

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

2010/HPC/0121

BETWEEN:

TIJEM ENTERPRISES LIMITED

PLAINTIFF

AND

CHILDREN INTERNATIONAL ZAMBIA LIMITED

DEFENDANT

BEFORE THE HON. JUSTICE NIGEL K. MUTUNA, ON 11th DAY OF APRIL, 2011.

For the Plaintiff : Mr. C. Chanda of Messrs Chanda Chizu and Associates.

For the Defendant : Mr. J. Sianyabo of Theotis, Mataka and Sampa Legal Practitioners.

JUDGMENT

Cases referred to:

- 1. *Printing and Numercial Registering Company -VS- Simpson (1875)*
*LR 19 EQ 462.***
- 2. *Colgate Palmolive (Z) Inc -VS- Able Shemu and 110 Others, Appeal*
*No. 181 of 2005.***
- 3. *Sam Amos Mumba -VS- Zambia Fisheries and Fish Marketing Corporation Limited (1980) ZR page 135.***
- 4. *Holmes -VS- Buildwell Construction Company Limited (1973) ZR*
*page 97.***
- 5. *JZ Car Hire Limited -VS- Malvin Chala and Scirocco Enterprises***

Limited (2002) ZR page 112.

Other authorities referred to:

- 1. *Text and Materials in Commercial Law, by L.S. Sealy and R.J.A. Hooley, Butterworths, London, 1994 page 15.***
- 2. *Chitty on Contracts, General Principles, 25th edition, Sweet and Maxwell page 767.***
- 3. *Halsbury's Laws of England by Lord Hailsham, 4th edition, volume 9.***
- 4. *Atkins Courts Forms Volume 12.***

The Plaintiff, Tijem Enterprises Limited, commenced this action against the Defendant, Children International Zambia Limited, on 25th February, 2010. The action was commenced by way of writ of summons and statement of claim, whose endorsement is as follows;

"... the Plaintiff's claim is for

- 1. The sum of K79,574,306.00 being outstanding balance on the supply and delivery of 85,986 melamine round plates as per the contract.*
- 2. Damages for breach of contract.*
- 3. Interest on all amounts found due.*
- 4. Costs.*
- 5. Any other relief the Court may deem just and equitable to grant"*

The Defendant's response was by way of memorandum of appearance and defence and counterclaim, filed on 10th March, 2010.

The statement of claim began by revealing the capacities of the two parties as being, a private limited liability company and a company limited by guarantee, respectively. Further, that on or about 24th June, 2009, the

Defendant, through a press advertisement invited bids from the public to tender for the supply and delivery of 76,432 melamine round plates (the plates). The advertisement requested the eligible bidders to obtain bidding documents from the Defendant upon payment of a non refundable fee of K100,000.00. These documents consisted of, the bid technical specification form, proposal, price schedules and the proper relationship with suppliers forms.

The Plaintiff duly submitted its bid on or about 26th June, 2009, for the supply of the 76, 432 plates, at a price of K4,600.00, per plate, bringing the total to K351,587,200.00 (exclusive of taxes). Subsequently and by letter dated 15th July, 2009, the Defendant notified the Plaintiff that it was the successful bidder and offered it a contract to supply 85,986 plates, at the bid price of K4,600.00 per plate, bringing the total to K395,535,600.00. On that same day, the parties executed a contract which expressly incorporated the following documents namely, the bid proposal and price schedule submitted by the bidder, general conditions of contract, supplier relationship form and letter of notification of contract award. Subsequently, on 21st July, 2009 the Defendant issued to the Plaintiff a purchase order number 0407, for the supply and delivery of 85,986 plates. This was in accordance with the contract and, pursuant to this, the Plaintiff purchased the plates from China and consigned them to the Defendant in its name. This was with the full knowledge of the Defendant. Despite, the plates being consigned in the Defendant's name, the Plaintiff met all the expenses for the cost, freight, insurance and forwarding charges. The plates were delivered to the Defendant on or about 26th November, 2009, and the Defendant accepted them without complaint. The Plaintiff thereafter issued an invoice for the contract price of K395,535,600.00, and expected prompt payment to be made in full within 60 days of the date of the invoice. Arising from this, the Defendant, on or about, the 9th of December, 2009, paid the sum of K315,961,294.00, to the Plaintiff, purporting same to be part payment of the

invoiced amount. This left a balance outstanding of K79,574,306.00. The Plaintiff accepted the said part payment as it was made within the agreed 60 days and it awaited receipt of the balance. However, on the 22nd of December, 2009, the Defendant wrote to the Plaintiff informing it that the sum of K79,574,306.00 had been withheld on the ground that, the Plaintiff breached the contract by consigning the plates in the Defendant's name. The said sum of K79,574,306.00 was therefore to cater for taxes. This, the Plaintiff alleged was an unlawful act and a breach of contract because, the said amount is the balance outstanding on the purchase price for the 85,986 plates. Further, the Defendant had applied for tax exemption in accordance with its tax exemption status, which exemption was granted, pursuant to which, the plates were delivered and accepted by the Defendant. The Plaintiff has repeatedly demanded, payment of the balance but the Defendant has failed and or neglected to settle same.

In the defence, the Defendant admitted the existence of the contract for the supply of the plates and indeed that the said plates were delivered to it. It did not also deny the fact that it paid the sum of K315,961,294.00, and stated in this respect as follows; the K395,353,600.00 purchase price was not exclusive of tax and was the landed cost which included taxes, duties and licence fees as per the contract; the said duties and taxes as per the express terms of the contract were to be borne by the Plaintiff; the Plaintiff purchased and consigned the plates in the name of the Defendant without its knowledge or consent, which resulted in the Defendant being ordered to pay the sum of K79,54,306.00 as tax by Zambia Revenue Authority (ZRA); arising from this, a meeting was held in November, 2009, at which it was agreed that the Defendant would pay VAT and customs duty in the sum of K79,574,306.00, on behalf of the Plaintiff, which would be offset from the purchase price; and that it was pursuant to this agreement that the Defendant paid the Plaintiff the sum of K315,961,294.00. The Defendant alleged further that it applied to Ministry of Finance for exemption of

customs, duty and VAT on the said consignment, which exemption was granted. It was after the said exemption was granted that the Plaintiff demanded payment of the K79,574,306.00.

In the counterclaim, the Defendant repeated the facts in the defence. It alleged further that it was the Plaintiff's obligation to pay taxes on the plates and that to evade the said obligation, the Plaintiff purchased the plates from China in the name of the Defendant. The Plaintiff only informed the Defendant of its actions by emails dated 13th November, 2009. This was four months after the execution of the contract and after the plates had been dispatched from the source. By the said conduct, the Plaintiff breached the contract and misrepresented that the plates had been procured by the Defendant. This was intended by the Plaintiff as a way of evading tax, arising from which the Defendant has suffered loss and damage and claimed the following relief;

- “(i) Damages for breach of contract*
- (ii) Damages for fraudulent misrepresentation*
- (iii) Interest*
- (iv) Any other relief as the Court may deem fit*
- (v) Costs”*

The matter came up for trial on 10th October, 2010, and 14th February, 2011. The parties presented a witness each. For the Plaintiff the witness, PW, was Fitz Mukuto Kaoma, while for the Defendant, the witness, DW, was Chipo Lungu.

The evidence-in-chief of PW is contained in the witness statement filed on 12th July, 2010. It revealed that; the Defendant invited bids for supply of 76, 432 plates; the Plaintiff submitted a bid on 26th June, 2009 (see pages 3 to 16 of the Plaintiff's bundle of documents); the Plaintiff was awarded the tender and it executed a contract to supply and deliver 85,986 plates at the price of

K4,600.00 per plate, total being K395,535,600.00; the said sum was exclusive of tax as evidenced from the bid proposal and price schedule; the bid invitation required the plates to be specifically branded with the Defendant's name and all documents ended up bearing the Defendant's name; this fact notwithstanding, the documents for the plates were marked to the Plaintiff's attention and the Plaintiff bore all the payments in respect thereof, (see pages 46 to 52 and 28 to 33 of the Plaintiff's bundle of documents); the Defendant was informed as per clause (x) of the General Conditions of the contract that the plates were consigned in its name and it did not object; the Defendant received and accepted the plates when they were delivered without objection (see pages 34 to 36 of the Plaintiff's bundle of documents); the Plaintiff invoiced the Defendant after the delivery, pursuant to which the Defendant paid an initial deposit of K315,961,294.00, on the purchase price; this was done without objection by the Defendant as per documents at page 38 of the Plaintiff's bundle of documents; the assessed value for duty purpose of the plates made by ZRA was equivalent to the withheld amount of K79,574,306.00. The Defendant applied for and was given tax exemption by the Ministry of Finance on 30th March, 2009, (see documents at pages 39 to 53 of the Plaintiff's bundle of documents); it has since defaulted in payment of the K79,574,306.00 alleging breach of contract; and procedure to be followed in the event of breach of contract is at clause (q) in the General Conditions of the contract at page 24 of the Plaintiff's bundle of documents.

Under cross examination PW, confirmed the subject matter of the contract, the date it was signed and the bid price. He, in this respect, conceded that in its letter to the Defendant, the Plaintiff did not indicate that the bid price was exclusive of duty and VAT. PW, went on to state that the Plaintiff did pay taxes as they related to the shipment, insurance, port of entry, in-land port and clearing agents charges. He stated further that all procurement, including transportation and taxes were to be handled by the Plaintiff and

that the funds withheld by the Defendant, were the funds it was supposed to pay the taxes with. He went on to state that after delivery of the plates, the Plaintiff gave all the documents to the Defendant which included ZRA assessment papers. PW, went on to state that the reason why the plates were put in the Defendant's name was to ensure swift delivery and that by letter dated 13th November, 2009, the Plaintiff informed the Defendant that the plates would be delivered in its name. He ended by conceding that, the plates were not supplied on time.

In re-examination, PW, indicated that the delay in delivery of the plates was caused by the shipping merchant. He stated further, in this respect, that the Plaintiff had informed the Defendant of the delay by way of emails at pages 41 to 54 of the Defendant's bundle of documents. Further that, there was no objection by the Defendant and that the reply indicated that the Plaintiff was given an extension. He went on to state that, the contract provided for an extension under clause (o) at page 21 of the Plaintiff's bundle and that the Defendant did not terminate the contract or reject the plates on account of the delay. Regarding the taxes, he explained that, from the point of import to point of entry into Zambia, taxes were paid and were included in the Plaintiff's procurement process. The payment, he stated further, of the purchase price for the plates was to be paid in full.

The Plaintiff proceeded to close its case.

The evidence-in-chief of DW, is contained in the witness statement filed on 3rd August, 2010. It began by highlighting the invitation to bid, the tender by the Plaintiff, and contract executed by the parties. It went on to confirm delivery of the plates and payment of the sum of K315,961,294.00. The statement proceeded to highlight the breaches of the contract committed by the Plaintiff as follows; ordering the plates in the Defendant's name; and delay in delivery of the plates. DW, stated in this respect that the Defendant

was only informed of the plates being in its name by way of email dated 13th November, 2009, despite the Plaintiff having imported the plates from China on 18th September, 2009. By that time the plates were already on a truck being consigned from Tanzania. She testified further that, prior to the payments, meetings were held at which it was agreed that the Plaintiff would be liable for payment of customs duty and VAT. It was therefore agreed that the payment should be less, the sum of K79,574,306.00. The said sum was to be paid to ZRA as per the assessment at pages 70 to 76 of the Defendant's bundle of documents. The payment of K315,961,294.00, was therefore in full settlement of the amount owed to the Plaintiff and not part payment. Subsequently the Defendant applied to ZRA for VAT exemption which was approved by notice dated 11th December, 2009, (see page 69 of the Defendant's bundle of documents). A series of correspondence between the parties followed, in which the Plaintiff demanded payment of the K79,574,306.00, which was meant for duty and VAT. The Defendant had suffered loss on account of the Plaintiff's breach arising from the delay in delivery of the plates which took the form of; the delay in distribution of the plates as children's gifts, having a negative impact on its competence and reputation; and also time and fuel spent in pursuing the exemption at Ministry of Finance.

Under cross examination, DW, confirmed the invitation to bid, the tender by the Plaintiff, the contract and supporting documents, the price of the plates and the fact that the plates were supplied and received by the Defendant. She also confirmed that the amount paid was less than the invoiced amount and that an amount of K79,574,306.00 was the balance. Further that, there was delay in the delivery but that the Plaintiff wrote to inform the Defendant of the delay and that the request for payment was to be made by way of raising an invoice.

Under re-examination, DW, clarified that the import documents indicated that the Plaintiff would pay the taxes on the delivery. This she stated is specifically provided in the contract. However, without the permission of the Defendant, the plates were consigned in the name of the Defendant making it liable for the taxes. She stated further that, the Defendant paid the duties through a voucher given to it by Ministry of Finance to ZRA. This she argued made the Defendant technically exempt from paying the taxes.

The Defendant proceeded to close its case.

At the close of the hearing, I directed the parties to file submissions 14 days apart. Pursuant to the said directive, the Plaintiff's submissions were filed on 3rd March, 2011, while the Defendant defaulted. Prior to this, the parties had filed skeleton arguments on 26th July, 2010. In summing up the submissions, I will also capture the contents of the skeleton arguments.

In the Plaintiff's submissions, counsel for the Plaintiff, Mr. C. Chanda began by restating the claim, defence and counterclaim made by the parties. He proceeded to highlight the facts of the case with special emphasis on the fact that the parties had entered into a written contract. Counsel argued further that where parties have signed a contract, they are bound by the terms of the said contract. My attention in this respect was drawn to **Text and Materials in Commercial Law**, by L.S. Sealy and R.J.A. Hooley and the case of **Printing and Numerical Registering Company -VS- Simpson (1)** cited at page 8 in the case of **Colgate Palmolive (Z) Inc -VS- Able Shemu and 110 Others (2)**. Based on these authorities, it was argued that the Defendant's acceptance of the plates when delivered and the subsequent distribution of the same to the beneficiaries was an indication that the Plaintiff had discharged its duty, thereby entitling it to payment in full. This position, it was argued further, was fortified by the Defendant's

acceptance and unconditional part payment of the contract price. I was therefore urged to enforce the contract.

Counsel proceeded to deny the allegation of breach of contract by arguing that for a breach of contract to subsist, a party must have departed from the express provisions of that contract and the innocent party decides to terminate or rescind it. He stated, in this respect, that there was no breach because, there was no way the parties could with certainty determine the total customs duty and VAT before hand as same had to be assessed by ZRA, based on the value of the goods. This he stated was assessed at K50,040,040.00 based on value of plates placed at K176,831,790.00 for duty purposes (see page 71 of the Defendant's bundle), and the contract does not in anyway stipulate in whose name the plates were to be procured. It was argued further, that the assertion by the Defendant that it was the Plaintiff's responsibility to pay tax on behalf of the Defendant is outside the provisions of the contract. Counsel therefore argued that, in accordance with the decision in the case of **Sam Amos Mumba -VS- Zambia Fisheries and Fish Marketing Corporation Limited (3)**, the Defendant could not adduce evidence to vary the terms of the contract. He argued further that, the wording in the contract was plain and simple and as such it ought to be given its ordinary and natural meaning within the four corners of the contract. My attention in this respect was drawn to **Chitty on Contracts, General Principles, 25th edition**.

Regarding the allegation that the Plaintiff had breached the contract, counsel argued it in two limbs. The first limb was that even assuming the Plaintiff had committed the fraudulent practices alleged, the option open to the Defendant was to invoke clause (q) in the contract and not refuse to pay the balance. It was argued in this respect that the Defendant can not depart from a procedure agreed upon by the parties.

On the second limb, counsel argued that, the Plaintiff did not breach clause (y) of the contract. It was argued, in this respect, that the said clause only obliged the Plaintiff to pay taxes up to delivery. These, it was argued, were paid by the Plaintiff. It was also argued that, if indeed it was the responsibility of the Plaintiff, the Defendant waived the breach by conduct. This is demonstrated by its acceptance of the goods, making a part payment towards the goods and applying for tax exemption. Counsel ended the submission by stating that the allegation of late delivery was untenable because, the delivery dates were being extended as is evidenced by emails at pages 41 to 54 and page 65 of the Defendant's bundle.

In the skeleton arguments, Counsel for the Defendant Mr. Sianyabo began by highlighting the facts of the case. He proceeded to argued that all the terms of the contract between the parties were embodied in the contract dated 15th July, 2009. The said contract, it was argued, provided for the goods to be supplied to be imported by the Plaintiff and payment of the tax by the Plaintiff. It was argued in this respect that since all the terms of the contract were embodied in the contract, the Plaintiff can not attempt to vary the contract. My attention in this respect was drawn to ***Chitty on Contracts, 28th edition*** and the case of ***Sam Amos Mumba -VS- Zambia Fisheries and Fish Marketing Corporation Limited (3)***. It was argued that the Plaintiff therefore breached the contract by importing the goods in the Defendant's name.

Regarding the counter claim, counsel argued firstly that, the Plaintiff breached the contract by importing the goods in the Defendant's name and delaying delivery. This entitled the Defendant to repudiate the contract and commence an action for breach of contract. My attention in this respect was drawn to ***Halbury's Law of England, Volume 9***. It was argued further, that the importation of goods in the name of the Defendant by the Plaintiff amounted to misrepresentation, which entitled the Defendant to damages.

My attention in this respect was drawn to ***Halbury's Laws of England, volume 25***. He ended by defining misrepresentation as per ***Atkins Court Forms volume 12***.

I have considered the pleadings, evidence and arguments by counsel. The issues in contention in this matter can best be summed up as follows; is the Plaintiff entitled to the sum claimed of K79,574,306.00? was the Plaintiff responsible for the payment of tax? and, is the Plaintiff liable to the Defendant for damages for breach of contract for the late delivery and misrepresentation? The determination of the foregoing issues will lead to findings in respect of the claim and counter claim.

Regarding the first issue, it is important to peruse the contract between the parties. The said contract is at pages 19 to 26 of the Plaintiff's bundle of documents. The first paragraph of the said contract, at page 19, reads in part as follows;

"THIS AGREEMENT made the 15th day of July, 2009 Between Children International Zambia (hereinafter called "the SOA") of the one part and Tijem Enterprises Ltd (hereinafter called "the Supplier") of the other part: WHEREAS the SOA invited bids for certain goods and ancillary services VIZ.) Supply and delivery of 85,986 Melamine round plates as per schedule of requirements and has accepted a bid by the Supplier for the supply of those goods and services in the sum of ZMK 395,535,600.00... (hereinafter called "the contract price"), to be supplied within 45 ... days."

It is clear from the foregoing paragraph that the contract price was K395,535,600.00. The contract as counsel for the Plaintiff argued is signed by both parties and is therefore binding and as a Court I am obliged to enforce it. My finding is fortified by the holding in the case of ***Printing and Numerical Registering Company -VS- Simpson (1)***, referred to me by

counsel for the Plaintiff, which is quoted at page J8 in the case of **Colgate Palmolive (Z) Inc. -VS- Able Shemu and 110 Others (2)** which states as follows;

“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 in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice.”

The Defendant has not alleged that it did not enter into the said contract freely and voluntarily. Infact the arguments by counsel for the Defendant indicate that the Defendant acknowledges the existence of the contract. It is therefore bound by it. Further, in pursuance of the said contract, the Defendant did indeed pay a deposit of K315,161,294.00, towards the purchase price. This was by way of a bank transfer as is evidenced by letter at page 38 of the Plaintiff’s bundle of documents. In her testimony, DW, did confirm under cross examination that the said payment was a deposit which left a balance of K79,574,306.00. I therefore find that the Plaintiff is entitled to the payment of the sum of K79,574,306.00. In making the said finding I have considered the argument by counsel for the Defendant that the Plaintiff breached the contract by importing the plates in the Defendant’s name and failed to pay tax, and dismissed it. The contract that I have referred to does not indicate in whose name the plates were to be imported. Further, the amount withheld by the Defendant of K79,574,306.00, is part of the total purchase price of K395,535,600.00 as is evidenced by the contract and the tax invoice at page 37 of the Plaintiff bundle of documents. It can not therefore be segregated from the purchase price. This position is strengthened by the evidence of the DW, that there was no tax that the Defendant paid to ZRA, and that the invoice at page 37 of the Plaintiff bundle of document, tendered to the Defendant did not have a tax component in it. This goes to prove that the purchase price of K395,535,600.00 was therefore

payable without deduction. The contract does not also provide for the Defendant withholding part of the purchase price in the event of breach by the Plaintiff. As counsel for the Plaintiff has argued, clause (q) in the contract at page 24 of the Plaintiff's bundle of documents makes provision for default. The said clause states as follows;

"Termination of Default

The Project, without prejudice to any other remedy for breach of Contract, by written notice of default sent to the Supplier, may terminate this Contract in whole or in part:

- (1) If the Supplier fails to delivery any or all the Goods within the period(s) specified in the Contract.*
- (2) If the Supplier fails to perform any other obligation(s) under the Contract.*
- (3) If the Supplier, in the judgment of the SOA has engaged in corrupt or fraudulent practices in competing for or in executing the Contract. "For the purpose of this clause: "corrupt practice" means the offering, giving, receiving or soliciting of any thing value to influence the action of a public official in the procurement process or in contract execution. "fraudulent practice" means a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Project, and includes collusive practice among Bidders (prior to or after bid submission) designed to establish bid prices at artificial non competitive levels and to deprive the SOA of the benefits of free and open competition.*

In the event the SOA terminates the Contract in whole or in part, the SOA may procure, upon such terms and in such manner as it deems appropriate, Goods or Services similar to those undelivered, and the Supplier shall be liable to the SOA for any

excess costs for such similar Goods or Services. However, the Supplier shall continue performance of the Contract to the extent not terminated.”

It is clear from the said clause that, the act by the Defendant of withholding part of the purchase price is not one of the remedies open to it.

I also agree with the argument by Counsel for the Plaintiff that the Defendant’s argument that the K79,574,306.00 was the tax component amounts to an attempt at admitting extrinsic evidence. As I have found earlier the K395,535,600.00, was denoted as the purchase price without deduction. The case of **Holmes -VS- Buildwell Construction Company Limited (4)** states, in respect of admission of extrinsic evidence, as follows at page 97

“Where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract.”

The said evidence is therefore inadmissible as it attempts to add to, and or, indeed vary, what is indicated as the purchase price in the contract.

Regarding the second issue as to whether the Plaintiff was responsible for payment of tax, my attention was drawn to clause (y) of the contract at page 25 of the Plaintiff’s bundle of documents. The said clause states as follows;

“A supplier shall be entirely responsible for all taxes, duties, licence fees, etc incurred until delivery of the contracted Goods to the project.”

The Plaintiff’s position, in this respect, is that it has borne all the taxes and charges that were due prior to delivery of the plates. This evidence and

argument were not challenged by the Defendant. It was also demonstrated that the Defendant accepted the plates and that the issue of whether or not the K79,574,306.00, was to be considered as a tax component arose after the plates were delivered. If I were to assume that the K79,574,306.00 was the tax component, (which it is not, in view of my findings above) given that it arose subsequent to the delivery of the plates, the Plaintiff would not be liable for payment of same. I therefore find that, as clause (y) clearly stipulates, the Plaintiff was only liable for payment of taxes and other charges incurred up to delivery of the plates.

The last issues relates to the determination of whether the Plaintiff is liable to the Defendant for damages for breach of contract for late delivery and misrepresentation. Clause (o) of the contract stipulates as follows, in relation to time for delivery;

“Delivery of the Goods and performance of services shall be made by the Supplier in accordance with the time schedule prescribed by the Project’s Bid Technical Specification Form. If at any time during performance of the Contract, the Supplier or its Subcontractor(s) should encounter conditions impeding timely delivery of the Goods and performance of services, the Supplier shall promptly notify SOA in writing of the fact of the delay, its likely duration and its cause (s). As soon as practicable after receipt of the Supplier’s notice, the SOA shall evaluate the situation and that at its discretion extent the Supplier’s time for performance, with a without liquidated damages, in which cases the extension shall be notified by the parties by amendment of Contract.

Except as provided under GCC Clause “Force Majeure”, a delay by the Supplier in performance of its delivery obligations shall render the Supplier liable to the imposition of Liquidated Damages, unless an extension of time is agreed upon pursuant to GCC Clause L without the application of liquidated damages”.

The Bid Technical Specification Form, which stipulates the time for delivery as per clause (o) quoted above, is at page 4 of the Defendant's bundle of documents. The said document states, in relation to delivery, that the plates were to be delivered in 45 days. The Notification of Contract Award for the Supply and Delivery dated 15th July, 2009, is at page 17 of the Plaintiff's bundle of damages. It clarifies delivery to be within 45 days.

It is not in dispute that the Plaintiff delayed in delivering the plates. What is in dispute is whether or not the Defendant is entitled to damages as a result of the said delay. A reading of clause (o) of the contract indicates that the Plaintiff was obligated to promptly notify the Defendant. Following this the Defendant was to assess the situation and in its own discretion decide whether or not to grant the extension. In exercising the said discretion, the Defendant was to decide whether the extension was to be, with or without, liquidated damages, following which the parties were to ratify the extension by amendment of contract. The emails at pages 41 to 54 of the Defendant's bundle of documents, indicate that the Plaintiff notified the Defendant of the delay in delivery. They also indicate a regular update by the Plaintiff to the Defendant of the situation. The Defendant, despite the delay, did not indicate or intimate that it would invoke its right, under the contract, to impose damages. Further, on 26th November, 2009, the Defendant accepted the plates unconditionally despite the delay. This is discernible from the delivery note at page 34 of the Plaintiff's bundle of documents. The stamp of the Defendant acknowledging receipt evidences this fact. I therefore find that the Defendant is not entitled to damages as it did not invoke its right to impose same under the contract. I also find that, even assuming that the Defendant had invoke its rights to impose damages, it still would have had to prove the damages in order for the Court to award them. The case of **JZ Car Hire Limited -VS- Malvin Chala and Scirocco Enterprises Limited (5)**, states in this respect as follows at page 112

“It is the party claiming any damages to prove the damages”

In her testimony, DW stated that the delay in the delivery of the plates resulted in late distribution of same by the Defendant which had a negative impact on its competence and reputation. She did not state what damage the Defendant suffered as a result of this and neither are the particulars of such damages stated in the pleadings. I therefore find that the Defendant is not entitled to damages for the late delivery.

Regarding damages for misrepresentation, it was alleged that the Plaintiff misrepresented that the plates would be imported in its name but instead it imported them in the Defendant's name. It was argued further in this respect that the contract provided for the plates to be imported in the Plaintiff's name. A perusal of the contract indicates that it does not specify in whose name the plates should have been imported. This claim therefore fails.

In conclusion, the Plaintiff's claim for K79,574,306.00, succeeds and I accordingly enter judgment in favour of the Plaintiff against the Defendant in the sum of K79,574,306.00. The said sum to attract interest at the average short term bank deposit rate from date of writ to date of judgment, thereafter at the current bank lending rate as determined by Bank of Zambia, till date of payment. The claim for damages for breach of contract, made by the Plaintiff therefore succeeds to that extent only. The Defendant's counterclaim fails and I accordingly dismiss it.

I also award the Plaintiff costs, to be agreed in default taxed.

Leave to appeal is granted.

Delivered at Lusaka this 11th day of April, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE