as described in the Purchase Order, cannot now be seen to say that the technical descriptions in the Purchase Order only relate to the length of the ladders.

That, that would be taking far too simplistic a view of the order defying the very purpose for which the ladders were required, namely for use on overhead power lines.

- 3.6 Coming to the issue of the merchantability of the ladders supplied, the learned Judge, relying on section 14 of **The Sale of Goods Act**¹, found that the ladders that were supplied were sagging and were not fit for use on overhead power lines being the purpose for which they were ordered. As, a result of the above findings, the learned Judge dismissed the Appellant's case.

4.0 THE APPEAL

- 4.1 Dissatisfied with the decision of the lower court, the Appellant has appealed to this Court advancing six grounds of appeal couched as follows:

- 1. The Honourable trial court erred both in law and fact when she failed to recognise that the purchase order is the final document in the simplified bidding process.**

- 2. The court misdirected itself in finding that the purchase order should not be read alone but with the request for a quotation by virtue of clause 5(c) and when there is evidence on record to show approved specifications by the Respondent during the evaluation process.**
- 3. The Honourable trial Judge misdirected herself in finding that all the ladders were not of merchantable quality even when there was evidence on record that technical specifications were given by the Respondent and it was also pleaded by the Respondent that the 9 metre ladders were in accordance with the Respondent's technical specifications.**
- 4. The Honourable Judge fell into error in holding that the allegation of the ladders wobbling and sagging was not objected to when there was no evidence on record to establish it nor was the issue of quality raised.**

5. The Honourable trial Judge erred when she glanced over the rejection of the ladders when it was established at trial that the Respondent did not formally reject the ladders and is still in possession of all the ladders.

6. The findings of fact that led to the Judgment handed down by the Court were either perverse or made upon a misapprehension of the facts and or they were findings which on a proper view of the evidence would not have been arrived at.

5.0 ARGUMENTS IN SUPPORT OF APPEAL

5.1 Mr. Mwiche, Counsel for the Respondent, relied entirely on the filed heads of argument dated 29th April 2021. Counsel argued grounds one to six together which basically attacked the findings of fact on the basis that the learned Judge misapprehended the facts before her.

5.2 According to Counsel, a Purchase Order is intended to be a final document indicating the specifications to be

followed by a supplier after an evaluation process has been conducted. That it is the final order in the simplified bidding process and is essentially a binding contract between the parties.

5.3 It was argued that in the present case, notwithstanding the fact that the Appellant made an offer which was accepted by the Respondent, the Purchase Order prepared by the Respondent only contained the Respondent's minimum technical specifications. It was argued that nowhere in the Purchase Order did it state that the Purchase Order had to be read together with other documents.

5.4 Counsel relied on the cases of **National Drug Company Limited and Zambia Privatization Agency v Mary Katongo**¹ and **Shogun Finance Limited v Hudson**² for the position that parties are bound by the terms of the contract voluntarily and freely entered into.

5.5 It was further argued that the learned Judge's finding that clause 5(c) of the tender document meant that the

Appellant was obligated to use the specifications it had offered was erroneous. According to the Appellant, the specifications offered by the Appellant were better and thus amounted to a counter offer which had to be accepted or rejected by the Respondent.

- 5.6 With regard to the delivery and receiving of the ladders, the Appellant relied on **The Sale of Goods Act**¹ and the cases of **Jaffico Limited v Northern Motors Limited**³ and **Leaf v International Galleries**⁴ and submitted that the Respondent, upon receiving the ladders, had the right to reject the goods but the same were inspected and accepted. It was further argued that during inspection, the ladders were measured against the Respondent's minimum specifications and not those of the Appellants. That the learned Judge did not pronounce herself on this fact and therefore, erred when she found that the Appellant delivered ladders whose specifications were contrary to those contained in the Appellant's quotation.

5.7 Counsel, relying on section 35 of **The Sale of Goods Act**¹ and the case of **Bernistein v Pamson Motors (Golders Green) Ltd**⁵, submitted that while the Respondent had the right to reject the goods, such rejection ought to have been communicated to the Appellant. That this was not done and the learned Judge failed to take that into account. We were urged to uphold the appeal.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 Mr. Mweemba, Counsel for the Respondent, relied on the filed heads of argument dated 15th June, 2021, which he briefly augmented with oral submissions. In opposing ground one, it was submitted that the learned Judge's finding that the Purchase Order was not a stand-alone document was made on the basis of the evidence before her. Such as the fact that the Respondent's tender document requesting for quotations from suppliers expressly stated that the terms of the accepted offer would be incorporated in the Purchase Order.

6.2 Secondly, the Appellant completed schedule B of the technical specifications by stating the specifications of the ladders that it had to offer. Thirdly, the Appellant provided pictorial evidence of the ladders it was offering. That based on the above, it is clear that the approved quotation is what was intended to be incorporated in the Purchase Order and not the Respondent's minimum requirements. The Respondent relied on the case of **J Evans and Sons (Portsmouth) Limited v Andrea Merzaria**⁶ where it was held as follows:

"The court is entitled to look at and should look at all the evidence from start to finish in order to see where the bargain was that was struck between the parties."

6.3 It was submitted that the learned Judge, in arriving at her decision, considered all the evidence before her and concluded that the Purchase Order related to the tender document and the quotation provided by the Appellant. Relying on the case of **Attorney General v Marcus**

Achiume⁷, it was submitted that this is not a proper case in which to interfere with the findings of the lower court.

6.4 In response to ground two, it was submitted that the evaluation of the bids against the Respondent's minimum specifications did not entail that the minimum specifications had been incorporated into the contract. That had that been the case, the parties would have expressly agreed to that effect. The case of **Ford v Beech**⁸ was cited and it was submitted that the clear intention of the parties as revealed in clause 5(c) of the request for quotations and Schedule B was that the Appellant provides its specifications and supply the ladders it had on offer. That the Appellant's argument that it is the Respondent's minimum requirements that formed the basis of the Purchase Order is illogical.

6.5 In response to ground three, it was argued that the finding by the learned Judge that the ladders were not of merchantable quality was confirmed by DW1 and this evidence went unchallenged by the Appellant. In

addition, the Appellant was well aware of the purpose for which the ladders were required but still delivered ladders which were not of merchantable quality and unfit for the purpose.

- 6.6 In response to ground four, the Respondent reiterated its arguments in response to ground three, that the finding that the ladders were not merchantable was supported by the evidence of DW1 which was uncontested.
- 6.7 Coming to ground five, it was submitted that the learned Judge was not obliged to consider the issue of the formal rejection of the ladders because of the principle of “he who alleges must prove”. In support thereof, the case of **Mohammed v Attorney General**⁹ was cited.
- 6.8 The Appellant did not adduce any evidence to prove that the Respondent accepted the ladders despite them being defective. On the contrary, the uncontroverted evidence from both the Appellant and Respondent witnesses is that the Respondent did not accept the ladders and this was communicated to the Appellant.

6.9 On the claim for breach of contract, it was argued that the Appellant failed to prove that it complied with the contract and that it duly supplied and delivered the ladders. That, therefore, the learned Judge rightly found that the Respondent was justified when it declined to pay for the ladders as the Appellant had not supplied what was agreed.

6.10 In response to ground six, the Respondent submitted that the Appellant in its arguments does not disclose the findings which led to the judgment of the lower court. Relying on section 22 of **The Court of Appeal Act²**, the Respondent submitted that findings of fact or points of law being appealed against must arise from the Judgment and not from the facts leading to the Judgment.

6.11 In his oral arguments, Counsel referred us to our decision in the case of **Phinate Chona v Zesco Limited¹⁰** for the position that a contract does not exist in a vacuum and that in interpreting a contract, the court is

entitled to take a holistic approach and look at the context in which the contract was made.

7.0 ANALYSIS AND DECISION OF THE COURT

7.1 We have considered the evidence on record, the arguments by Counsel and the impugned Judgment. In our view, the learned Judge formulated the correct issue for determination which is:

What documents constituted the contract that was entered into between the parties?

7.2 The Appellant argues that the terms of the Purchase Order constituted the entire contract between the parties and the Respondent was bound by it. Further that no other evidence or document should have been considered by the court in arriving at its determination. On the other hand, the Respondent argues that the Purchase Order ought to have been read with other documents in order for the contract to be complete.

7.3 First and foremost, we do agree with the Appellant to the extent that a Purchase Order is indeed a contractual

agreement between the purchaser and the supplier and becomes legally binding once it has been accepted by the supplier. The Purchase Order, in our view, details the goods or services that the buyer has agreed to buy and the terms of the purchase.

- 7.4 A perusal of the Purchase Order at page 121 of the record details *inter alia* the description of the items to be supplied, the quantity as well as the price but it is silent on the technical specifications of the ladders. The question that maybe posed here is whether this Purchase Order was a sufficient source of the recordings of everything that was agreed to between the parties. We opine that the answer is in the negative.
- 7.5 This is so, because the tender document at pages 123 – 125 and in particular heading 5 reads as follows:

5. Award of Contract

a)The Purchaser will award the contract to the bidder whose quotation has been determined to be substantially responsive and who has offered the

best evaluated quotation price and has no record of failure to perform any contract under ZESCO Limited in the past (4) years;

b)Notwithstanding the above, the purchaser reserves the right to accept or reject any quotations and to cancel the bidding process and reject all quotations at any time prior to the award of the contract; and

c) The bidder whose bid is accepted will be notified of the award of the contract by the purchaser prior to the expiration of the quotation validity period. The terms of the accepted offer shall be incorporated in the supply order.

7.6 The tender evaluation committee met on 7th December 2019 and approved the Appellant's quotation as it was determined to be substantially responsive. It was further indicated that the terms of the accepted offer would be incorporated in the supply order. In our view, it is only logical therefore, that if the Purchase Order is silent on the specifications of the ladders, the approved quotation

ought to be considered as that is what formed the basis of the award of the contract. The Appellant's argument that its quotation should not have been considered is devoid of any logical reasoning. Certainly, the Respondents would not have approved the Appellant's quotation which contained better specifications if it was only interested in its minimum specifications. We, therefore agree with the learned Judge that the Purchase Order ought to have been read with other documents.

- 7.7 However, this is not the end of the matter. We note that the learned Judge in arriving at her decision, rejected the Appellant's submissions on extrinsic evidence on account that issues of extrinsic evidence were not relevant in this matter. We hold a contrary view, and that is that the parol evidence rule played a crucial part in this case. There are various authorities on the parol evidence rule which include **Mercantile Bank of Sydney v Taylor**¹¹ and **Holmes Limited v Buildwell Construction Company Limited**¹² which provides that where a

contract is reduced into writing and it appears in the writing to be entire, it is presumed that the writing contains all the terms of it and evidence will not be admitted of any previous or contemporaneous agreement which would have the effect of adding to or varying it in any way.

- 7.8 However, the parol evidence rule does have exceptions as provided in the case of **Holmes Limited**¹² where it was stated as follows:

"By way of exception to the above rule, extrinsic evidence maybe admitted to show that the written instrument was not intended to express the whole agreement between the parties."

- 7.9 Further in the case of **Hoyt's Ltd v Spencer**¹³, it was stated that the parol evidence rule applies unless it can be shown that the document was not intended to be the complete record of their bargain.

- 7.10 Based on the above authorities, when a contract is formed and there are terms missing and not included in

the contract, the court may allow the parties to give extrinsic evidence. In the case at hand, evidence on record and in particular, the tender document under heading 5(c) reveals that the Purchase Order, while being the contractual document between the parties, was not intended to be the complete record of the bargain. This is therefore, an appropriate case in which extrinsic evidence, ought to be admitted in order to make the contract complete. Therefore, the learned Judge erred by holding that the admissibility of extrinsic evidence was irrelevant to the facts when in actual fact she admitted extrinsic evidence.

7.11 As regards the merchantability of the ladders supplied, as rightly argued by the Respondents, the evidence by the Respondent as to the ladders being unfit for purpose went unchallenged by the Appellant. The Respondents alleged that the ladders were wobbly and sagging and as a result were unsafe for the linesman to use.

7.12 It was expressly disclosed to the Appellant *via* the tender document the purpose for which the ladders were required and the Appellant indicated in its quotation that it would supply ladders for that purpose. Therefore, by supplying defective ladders, the Appellant was in breach of section 14 of **The Sale of Goods Act**¹ which provides for an implied condition that goods sold will be of merchantable quality. This simply means that the goods must be reasonably suitable for the purpose that they are bought.

7.13 Further, coming to the rejection of the ladders, it is clear from the evidence of PW1 and DW1 that the Appellant was informed orally that the Respondent was rejecting the goods. The Appellant's argument that it did not receive written notice is misplaced as it is not a requirement that the rejection should always be in written form. The notice was in our view sufficient.

7.14 Based on the foregoing, we adopt the lower court's position that the Respondent was entitled to reject the

ladders and withhold payment for the goods on the basis that the ladders were not of merchantable quality. This is not an appropriate case in which to disturb the findings of the lower court. All six grounds of appeal are devoid of merit and fail.

8.0 CONCLUSION

8.1 All the six grounds having been unsuccessful, we accordingly dismiss the appeal with costs to the Respondent, to be taxed in default of agreement.



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J. CHASHI
COURT OF APPEAL JUDGE



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M.J. SIAVWAPA
JUDGE PRESIDENT



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A.M. BANDA-BOBO
COURT OF APPEAL JUDGE