

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

2008/HPC/0241

BETWEEN:

AMANITA MILLING LIMITED

PLAINTIFF

AND

NKHOSI BREWERIES LIMITED

DEFENDANT

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 4th DAY OF MARCH,
2011**

For the Plaintiff : Ms. M. Banda, Musa Dudhia & Co.
For the Defendant : N/A

JUDGMENT

Cases referred to:

- 1. *A. K. Mazoka, Lt. General C. S. Tembo, G. K. Miyanda -VS- L. P. Mwanawasa, the Electrol Commission of Zambia and The Attorney General (2005) ZR page 138.***
- 2. *Bater -VS- Bater (No. 2) (1950) 2 ALL ER page 458.***
- 3. *Printing and Numerical Registry Company -VS- Simpson (1875) LR 19 EQ 462.***
- 4. *Colgate Palmolive (Z) Inc -VS- Able Shemu Chuka SCZ 181 of 2005.***
- 5. *Miller -VS- Minister of Pensions (1947) 2 ALL ER page 372.***

Other authorities referred to:

- 1. *Companies Act, Chapter 388 of the Laws of Zambia.***
- 2. *High Court Act, Chapter 27 of the Laws of Zambia.***

3. Sale of Goods Act, 1893

The Plaintiff, Amanita Milling Limited, commenced this action against the Defendant, Nkhosi Breweries Limited, on the 17th of June, 2008, by way of writ of summons and statement of claim. The endorsement on the writ is as follows;

- 1 Payment of the sum of Zambian Kwacha Fifty Nine Million Eight Hundred and Sixty Two Thousand Five Hundred (K59,862,500.00), being money owed by the Defendant to the Plaintiff on account of maize meal supplied by the Plaintiff to the Defendant on various occasions at the Defendant's own instance and request;*
- 2 Interest on the above sum of K59,862,500.00*
- 3 Any other relief the Court may deem fit; and*
- 4 Costs."*

The Defendant responded by way of memorandum of appearance and defence filed on 2nd July, 2008. Subsequently, on the 3rd October, 2008, judgment on admission was entered in favour of the Plaintiff against the Defendant in the sum of K20,115,000.00. Arising from this, the trial held, was for purposes of adjudicating upon the disputed amount of K39,747,500.00.

In the statement of claim, the Plaintiff revealed the capacities of the two parties as being limited liability companies incorporated in Zambia under the **Companies Act**, of the Laws of Zambia. It went on to reveal that on or about 14th December, 2006, the two established a business relationship whereby the Plaintiff on request, supplied to the Defendant maize meal on credit basis. The said credit being payable within seven days of the Plaintiff issuing an invoice.

The business relationship between the parties subsisted for a period of time, resulting from which the credit sales, in terms of amount owing to the Plaintiff by the Defendant, accumulated to the sum of K59,862,500.00, as at 27th July, 2007. It ended by revealing that the Plaintiff had failed and or neglected to settle the said sum despite demand.

The Defendant's defence denied the allegation in terms of the amount owed. It was averred in this respect, that the Plaintiff had not taken into account payments made by the Defendant on the following dates, that is to say; 9th March, 2007; 13th March, 2007; 21st March, 2007 and 22nd March, 2007. The amounts paid on the said dates, it was alleged were; K6,750,000.00, K9,300,000.00, K6,750,000.00 and K12,300,000.00, respectively. It was alleged further that there was another sum of K5,450,000.00 in respect of invoices not received and price adjustment differences, totally K802,500.00. The defence ended by indicating that the Defendant admitted an amount of K20,115,000.00 as owing and that proposals were made for settlement of same by way of monthly installments of K2,000,000.00.

The matter came up for trial on 18th January, 2011, and 25th January, 2011. Prior to this the matter came up for hearing on 20th October, 2010, and was adjourned on the ground that counsel for the Defendant was on the Copperbelt attending to another matter. When it came up again on 18th January, 2011, Mr. K.M. Kalumba, standing in for Mr. H. Kabwe, counsel for the Defendant, requested for another adjournment on the ground that Mr. H Kabwe who had conduct of the matter was once again out of town. He went on to indicate that he thought the matter was coming up for a status conference and not trial. I refused to grant the adjournment, notwithstanding, there being no objection from counsel for the Plaintiff because, I did not accept the reasons given for applying for same and neither was a notice filed indicating that an adjournment would be sought in accordance with ***Practice Direction number 13 of the Commercial List.***

I therefore, proceeded to hear, the Plaintiff's witness, in chief, and adjourned the matter to 25th January, 2011, for continued trial and to enable counsel for the Defendant, cross examine the Plaintiff's witness and open the defence. On the 25th of January, 2011, when the matter came up for continued trial, counsel for the Plaintiff, Ms. M. Banda indicated that counsel for the Defendant, Mr. H. Kabwe had intimated to her that he was scheduled to appear before my brother, Wood, J. at 10:00 hours. She had spoken to him a few minutes ago and he had indicated that he was returning to Wood, J.'s chambers. The record will show that this transpired at 11:20 hours, after the matter had been stood down. Further, once again no motion or notice was filed by Mr. H. Kabwe to request for an adjournment or for the matter to be stood down.

In considering whether or not to grant an adjournment, this Court is guided by Order 53 of the **High Court Act**, which introduces the Commercial List rules. The said Order, under rule 9 states that;

“A judge shall not grant an application for an adjournment except in compelling and exceptional circumstances.”

I found the conduct of Counsel for the Defendant during this episode to be very casual and discourteous to this Court. The discourtesy lay in his failure to file notices or motions to adjourn. It was clearly an attempt at delaying the disposal of the matter by way of procrastination. I therefore found no compelling reason to adjourn the matter and proceeded to hear the Plaintiff close its case.

As I have stated in the earlier part of this judgment, the Plaintiff had one witness. The said witness was Saviour Hatyoka, and he testified as PW.

The testimony of PW was contained in the witness statement filed on 5th December, 2008. It revealed the business relationship that existed between

the parties, which commenced on or about 14th December, 2006. It also revealed that by the said relationship, the Plaintiff supplied maize meal to the Plaintiff on credit, which was payable seven days after issuance of the invoice by the Plaintiff. The statement went to highlight the accumulated amount outstanding as at 27th July, 2007, as being K59,862,500.00. The said amount was supported by invoices issued and delivery notes supplied, to the Defendant. The same were produced in the Plaintiff's bundle of documents. Reference was also made to page 22 of the Plaintiff's bundle of documents, at which was produced a summary of the transactions between the two parties. It ended by indicating that of the amount claimed, the sum of K20,115,000.00 was not disputed.

At the close of the hearing I directed Counsel for the Plaintiff to file submissions within 21 days. Pursuant to the said directive, the Plaintiff's submissions were filed on 16th February, 2011.

In the Plaintiff's submissions, Counsel for the Plaintiff, Ms. M. Banda, began by highlighting the claim and defence in the pleadings. She proceeded to state that it was not in dispute that there was a business relationship between the parties, whereby the Plaintiff supplied maize meal on credit, payable within 7 days of the Plaintiff's invoice. Consequent upon this, she argued, a contract for the sale of goods between the parties was created, pursuant to which, the Defendant was obliged to make payment equal to the value of the maize meal supplied to the Plaintiff. My attention in this respect was drawn to Sections 1 and 27 of the ***Sale of Goods Act, 1893***. Counsel proceeded to summarise the evidence tendered in respect of; the period of delivery of the maize meal; the value of the sales; amount paid as evidence by the account statement; the amount admitted and paid; and the invoices issued. She went on to highlight the contents of the Defendant's witness statement and denied the allegation made by the Defendant that it had made certain payments that were not taken into account. My attention in

this respect was drawn to page 1 of the supplementary bundle of documents, which demonstrated how the amount claimed of K59,862,500.00 was arrived at. She argued further that, the Defendant had failed to tender any proof of cheque payments it allegedly made to the Plaintiff in the form of receipts issued to it. Counsel ended her arguments by stating that the Plaintiff had tendered sufficient evidence in support of its case against the Defendant, on a degree of probability commensurate with the occasion. My attention in this respect was drawn to the case of **A. K. Mazoka, Lt. General C. S. Tembo, G. K. Miyanda -VS- L. P. Mwanawasa, The Electoral Commission of Zambia & the The Attorney General (1)**, which case was quoting from the case of **Bater -VS- Bater (2)**.

I have considered the pleadings filed and evidence tendered by the Plaintiff. I have also considered the defence filed by the Defendant. In determining this matter, the starting point is to ascertain the nature of the business relationship that existed between the parties. As Ms. M. Banda has quite rightly argued, it is not in dispute that there existed between the parties an arrangement whereby the Plaintiff supplied maize meal to the Defendant for purchase on credit. The fact that, this is not in dispute, is discernible from the Defendant's defence which does not deny the existence of such an arrangement. This being the case, as Ms. M. Banda, quite rightly argued, there was in existence a contract for the sale of good between the parties which obliged the Defendant to pay the value of the maize meal supplied. The contract is akin to the contract for sale of goods as prescribed under the Sections 1 of the **Sale of Goods Act**. The said Section state as follows;

"Sale and agreement to sell

A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. There may be a contract of sale between one part owner and another."

Such contracts do impose duties on the parties. On the part of the buyer there is a duty to accept and pay for the goods received. Section 27 of the **Sale of Goods Act** states in this respect as follows;

“Duties of seller and buyer

It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.”

Further, having found as a fact that a contract for the sale of goods existed between the parties, as a Court I am obliged to enforce the wishes of the parties as enshrined in the said contract. I am fortified in my finding by the holding in the case of ***Printing and Numerical Registering Company - VS- Simpson (3)*** quoted in the case of ***Colgate Palmolive Zambia Inc - VS- Able Shemu Chuka and 10 Others (4)*** which states at page 8 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 the Courts of Justice.”

(Underlining is the Court’s for emphasis only).

The said case clearly demonstrates the duty placed upon the Court to enforce the provisions of the contract entered into by two parties. However, there is still a duty placed upon the Plaintiff to prove its case. In terms of the burden, this is as per the holding in the case cited by Ms. M. Banda of, ***A. K. Mazoka, Lt. General C. S. Tembo, G. K. Miyanda -VS- L. P. Mwanawasa, The Electoral Commission of Zambia and The Attorney General (1)*** which states at page 140 as follows;

“As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing charity.”

This indeed is in line with the decision in the case of ***Miller -VS- Minister of Pensions (5)*** which states at page 374, that the evidence adduced;

“...must carry a reasonable degree of probability, not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘we think it more probable than not’, the burden is discharged, but if the probabilities are equal it is not”.

The issue that arises from the foregoing is whether or not the Plaintiff has discharged the burden to warrant the award of the sums claimed.

The evidence of PW demonstrates the transactions between the parties, and that invoices and delivery notes were issued by the Plaintiff in respect of the maize meal delivered. These are at pages 1 to 42 of the Plaintiff’s bundle of documents. Further, it also reveals at page 43 of the same bundle of documents, that there is a statement of account revealing an amount of K59,862,500.00 as owing, which was the final amount claimed. There is another statement in the Plaintiff’s supplementary bundle of documents at page 1 which also has the figure outstanding as being the initial K59,862,500.00. It is clear from the said statement and as Counsel for the Plaintiff argued, that the concerns raised by the Defendant in paragraph 2 of the defence were taken care of. The said evidence is not contested, albeit, by default, by the Defendant and I therefore find that, and quoting from the ***Miller (5)*** case), ***“[it] is more probable than not”*** that the Defendant is indebted to the Plaintiff in the sum of K39,747,500.00. The Plaintiff has therefore discharged its burden and I enter judgment in its favour in the sum of K39,747,500.00. In doing so I am enforcing the contract between the

parties as per the doctrine in the ***Printing and Numerical (3)*** case and the duty of the Defendant enshrined in Section 27 of the ***Sale of Goods Act***. The judgment sum is 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. I also award the Plaintiff costs of and incidental to this action, to be agreed in default taxed.

Leave to appeal is granted.

Delivered on the 4th day of March, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE