

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

2010/HPC/0059

BETWEEN:

TOBACCO BOARD OF ZAMBIA

PLAINTIFF

AND

TOMBWE PROCESSING LIMITED

DEFENDANT

**BEFORE THE HON. JUSTICE NIGEL K. MUTUNA ON 18th DAY OF OCTOBER,
2011**

For the Plaintiff : Mrs. W. Ndhlovu of Messrs Ranchhod Chungu
Advocates

For the Defendant : Ms A. Chimuka of Messrs Musa Dudhai & Company

JUDGMENT

Cases referred to:

- 1. Tobacco Board of Zambia -VS- Contract Nicotex Tobacco Limited
and Tobacco Association of Zambia 2000/HP/0003.**
- 2. Briggs -VS- Hoddinott 1898 Chd page 313.**
- 3. Rose and Frank Co. -VS J.R. Crompton and Brothers Limited
(1923)
AC page 445.**
- 4. Currie -VS- Misa (1975) ALL ER page 686.**
- 5. William -VS- Roffey Brothers and Nicholls (Contractors) Limited
(1991) 1 QB.**
- 6. Combe -VS- Combe (1951) 2 KB 215.**
- 7. Smith -VS- Hughes 91871) LR 6 QB page 597.**
- 8. Oades -VS- Spafford (1948) 2 KB page 74.**
- 9. Scriven -VS- Hindley (1913) 3 KB page 564.**
- 10. Pickard -VS- Sears (1837) LR 6 H.L. 352.**

11. **Merrit -VS- Merrit (1970) 2 ALL ER page 760.**
12. **Citizens Bank of Louisiana -VS- First National Bank of New Orleans (1873) LR 6 HL page 352.**
13. **Edyington -VS- Fita Maurice (1885) 29 Chd page 459.**
14. **Sidney Bolson -VS- Salermi Coupling Limited (1932) 1 ALL ER page 536.**
15. **Law -VS- Bonvene (1891) 3 Chd 8 RCA.**
16. **Freeman -VS- Cooke (1848) 2 EXCH page 654.**
17. **Ashpitel -VS- Bryan (1863) 3 B and S 474 page 492.**
18. **Bloomenthal -VS- Ford (1897) AC page 156.**
19. **Knights -VS- Wiffen (1870) LRS QB page 660.**
20. **Compamia Naviera Vascazanda -VS- Churchill and Slim Corporation (1906) 1 KB 237 page 250.**
21. **Camdex International Limited -VS- Bank of Zambia (1996).**
22. **Kobil Oil Zambia Limited -VS- Loto Petroleum Distributors Limited (1977) ZR page 336.**
23. **Bank of Zambia -VS- Attorney General and Another Appeal No. 125 of 2000.**
24. **Zambia Export and Import Bank Limited -VS- Mukuyu Farms Limited, Elias Andrew Spyron and Ann Langley Spyron (1993-1997) ZR page**
25. **Zulu -VS- Avondale Housing Project (1982) ZR page 172.**
26. **Galaunia Farms Limited -VS- National Milling Company Limited and National Milling Corporation (2004) ZR page 1.**
27. **Lynch -VS- DPP (1975) AC 653.**
28. **Alech Lobb -VS- Total Oil GB Ltd (1983) 1 ALL ER page 944.**
29. **Universe Tanship of Monrovia -VS- I.T.W.F. (1983) 1 AC page 366.**

Other authorities referred to:

1. **Tobaaco Act, Chapter 237 of the Laws of Zambia.**
2. **Tobacco Levy Act, Chapter 238 of the Laws of Zambia.**
3. **Cheshire and Fifoot, Law of Contract 10th edition.**
4. **Chitty on Contracts, 21st edition.**
5. **David Baker and Collin Padfield, Law of Contract 10th edition, Butterworths - Heinemann.**
6. **Halsbuys Laws of England 3rd edition.**
7. **Heffey, Paterson and Hocko, Contract Commentary and Materials, 8th edition, 1998 LBC International Service USA.**
8. **Statutory Functions Acts, Cap 4.**
9. **Bradgate on Commercial Law, 2nd edition.**
10. **Blacks Law Dictionary, by Bryan A. Garner, 8th edition.**

The Plaintiff, Tobacco Board of Zambia, instituted these proceedings against the Defendant, Tombwe Processing Limited on 1st February, 2010. The action was commenced by way of writ of summons and statement of claim in which the claim is as follows;

- “(i) *Payment of the sum of ZMK 813,864,804.73 being monies outstanding on a debt owed by the Defendant to the Plaintiff and acknowledged by an Agreement dated 11th April, 2007 and signed by the Defendant on 17th April, 2007 particulars of which are the Defendants knowledge and exceed three folios;*
- (ii) *Interest on the outstanding sums at the ruling base rates from the*
dates that monies fell due until date of Judgment and thereafter at the ruling bank deposit rate until date of full payment;
- (iii) *Legal costs and any other such relief as the Court may order.”*

The Defendant’s response was by way of memorandum of appearance and defence filed on 15th February, 2010.

The statement of claim revealed that the Plaintiff is a body corporate established under the provisions of the **Tobacco Act**, Chapter 237 of the Laws of Zambia. On the other hand, the Defendant is a limited liability company registered under the provisions of the **Companies Act**, Chapter 388 of the Laws of Zambia. Pursuant to the **Tobacco Levy Act**, Chapter 238 of the Laws of Zambia, the Defendant is under an obligation to pay a prescribed levy for tobacco bought in any particular year and or season. The levy is payable to the Ministry of Agriculture and Co-operatives but the said Ministry, through its Permanent Secretary assigned, all moneys owed and payable as levy to the Plaintiff. In the seasons between years 2002 and

2006, the Defendant bought tobacco whose levy amounted to K 863,864,804.73. This figure is broken down as follows;

<i>“Seasons</i>	<i>Volumes (kg)</i>	<i>Value(ZMK)</i>	<i>1% Levy (ZMK)</i>
<i>200/2003</i>	<i>1,591,069</i>	<i>11,415,722,833</i>	<i>114,157,228.33</i>
<i>2003/2004</i>	<i>2,534,305</i>	<i>21,468,146,700</i>	<i>214,681,467.00</i>
<i>2004/2005</i>	<i>3,767,251</i>	<i>23,810,871,500</i>	<i>238,108,715.00</i>
<i>2005/2006</i>	<i>3,087,259</i>	<i>19,512,956,500</i>	<i>296,917,393.40</i>
			<i>863,864,804.73”</i>

The Defendant has acknowledged the said sum as owing, pursuant to which, on 17th April, 2007, it executed an agreement for settlement of the sum owed by installments thus; ZMK 269,917, 393.40, within ninety days from 17th April, 2007; and ZMK 566,947,411.33 in accordance with a scheduled to be agreed by the parties. Arising from the said agreement the Defendant commenced servicing the debt by depositing with the Plaintiff two cheques in the sums of K20,000,000.00 and K30,000,000.00 on 5th May, 2008. It has however, neglected to make any further payments despite repeated reminders by the Plaintiff.

In the defence, the Defendant denied that the Plaintiff is entitled to claim any levy for tobacco under the ***Tobacco Levy Act***. The claims made by the Plaintiff therefore have no legal basis. The Defendant also denied the existence of assignment of debt to the Plaintiff by the Ministry of Agriculture and Co-operatives. It stated further, that if such an assignment does exist, it is not enforceable at law.

The defence, went on to allege that the agreement to settle the amount claimed between the Plaintiff and Defendant, was executed by the Defendant under duress. Arising from this, the payments made of K20,000,000.00 and K30,000,000.00 on 5th May, 2008, were made under duress and the Defendant therefore had no obligation to make further

payments. The particulars of the duress were that the Plaintiff refused to give the Defendant and its agents a buyer's licence unless and until the agreement was signed. The Defendant, it was alleged further succumbed to signing the agreement as its entire business would have collapsed without the licence, resulting in loss of employment for several of its workers. Lastly that, at the time of executing the agreement, the Minister of Agriculture and Co-operatives, had assured the Defendant that the agreement would not be enforced.

The matter came up for trial on 26th July, 2011. The parties paraded a witness each. For Plaintiff, PW, was Moses Bwalya while for the Defendant, DW was Aldert Van Der Vinne. PW, is an accountant in the Plaintiff, his evidence in chief revealed that the Defendant grows and sells tobacco in Zambia, and is obliged to pay a levy on all tobacco grown and sold in Zambia. The levy is charged at 1% of the leviable tobacco grown and sold and is payable in every farming season of the year.

It went on to reveal that the Defendant grew and sold tobacco in the seasons of the years between 2002, and 2006, whose quantities entitled the Plaintiff to levy the sum of K863,864,804.73. The Defendant defaulted in remitting the levy, subsequent to which it acknowledged owing the levy and executed an agreement to that effect pursuant to which, the Defendant paid a total of K50,000,000.00 to the Plaintiff by way of cheque numbers 008628 and 008627. This left an amount outstanding of K813,864,804.73, which the Defendant has failed and neglected to settle. The evidence ended by revealing that the Plaintiff's claim for the money was based on the decision by the Ministry of Agriculture and Co-operatives to assign all levies payable under the **Tobacco Levy Act** to the Plaintiff. Further that, the Defendant has paid levy to the Plaintiff for the agricultural seasons in the years 2006/2007, and 2007/2008.

Under cross examination PW stated that the Plaintiff does not grow tobacco. He went on to state that the **Tobacco Levy Act** stipulates that tobacco levy is payable by the growers of tobacco. Further that, the levy is payable to the Plaintiff based on the fact that the Ministry of Agriculture and Co-operatives assigned the collection of the levy to the Plaintiff. The said assignment it was alleged was done in the year 2001, by way of correspondence passing between the Plaintiff and the Ministry of Agriculture and Co-operatives. The witness, restated the fact that the assignment was not done pursuant to the provisions of the **Tobacco Levy Act**. He went on to state that the Defendant had paid levy to the Plaintiff for the seasons up to the year 2007, but was in default from the year 2008.

On the issue of licencing, PW stated that the Plaintiff issues licences conditionally. The condition being that a buyer such as the Defendant should pay levy prior to issuance of the licence. He however conceded that under the Act, the only reason why a buyer would be denied a licence is if its financial standing is not sound. He went on to state that levy is charged to buyers rather than the growers of tobacco for purposes of easing the collection exercise. This he stated is not pursuant to the provision of the **Tobacco Levy Act**, but by virtue of an agreement between the buyers and the Plaintiff. He however stated that the said agreement and the correspondent in respect of assignment of the levy to the Plaintiff were not before Court.

In re-examination PW stated thus; the levy is based on 1% of the tobacco grown; it is charged to the buyers because, when they buy tobacco from the various farmers in Zambia, they charge them a levy of 1% by way of collection for and on behalf of the Plaintiff; the amount claimed by the Plaintiff from the Defendant actually belongs to the Plaintiff; there was no duress, prior to the signing of the agreement by which the Defendant under

took to pay the amount claimed; and the only condition set was that the Defendant should settle the levy.

At the close of the Plaintiff's case the Defendant opened its case.

DW is the managing director of the Defendant whose business is to purchase tobacco in Zambia and process and export it to Contaf Nicotex Tobacco (CNT). He went on to testify that in the year 1998, the Plaintiff approached the Defendant requesting it to pay tobacco levy. The Defendant refused to pay because the **Tobacco Levy Act** requires the said levy to be paid by growers on all leviable tobacco sold by them. He stated further that the Defendant's refusal was based on the fact that the **Tobacco Levy Act** requires all tobacco levy to be payable to the Minister responsible for agriculture. Arising from this in the year 2003, the Defendant challenged the Plaintiff's power to collect tobacco levy under cause number 2000/HP/0003. The Court in the said cause ruled that the Plaintiff had no *locus standi* in those proceedings.

Resulting from the Defendant's refusal to pay the tobacco levy, the Plaintiff refused to issue a buying licence to the Defendant in the year, 2005. No valid reasons were given for the said action in terms of the **Tobacco Act** and the Plaintiff merely relied on the Defendant's alleged failure to pay the tobacco levy. Following from this, the Defendant appealed to the Minister of Agriculture and Co-operatives and upon the Minister's intervention, the Defendant was issued with a licence. This pattern was repeated in the years 2006 and 2007. In the case of the year 2007, following the Plaintiff's refusal to issue the licence, a meeting was held on 17th April, 2007. At the said meeting, the Defendant was advised to sign an acknowledgment of debt or else the licence would not be issued. This was on the prompting of the Minister who assured the Defendant that notwithstanding the signing of the acknowledgment of debt, the same would not be enforced. The Defendant

was therefore, coerced to sign the acknowledgment of debt for purposes of being issued with a licence. It did so under duress.

With respect to the payments made of K20,000,000.00 and K30,000,000.00, DW's evidence revealed that, the Defendant was prompted to make the same on the advice of the Minister of Agriculture and Co-operatives in order to persuade the Plaintiff to issue the licence to the Defendant. The evidence ended by stating that the Defendant has no obligation under the **Tobacco Levy Act** to pay tobacco levy as the same is only charged to growers of tobacco. Further that, the Plaintiff has no legal right to collect tobacco levy as all tobacco levy is required to be remitted to the Permanent Secretary, Ministry of Agriculture and Co-operatives.

Under cross examination DW's evidence was as follows; the Defendant entered into the agreement to settle the debt with Ministry of Agriculture and Co-operatives through the Plaintiff; the Minister of Agriculture and Co-operatives advised the Defendant to sign the agreement; and that this followed an appeal to the Minister by the Defendant after the Plaintiff refused to issue the licence.

In re-examination, DW stated that the Plaintiff rejected the Defendant's application for a licence for no apparent reason. Further that, at all times the Minister of Agriculture and Co-operatives had to intervene prior the issuance of the licence to the Defendant. He ended by stating that the Defendant paid the levy only because the licence was not issued.

At the close of the proceedings the parties filed written submissions.

In the Plaintiff's submissions counsel for the Plaintiff, Mrs. W. Ndhlovu began by summarizing the facts of the case and the evidence tendered. She concluded this portion of the submission by arguing that the Defendant does

not deny that it owes the moneys claimed. The Defendant merely disputed the legal basis for the claim and the Plaintiff's interest in the said moneys.

Counsel went on to state the issues in dispute thus; does the Plaintiff have sufficient interest in the suit and is it entitled to claim the sums claimed; and is the Defendant entitled to decline to pay the sum claimed.

In advancing arguments with respect to the first issue, counsel began by distinguishing the facts of this case from those in the case of ***Tobacco Board of Zambia -VS- Contact Nicotex Tobacco Limited and Tobacco Association of Zambia (1)***. She argued that in that case the Court found that the Plaintiff had no *locus standi* to claim for the tobacco levy because it was evident from the pleadings that it relied on the ***Tobacco Levy Act***. On the other hand, in this case, the Plaintiff seeks to enforce an agreement entered into between itself and the Defendant. The Defendant, it was argued further, executed the said agreement with the full knowledge of the holding in the ***Tobacco Association of Zambia (1)*** case, and indeed went ahead to honour the agreement by paying the sum of K50,000,000.00. It can not now be heard to say that the Plaintiff has no *locus standi*. Counsel went on to argue that having executed the contract the Defendant is bound by it and that the parties are presumed to be bound by the contract. My attention was drawn to the cases of ***Biggs -VS- Hoddinott (2)***, ***Rose and Frank Co. -VS- J.R. Crompton and Brothers Limited (3)*** and the text, ***Law of Contract by Cheshire and Fifoot, Chitty on Contracts and David Baker and Collin Padfield, Law.***

As regards consideration provided by the Plaintiff in respect of agreement, counsel began by defining the term consideration in relation to the cases of ***Currie -VS- Misa (4)*** and ***William -VS- Roffey Brothers and Nicolls (Contractors) Limited (5)***. She argued that a right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or

responsibility given, suffered or undertaken by the other, constitutes consideration. The Plaintiff it was argued provided sufficient consideration to the agreement by forbearing to issue buyer and grader licences to the Defendant in consideration of its remitting the tobacco levies collected for the years in issue. The Plaintiff has also suffered detriment by issuing the licences when the Defendant had not remitted the tobacco levy. The Defendant had derived a benefit from the licences issued by the Plaintiff, and is therefore obliged to honour the terms of the agreement it signed.

Counsel ended arguments on this issue by stating that the Defendant is estopped from going back on the agreement. In doing so she defined the doctrine of stoppel and instances that result in the doctrine being invoked. This was with reference to the following authorities, **Combe -VS- Combe (6)**, **Smith -VS- Hughes (7)**, **Oades -VS- Spafford (8)**, **Scriven -VS- Hindley (9)**, **Pickand -VS- Sears (10)**, **Merrit -VS- Merrit (11)**, **Citizens Banks of Louisiana -VS- First National Bank of New Orleans (12)**, **Edyriton -VS- Fita Maurice (13)**, **Sidney Bolson -VS- Salermi Coupling Limited (14)**, **Law -VS- Bovene (15)**, **Freeman -VS- Cooke (16)**, **Ashpitel -VS- Buyan (17)**, **Bloomenthal -VS- Ford (18)**, **Knights -VS- Willen (19)**, **Coupania Naviera Vascazanda -VS- Churchill and Slim Corporation (20)**, **Chitty on Contracts and Halsbuys Laws of England**.

As regards the second issue counsel argued that since the parties had reduced their agreement to writing, they are precluded from advancing oral evidence to add to vary or contradict its terms. It was argued that the Defendant is precluded from alleging that there were some other terms agreed between the parties whereby liability would be extinguished. My attention in this respect was drawn to **David Baker & Padfields Law**. Counsel went on to argue that the assignment of debt by the Ministry of Agriculture and Co-operatives to the Plaintiff was in order. The same was not illegal and the debt does not become unenforceable merely because the

assignee has to commence litigation to recover the debt. My attention in this respect was drawn to the case of ***Camdex International Limited -VS- Bank of Zambia (21)***. It was argued that the Plaintiff is therefore entitled to assert an equitable assignment for collection of tobacco levy on behalf of Ministry of Agriculture and Co-operatives. In articulating this argument, counsel relied on ***David Baker and Padfields, Law***, quoting Section 136 of the ***Law of Property Act***. Counsel ended arguments on this issue by stating the effect of a debt with reference to the cases of ***Kobil Oil Zambia Limited -VS- Loto Petroleum Distributors Limited (22)*** and ***Bank of Zambia -VS- The Attorney General and Another (23)***.

On the defence of duress raised by the Defendant, counsel began by stating what constitutes economic duress and the circumstances under which it will be implied with reference to ***Heffey, Paterson and Hocko, Contract, Commentary and Materials***. It was argued that one must prove that illegitimate threats were made that would affect a persons economic interests. There must effectively be no chance other than to comply with the request to be successful in a claim for duress. The Defendant it was argued, had not proved that the Plaintiff threatened it in any way prior to or culminating in the signature to the agreement acknowledging and settling the debt. Counsel went on to argue that despite DW's testimony to the effect that the Plaintiff had declined to issue the licence no proof to this effect had been presented to the Court. She argued that there was therefore, no duress and the agreement was signed freely as it was signed in the course of business and the Defendant had the option not to sign. My attention in this respect was drawn to the case of ***Zambia Export and Import Bank Ltd -VS- Mukuyu Farms Limited and Elias Andrew Spyron and Mary Ann Langley Spyron (24)***. Counsel ended by stating that the defence is defeated further by the fact that the purpose of the agreement was legitimate.

In the Defendant's submissions, counsel for the Defendant, Ms A Chimuka began by summarizing the facts of the case. She proceeded to state the grounds upon which the Defendant's defence was anchored as follows; the Defendant is not required at law to pay tobacco levy; the Plaintiff has no legal right to collect tobacco levy; and the acknowledgment of debt was signed by the Defendant under duress and as such it is null and void.

As regards the first ground, counsel argued that PW conceded that tobacco levy is only chargeable to growers of tobacco and that the Defendant is not a tobacco grower. It was argued further that PW indicated that tobacco levy was initially collected by the Ministry of Agriculture and Co-operatives but that the Minister assigned the collection to the Plaintiff. This assignment, PW testified was by way of correspondence which was not produced before the Court. Counsel ended arguments on this ground by stating that DW had testified that the Plaintiff had refused to issue the Defendant with a licence prior to signing the acknowledgment of debt. Further that, this had been the case in other instances and that the licence was only issued after intervention by the Minister of Agriculture and Co-operatives.

Regarding ground 2 counsel argued that the Plaintiff is established under Section 3 of the **Tobacco Act**. The said Act at Section 14 lists the Plaintiff's functions and that the same do not empower the Plaintiff to collect tobacco levy. The said levy, it was argued, is collected pursuant to sections 4(1), 5(1) and 6 by the Ministry of Agriculture and Co-operatives. Counsel went on to argue that in accordance with section 13 of the **Tobacco Levy Act**, a levy is a debt due to the Zambia Government, the Plaintiff therefore, has no *locus standi*. My attention in this respect was drawn to the case of **Tobacco Board of Zambia -VS- Contaf Nicotex Tobacco Limited and Tobacco Association of Zambia (1)**. Counsel argued that the Plaintiff's position was put in further jeopardy by the fact that there was no evidence before Court to demonstrate that the Minister had indeed delegated collection of

tobacco levy to the Plaintiff. It was argued that PW did concede under cross examination that the correspondence pursuant to which the alleged delegation was done was not before Court. She went on to argue that, delegation of statutory functions can only be done pursuant to Section 7 of the **Statutory Functions Act**. By the said Act, delegation has to be under the hand of the President or the person delegating the functions. Further that, the public must be notified of such delegation by gazette notice. There was no evidence led to prove that this process was followed, as such the Plaintiff failed to discharge its burden of proof in line with the cases of **Zulu -VS- Avondale Housing Project (25)** and **Galaunia Farms Limited -VS- National Milling Company Limited and National Milling Corporation Limited (26)**.

In the third limb of her arguments counsel argued that in terms of Section 5(1) of the **Tobacco Levy Act**, the Defendant is not subject to pay levy. She argued that the said section makes provision for the levy to be paid by a grower as defined by the Act. The evidence of DW and PW also indicated that the Defendant is not a grower. She argued further that no evidence was led to prove the assertion by the Plaintiff that buyers such as the Defendant collected levy on behalf of the Plaintiff.

In the last limb of her arguments, counsel for the Defendant argued that the acknowledgment of debt was signed under duress by the Defendant. The grounds of duress were as follows, that is to say; the Plaintiff refused to give the Defendant and its agents a buying licence unless it acknowledged the debt; and without the buying licence, the Defendant's entire business would have collapsed resulting in loss of employment by several of its workers. The Defendant would also have subsequently gone into receivership and or liquidation. The Defendant's business is of such a nature that it depends entirely on a buying licence. Counsel went on to highlight the evidence of DW which supported the allegation of duress. She also referred to the

acknowledgment of debt signed by the Defendant at page 7 of the Defendant's bundle of documents. It was argued that it was clear from the said document and evidence of DW that the Plaintiff did in fact refuse to issue the Defendant with a licence prior to signing the acknowledgment of debt. Counsel went on to define duress and what constitutes duress with reference to the following authorities; **Bradgate on Commercial Law, Lynch -VS- DPP (27), Alec Lobb Ltd -VS- Total Oil GB Ltd (28), Universe Tanships of Monrovia -VS- I.T.W.F (29)** and **Chitty on Contracts**. It was argued that the facts of the case demonstrated that the Defendant signed the acknowledgment of debt unwillingly after the intervention by the Minister. This was evident from the last document in the Plaintiff's bundle of documents which indicated that the acknowledgment of debt was signed "after some protracted indulgence...". The Defendant, it was argued, therefore, had no realistic alternative but to submit to the Plaintiff's request to sign the acknowledgment of debt. The same should therefore be rendered null and void in accordance with holding in the **Lynch (27)** case.

I have considered the pleadings evidence and arguments by counsel for the parties. The issue in dispute in this matter as I see it is whether or not the Plaintiff is entitled to payment of the amount claimed. The determination of the said issue, in my considered view, hinges on the interpretation of the provisions of the **Tobacco Act** and **Tobacco Levy Act**.

The Plaintiff is constituted by virtue of Section 3 of the **Tobacco Act**. The said Section states as follows;

"There is hereby established a board to be known as the Tobacco Board of Zambia which shall be a body corporate with a common seal and capable of suing and being sued and, subject to the provisions of this Act, of doing all acts as a body corporate may be law perform."

Further, Section 14 of the said Act sets out the functions and duties of the Plaintiff as follows;

“The functions and duties of the Board shall, subject to the provisions of this Act, be to-

- (a) promote, protect and maintain the production, sale, preparation for subsequent use and export of tobacco grown in the Republic;***
- (b) control and regulate the production, marketing and export of tobacco;***
- (c) carry out tobacco research;***
- (d) obtain and collate statistics relating to the production, marketing, manufacture and consumption of tobacco inside and outside the Republic;***
- (e) provide and operate such services and other facilities as may be necessary or convenient for the tobacco industry;***
- (f) advise the Minister on all matters relating to tobacco; and***
- (g) do all things which the provisions of this Act require to be done by the Board.”***

The ***Tobacco Act*** also give the Plaintiff power to licence buying of tobacco. The relevant sections to this effect are Sections 41 and 42 of the Act which state as follows;

“41. Any person, other than the Board, or an employee or agent of a licensed buyer nominated pursuant to section forty-three, who buys tobacco and who is not licensed by the Board as a licensed buyer under this Part, shall be guilty of an offence.”

And

“42 An application for a licence to buy tobacco shall be made to the Board in the form and manner prescribed by rules by the Board with the approval of the Minister.”

The Plaintiff is therefore only empowered to carry out the functions prescribed under Sections 14, 41 and 42 of the **Tobacco Act**. The said functions do not include collection of tobacco levy by the Plaintiff. Notwithstanding this fact, it has been argued by the Plaintiff that the Minister of Agriculture and Co-operatives who is mandated to collect the levy did delegate this function to the Plaintiff. The delegation, was done by way of correspondence passing between the Plaintiff and the Ministry of Agriculture and Co-operatives. However, the Plaintiff did not produce the correspondence to this effect in evidence. Further Sections 5(1) and 6(2) of the **Tobacco Levy Act** prescribes the manner in which levy will be collected, from whom and to which office it will be remitted. The Sections state as follows;

“5(1) Subject to the provisions of subsection (2), and to the provisions of section seventeen, the levy imposed under this Act shall be payable to the Ministry by every grower on all leviable tobacco sold by him or on his behalf.”

And

6(2) The levy shall be remitted to the Permanent Secretary.”

It is evident from the foregoing sections that the levy is payable to the Minister and in so doing, remitted to the Permanent Secretary, and, the entities subject to the levy are the growers. This latter point clearly demonstrates that the Defendant is not liable to be levied for the tobacco it buys as it is a buyer and not a grower. In making this finding I am alive to the evidence of PW to the effect that the Plaintiff delegated collection of the levy to the buyers including the Defendant on account of the fact that there are too many growers spread though out the country. I however, reject the argument because there was no evidence tendered to prove this arrangement. I have also considered the arguments and authorities advanced by counsel for the Plaintiff regarding the definition of consideration, what constitutes consideration, estoppels and the effect of a written contract viz-a-viz, the parole evidence rule. I have found the said arguments and authorities to be irrelevant to the issue for determination in this matter.

I therefore find that the Plaintiff is not entitled to collection of levy and neither is the Defendant subject to payment of the levy. In arriving at the foregoing finding, I have also considered the Plaintiff's argument that the Minister delegated the function of collection of the levy to it. I have found the argument untenable because as counsel for the Defendant has argued, there is no written evidence of the delegation nor does it appear to have been done in the proper manner. PW did testify that the delegation was done by correspondence passing between the Plaintiff and the Minister authorizing the Plaintiff to collect the levy. However, he conceded that the evidence of the said correspondence is not on record. If the said evidence was before Court, it would have been possible to ascertain if it is in compliance with the provisions of Section 7 of the **Statutory Functions Act** referred to me by counsel for the Defendant. The said Section states as follows;

“(1) Every allocation, transfer, revocation or delegation of

statutory functions shall be in writing under the hands of the President or the person delegating such functions, as the case may be, and shall be deemed to come into effect immediately on the expiration of the day next preceding the day on which it was signed.

(2) Every such allocation, transfer, revocation or delegation shall be notified for public information by Gazette notice, but no failure so to notify shall invalidate any such allocation, transfer, revocation or delegation or anything done thereunder.”

The collection of levy under the ***Tobacco Levy Act*** is a statutory function and as such can only be delegated in the manner highlighted in Section 7 aforestated. I therefore find that the Plaintiff has failed to prove to my satisfaction that the Minister did delegate the collection of levy to the Plaintiff.

Despite my findings in the preceding paragraphs I am compelled to make a determination on the issue of whether or not there was duress exerted on the Defendant in signing the acknowledgment of debt. My decision to do so is based on the fact that counsel for both parties have argued the issue passionately and it is only fair and just that I make a determination on the issue. The undisputed facts in this respect are as follows; that the Plaintiff's business is dependant upon the licence issued by the Plaintiff; in previous years the Plaintiff had refused to issue the Defendant with a licence and only did so after the intervention of the Minister; and the acknowledgment of debt was conditioned upon the Plaintiff issuing the Defendant the licence (see clause 2 of the acknowledgment of debt at page 7 of the Defendant's bundle of documents).

The duress that has been alleged by the Defendant is economic duress. This is defined by **Blacks Law Dictionary** at page 543 as;

“an unlawful coercion to perform by threatening financial injury at a time when one cannot exercise free will.”

The case of **Alex Lobb (Garages Ltd and Others -VS- Total Oil GB Ltd (28)** referred to me by counsel for the Defendant sets out three requirements to be satisfied before economic duress can be established. It states at page 946 that the persons claiming such duress must establish;

“(i) that they entered into the transaction unwillingly with no real alternative but to submit to the Defendant’s demand,

or

(ii) that their apparent consent to the transaction was extracted

by the Defendant’s coercive acts, or

(iii) that they repudiated the transaction as soon as the pressure

on them was relaxed.”

I find that the predicament that the Defendant found itself in prior to, during and subsequent to execution of the acknowledgment of debt satisfies all the three tests highlighted above. To begin with the Defendant has demonstrated that it was always reluctant to pay the tobacco levy based on the fact that it felt that it is a grower and not buyer of tobacco. This is evident from the document at page 1 of the Plaintiff’s bundle of documents. Further, it had no real alternative but to sign the acknowledgment otherwise the licence would not have been issued. These facts, in my considered view satisfy the test under (i) in the **Alec Lobb (Garage) Ltd (28)** case.

As regard (ii), it is clear from the evidence and indeed the wording of the acknowledgment of debt that, payment of the levy was a coercive means the

Plaintiff used against the Defendant. This is apparent from the condition set that in the event of agreement being reached, the Plaintiff would issue the licence to the Defendant. The Plaintiff used these means notwithstanding that it is not empowered under the **Tobacco Act** to refuse to grant a buyer, such as the Defendant a licence on those grounds. Section 12 of the **Tobacco Act** sets out the grounds upon which the Plaintiff may refuse to grant a licence thus;

“The Board may refuse an application for the grant of a buyer’s licence on any or all of the following grounds:

- (a) that it is not satisfied with the financial standing of the applicant;***
- (b) that in its opinion-***
 - (i) the grant of the licence would not be in the best interests of the industry or would detract from the orderly marketing or export of tobacco.***
 - (ii) the applicant is not a fit and proper person to hold such licence;***
- (c) that the Board has in respect of any particular class of tobacco granted an exclusive licence, or intends, with the approval of the Minister, to issue such exclusive licence to another applicant pursuant to subsection (4) of section forty-four of the Act.”***

It is clear that refusal to pay tobacco levy is not one of the grounds, especially that I have found that it is growers and not buyers who should pay the levy. Further, the coercion meted out in this form is in my considered

view unlawful coercion which falls squarely in the definition of economic duress as defined by ***Blacks Law Dictionary*** that I have highlighted in the earlier part of this judgment.

As regards test number (iii), this has also been satisfied as is evident from the Defendant's refusal to pay tobacco levy beyond K50,000,000.00, paid. By the said act, the Defendant was repudiating the agreement as soon as the pressure was relaxed as it followed the issuance of the licence.

In view of my findings in the preceding paragraphs, I find that the Defendant has proved the defence of economic duress. I accordingly render the acknowledgment of debt a nullity on account of duress.

By way of conclusion, the Plaintiff's case as a whole fails and I accordingly dismiss it. In doing so, I award the Defendant costs of and incidental to this action. The same are to be agreed in default, taxed.

Leave to appeal is granted.

Delivered on the 18th day of October, 2011.

Nigel K. Mutuna
HIGH COURT JUDGE

