

IN THE HIGH COURT FOR ZAMBIA
2008/HK/85
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

BETWEEN:

S.P. MWILA & COMPANY
PLAINTIFF

AND

BP ZAMBIA PLC

DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court at Kitwe this 26th day of June, 2013

For the Plaintiff: Mr. N.J. Simwanza - Kitwe Chambers

For the Respondent: Mr. S. Lungu - Shamwana and Company

J U D G M E N T

Cases referred to:

1. Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66
2. Zambia Consolidated Copper Mines Limited v Chileshe (2002) Z.R. 86

The plaintiff's claims against BP Zambia Limited by writ and statement of claim issued on 27th February, 2008 was for (a) a declaration that it is entitled to continued occupation of the premises known as Buchi Service Station and the use of the equipment known as lubricating equipment and other effects thereat and that the said purported notice to terminate is void for *mala fide*; and (b) for an injunction restraining the defendant from removing or threatening to remove or evict the plaintiff or

interfering in any manner with the plaintiff in his occupation or operation of the service station or the use of the said equipment or effects and further restraining the defendant from refusing or stopping to supply the plaintiff with motor fuel and lubricants and further restraining the defendant from threatening or intending to breach the licence agreement entered into between the plaintiff and the defendant on or about 24th September, 2004 relating to or partly to the matters of the service station. The plaintiff also claimed damages, further or other relief and costs.

An order of interim injunction was granted by Mr. Justice Mukulwamutiyo on 27th February, 2008. On 14th March, 2008 the defendant filed the defence at pages 96 to 97 of the Bundle of Pleadings. On 4th July, 2008 Mr. Justice Mukulwamutiyo refused to grant an order for interlocutory injunction and discharged the interim injunction. On 30th July, 2008, the plaintiff applied for a period of 6 months to vacate the premises. It is not clear whether time was allowed. I took over this matter on 29th January, 2009 following the transfer of Mr. Justice Mukulwamutiyo to Livingstone. The trial of the matter delayed for two years

On 5th May, 2011 the plaintiff applied before the Deputy Registrar for leave to amend the writ and statement of claim to include a claim for loss, inconvenience and special damages. Leave was granted on 10th June, 2011. The amended writ and statement of

claim were filed on 15th June, 2011, but are not on the Bundle of Pleadings. Trial commenced a year later on 24th July, 2012.

Alexander Musolo Mwila, the Managing Director of the plaintiff company, testified for the plaintiff. His evidence is that the plaintiff was an agent for the defendant from 1982. The dealership agency related to distribution of fuel and lubricants. There was a letter of agency (at pages 1 to 2 of the plaintiff's Bundle of Documents). The plaintiff would purchase the fuel and lubricants from the defendant and sell the same from the service station situated at No. 21 Kwacha Road also known as Buchi Service Station. Subsequent contracts were signed between the parties such as the Licence Agreement (the Agreement) at page 4 of the same Bundle. The plaintiff carried on the business of buying and selling fuel products. According to PW1, there was on the premises a kiosk from which they sold food and beverages. Later when they extended the property, they included a restaurant and a spares shop.

It is also PW1's evidence that between 1990 and 1991, there was a lot of pilferage by the transporters that the defendant contracted out to deliver fuel to the service station. He said the drivers would decant fuel from the tankers before delivery. This would be evidenced on the dips before and after receiving the fuel. He said when a tanker arrived at the service station; the receiving agent in the presence of the driver would dip in the tank with a dip stick supplied by the defendant with a chart translating

into equivalent litres. They would dip and have a first reading which would show the level of fuel in the tank. After offloading the fuel, they would dip again to get a second reading.

The difference between the two readings would give an actual amount of the litres received. If there was a shortage it would be indicated on the invoice received and signed by both the driver and the receiving agent. The plaintiff's receiving agent would be any manager on site. In the event of a shortage they would call the defendant's Area Manager and give him a copy of the invoice showing the shortage. The purpose was to claim the lost fuel because it was the defendant who contracted the drivers. He said the defendant would promise to look into the issue, but never did.

PW1 identified the documents at pages 1 to 125 of the plaintiff's Supplementary Bundle of Documents as summaries of shortages of fuel from January, 1990 to November, 1991 and cash sale invoices issued by the defendant which show the shortages in litres and the values and the signature of the drivers and receiving agents. He explained the shortages on all the invoices. He said at page 126 is a summary of the total of shortages from January, 1990 to December, 1991 and the total value at the time they made their claim in 2009 which came to K483,494,147.00.

It is further PW1's evidence that the dealership agreement was terminated in 2009. Many issues led to the termination, but the main reason put to them was that they were not achieving their

monthly sales target. He said despite appeals he made into issues which made them not to meet the sales target; the defendant went ahead and terminated the contract.

He said they had bought a generator from the defendant to help them with the electricity situation. On average they had four days of electricity supply in Buchi. He identified the documents at pages 127 to 128 of the same Bundle as a request by the plaintiff through its Chief Executive Officer for the defendant to supply them with a generator; and an internal memorandum from one Albert Phiri recommending a GENSET. He said the defendant installed the generator and carried out routine maintenance checks. He did not know what the technicians did with the distribution box, but there was a short circuit between 2007 and 2008 which damaged the generator. Despite complaints and letters to the Area Manager, the generator was not fixed or replaced to date of trial. He said it was the main reason their sales dropped. He said the quotation at page 129 is of a similar generator that was destroyed and that the amount indicated of K33,400,000.00 was the replacement value. He said the obligation to replace the generator was on the defendant because it was their technicians who destroyed it.

He said the other challenge they faced was that despite all the other filling stations that belonged to the defendant being up-lifted and supplied with new pumps and uplifting of the forecourt theirs was deliberately left out. When he asked the Retail

Manager, North she said they needed to meet the target first. He was given an ultimatum to meet their sales target, or they would terminate the dealership which they proceeded to do and they were asked to leave the premises.

He said they filed for an injunction as they were trying to recover some of the losses and there was an issue of compensation as they had done some renovations to the service station amounting to K180,000,000 according to the Government valuation at pages 131 to 136 of the their Bundle of Documents. He said the compensation was not paid and the Retail Manager indicated that they would probably break them down, but later they said the structures were of value and that they would get back to him.

PW1 further testified that they had employees working for the service station. After termination of the agreement they declared them redundant and paid them. The letters of termination appear at pages 137 to 143 of their Bundle of Documents. Their claim in para 9(a) of the amended statement of claim is for redundancy payments from termination of employment.

In cross-examination by Mr. Lungu, counsel for the defendant, he accepted that the defendant wanted upfront payment, that though the invoices at pages 2 and 3 of their Bundle indicated that cheques would follow, as soon as the delivery was done, the cheques were issued. He accepted that the deliveries of fuel in issue were done between 1989 and 1991. He said the claims were

made to the defendant verbally as soon as they occurred and that the defendant responded verbally. At the same time he admitted that they made the claims in 2009 when the matter came to court. He accepted that the claim was not made in 2008.

He admitted that there is no written proof that they raised these claims with the defendant back in 1989. Further still, he agreed that the only time they raised the claims was June, 2011 when they amended their statement of claim, which would be twenty (20) years after the alleged loss. They still want this Court to enforce that right after they sat on it for twenty years. He said his late father prepared the document on shortages on fuel deliveries for January 1990 (page 1 of Supplementary Bundle). He agreed that it is not signed nor is it on the official letter head. He accepted that all the summaries he has produced are not on their official documents.

He agreed that the defendant owns Buchi Service Station. He said he could not find the approval or receipts for the renovations. In the absence of receipts he asked the Government Valuation Department to value the extensions. He said the instructions (page 132 of their Bundle) were to inspect and assess the current open market value of the property for sale purposes and not to assess how much was spent on building the extensions. He said the extensions alone could have been sold at K180,000,000.

He also accepted that the employees at the service station were not employed by the defendant. He wants the defendant to compensate them for paying the employees the redundancy packages though that was not enshrined in the agreement. He accepted that the defendant had the right to terminate the agreement whether fairly or unfairly; and that they were not meeting their target.

He said they had enough working capital. He acknowledged that the letter of termination of contract (page 15 of the defendant's Bundle) gave two reasons for termination, but he did not respond to the letter. He said he spoke to Shelly and came to court to get the injunction. He reiterated that he wrote to the Area Manager about the damaged generator, but it never occurred to him to complain about the undelivered fuel of 1989 to 1991.

On their letter to the defendant at page 5 of the same Bundle, he said a stock-out occurs when you run out of a product and that operating margins are margins that allow you to make a profit. He agreed that they were having stock-outs in 2006. On the letter at pages 7 to 8 of the same Bundle, he agreed that the defendant tried to help them to deal with the challenges they were facing and that one measure was to revise their performance plan in 2007 (letter at pages 9 to 11 of same bundle). He admitted that they did not reach the target for 2007 which was set on the best month for 2006 and that the defendant terminated their agreement for that reason. He said he suffered damages because

of termination of the agreement. He wants this Court to declare the termination null and void.

In re-examination he said it was not agreed to set the 2007 benchmark on the 2006 performance. He said under previous management, when his elder brother was running the company, there were stock-outs. He said apart from the verbal complaints about the fuel shortages they did nothing.

He stated further that when they were asked to leave the filling station they felt that they had to settle all outstanding issues including the fuel shortages for which they had received no compensation. This in summary is the plaintiff's evidence.

The defendant also called one witness, Shelly Sinzala Tayali, the Retail Manager for PUMA Energy, formerly BP Zambia Limited. She worked for BP Zambia Limited for sixteen (16) years. Her last portfolio was Retail Manager, North. She was looking after all the filling stations country wide. Between 2006 and 2009, she was the Sales Manager in charge of Buchi Service Station. Her evidence is that the termination of the agreement with the plaintiff was because of very poor performance at the service station. She said on 1st February, 2008 she wrote the letter of termination to the dealer. The reason given was that the dealer was not able to meet their targets and that it was giving a bad reputation to the defendant because of dry outs and failure to purchase products.

She testified that according to their standard lease agreements, the defendant is not responsible for the staff at the filling stations as these are employed by the dealer and at termination the defendant is not responsible to pay their packages. On fuel shortages she said as per cl. 22 of the agreement when a dealer notices abnormal losses he should notify the company in writing within 14 days and the abnormal shortages should be through daily reconciliations or sales through the pump compared with what is in the tank.

She said the claim for fuel shortages is new to them because they did not receive any claim at the time within 14 days for which they could have instituted investigations to find out the source of the shortages as per standard procedure. She said it is common that a service station would go down once in a while and that in this case the dealer wrote to them and they attended to issues when there was need to do so. With regard to the generator she said she did not see how the defendant could pay for the replacement as that was not in the agreement.

She testified further that according to cl. 11 of the Fixtures and Fittings agreement, when the dealer wishes to put up anything on a filling station, he should ask for written permission and at the time of termination the dealer should demolish those buildings at their cost. She said they do not understand the plaintiff's claim that the court should declare the termination of the dealership

agreement null and void when the dealer cost the company a lot of loss of business for so many years.

In cross-examination she agreed that she was aware of the challenges the plaintiff had such as the blackouts in Buchi Compound. She said the generator was fixed, but it would go down and it was down at the time termination. She agreed that they were responsible for maintaining the generator and believed that the dealer bought it from them.

She said they have a system to assess the impact of the blackouts and that these had very minimal impact on the profits of the filling station. She admitted that three days of a working week were affected by blackouts, but she insisted that from their statistics this only had a minimal impact. She also admitted that the defendant was responsible for servicing the pumps and that she received a complaint from the plaintiff that the pumps were old and were affecting business. She said they repaired the pumps and only replaced the pumps on a few sites. She said the agreement they terminated was running for three years and that the contract was being renewed. She said the fixtures agreement was the same contract they terminated; that the plaintiff had no prior agreement to do the extensions; and that they cannot trace any records.

She stated further that she was familiar with the process of fuel delivery to the filling station. She said there was an invoice carried by the driver and left at the filling station and that a copy with the driver's signature such as the one at page 2 of the plaintiff's Supplementary Bundle was taken to the defendant. She said she was not a member of staff of the defendant in 1989. She said she visited the filling station several times and that Mr. Mwila visited them and they had several meetings to try and help the plaintiff. She said they would reach an agreement, which would run for a few weeks, but the plaintiff would fall back. This in summary is the defendant's evidence.

Both learned counsel for the parties had undertaken to file written submissions, but I have not received any. From the pleadings and the evidence, the first question to decide is whether the plaintiff is entitled to a declaration that it is entitled to continued occupation of Buchi Service Station and the use of the lubricating equipment and other effects and whether the purported notice to terminate is void for *mala fide*. The second question is whether the plaintiff is entitled to special damages relating to redundancy payments; losses on delivery of gas oil and petrol for the period 1990 to 1991; loss of business from July, 2007 to August, 2008; replacement value of damaged generator set; evaporation losses on leaking and damaged underground tanks; and value on extensions to property. The third question to determine is whether the plaintiff is entitled to damages for any other loss and inconvenience.

From the evidence it is common ground that on 8th May, 1982 the defendant (then Shell and BP Zambia Limited) wrote to Mr. S.P. Mwila the dealership letter at page 1 of the plaintiff's Bundle of Documents setting out terms and conditions of the dealership agency. The initial duration for the agreement was a probationary period of three months and thereafter a confirmed agreement for a period of five years. The terms of trade were cash with order. The equipment on site was free on loan to the plaintiff while maintenance of the equipment was to be undertaken by the defendant's Pump Service.

It is a fact that on 29th September, 2004 the parties entered into the Agreement of Licence at page 4 of the same Bundle. According to cl. 1 of the said agreement the General Conditions of License, the Equipment Loan Agreement (annexure "A"), the Service Station Equipment Schedule (annexure "B"), the Rental Policy (annexure "C"), the Maintenance Schedule (annexure "D") and the Gold Franchise Agreement entered into between the parties constituted the License Agreement in respect of the premises.

It is clear to me that this was the contract that was terminated or not renewed by the defendant. The termination letter at pages 84 and 15 respectively of the parties Bundles of Documents show that by a letter dated 7th May, 2007 the defendant had decided to terminate the relationship with the plaintiff and that the latter was given 3 months notice to vacate the site effective 9th May, 2007. The said letter further indicated that the licence agreement that expired on 30th September, 2007 would not be renewed because of failure on the plaintiff's part to adhere to the conditions of their business relationship. The letter refers to poor volumetric performance; lack of working capital and the defendant's reputation. The plaintiff was advised to vacate the premises by 28th February, 2008 and that the defendant would repossess the service station on 1st March, 2008. Of course, on 27th February, 2008 the plaintiff issued these proceedings and obtained an

interim order for injunction which was later discharged on 4th July, 2008. The plaintiff has since vacated the service station.

With regard to the first question raised above, I wish to start by saying that a declaratory relief refers to a judgment of a court which determines the rights of parties without ordering anything be done or awarding damages. By seeking a declaratory judgment, the party making the request is seeking for an official declaration of the status of a matter in controversy. Optionally, the resolution of the rights of the parties involved will prevent further litigation. The theory is that an early resolution of legal rights will resolve some or all of the other issues in the matter. Clearly a declaratory judgment is conclusive and legally binding as to the present and future rights of the parties involved. In *Christopher Lubasi Mundia v Sentor Motors Limited* (1) Chirwa, J (as he then was) held, inter alia, that a declaration is a discretionary judgment which must be granted with care, caution and justice having regard to all the circumstances of the case and not where the relief claimed would be unlawful or inequitable or where an adequate alternative remedy which disposes of all the issues is available.

In this particular case, the Agreement between the parties dated 29th September, 2004 was for a period of three years (cl. 2). Therefore it was to expire on 29th September, 2007. Para 5 of the amended statement of claim states that on or about 1st February, 2008 the defendant wrote to the plaintiff informing the latter that

the licence agreement which expired on the 30th September, 2007 would not be renewed thereby alleging that the plaintiff was and had been in constant breach of the said licence agreement.

In paras 6 and 7, the plaintiff averred that it was not in breach of the agreement and that the decision to evict the plaintiff from the said property was actuated by *mala fide*; and that the purported termination was really an attempt by the defendant to sell the service station to other persons. On the other hand in paras 3 to 6 of the defence, the defendant pleaded that the licence agreement was for a period of three years and expired on 27th September, 2007; that at the expiration of the agreement the defendant exercised its rights thereunder and opted not to renew the agreement which terminated by effluxion of time.

It seems to me that although the letter of termination of contract indicated that the Agreement was terminated on 7th May, 2007, the termination fell through and the agreement was allowed to run its full term until it expired in September, 2007. Cl. 4.1 of the General Terms and Conditions of Licence at page 20 of the plaintiff's Bundle indicated that the licence shall commence on the commencement date and terminate on the expiry of the licence period. Cl. 4.2 stated that the licensor shall give the licensee written notice not later than six calendar months prior to the termination of the licence period if the licensor was prepared to consider granting the licensee a further licence, or such other agreement relating to the supply and sale of petroleum products

from the licensed premises upon the licensor. There was no provision for similar notice period if the licensor was not prepared to consider granting the licensee a further license.

Further by cl. 7.3 (page 22) the licensor was entitled upon giving the licensee one month's written notice to assign, or transfer the agreement or any part thereof and/or any or all of the obligations on the part of the licensor to any other wholesalers of petroleum products of its choice. By cl. 9.7 (page 25), the licensee was required on termination of the license to hand over and deliver the premises and dispensing equipment to the licensor in good order and condition, fair wear and tear excepted.

The agreement as seen from cl. 3 (page 19) and cl.17 (page 30) of the plaintiff's Bundle of Documents, was for the defendant to grant to the plaintiff which the plaintiff accepted, the business of selling by retail such grades and brands of automotive fuels, oils, greases and other petroleum products the defendant might from time to time nominate which products were to be supplied exclusively by the defendant on the defendant's premises upon the terms and subject to the conditions set forth in the Agreement. In addition by cl. 20.1 (page 32), the delivery of petroleum fuels, in respect of both the minimum or maximum quantities to be delivered and the time of delivery, was to be at the entire discretion of the defendant, but the defendant was to endeavour to meet the plaintiff's reasonable requirements in regard thereto. The defendant was entitled to recover a penalty

from the plaintiff where the latter failed to order the minimum order quantity "MOQ", as recorded in the license schedule and based on the tables as prescribed by the defendant in the Operating Procedures Manuals or any amendment thereto.

By cl. 6 of the agreement the plaintiff was required to purchase minimum average monthly volumes of leaded petrol-60,000 litres, unleaded petrol-3500 litres, diesel/gas oil-25,000 litres, lubricants-400 litres. By cl. 7 (page 8), the plaintiff was obliged to order MOQ in terms of cl. 20.1 of the memorandum during the licence period of 35,000 litres. By cl. 21.3 (page 33), the plaintiff undertook to keep in stock at all times upon the premises all the classes of lubricants sold by the defendant as the latter might reasonably require and to display the same upon the premises and to promote the sales of the said lubricants. By cl. 21.4 the plaintiff undertook to adhere to the marketing policy of the defendant and to sell the products of the defendant at such retail prices as maybe fixed from time to time by a competent authority or failing such, by the defendant subject as may be applicable any amendment or re-enactment.

As I have already said, in the letter of termination of contract, the defendant gave three reasons for not renewing the contract. The first was poor volumetric performance indicating that the site continued to perform below its full capacity with no improvement as tabulated in the table. According to the defendant that had a negative effect on their performance and was a clear breach of

the conditions the plaintiff agreed upon when it signed the agreement. PW1 accepted in cross-examination that they were having stock-outs in 2006 and that the defendant tried to help them deal with the challenges they were facing during that period and revised their performance plan in 2007.

He admitted that despite that help the plaintiff did not reach the set target for 2007 leading to the termination of the agreement. PW1 also accepted that the defendant had the right to terminate the agreement as they were not meeting their target. It seems to me that the defendant had a good reason not to renew the plaintiff's contract. Admittedly the plaintiff failed to meet its sales targets.

The second reason given for not renewing the contract was lack of working capital. According to the defendant no serious effort had been made to redress their concerns despite numerous discussions and correspondence to redress the issue of the plaintiff's working capital. In his evidence in cross-examination PW1 simply said they had enough working capital, but for the defendant this was not the case. The third reason given by the defendant for not renewing the contract was a serious risk on its reputation due to stock-outs at the plaintiff's site which had caused serious concerns not just to them, but also to the Energy Regulation Board and Kitwe residents in general. Admittedly again the plaintiff did not respond to the letter of termination of contract. They came to court and obtained an interim injunction which was later discharged because the contract had expired and

the losses (if any) that the plaintiff may sustain could be calculated in money terms.

I have no doubt that by cl. 9.1 of the agreement (page 23), the defendant had the obligation to keep and maintain the exterior of the building (including the roof), the canopy, driveways and all signage on the premises in good order and repair.

The defendant was also responsible for servicing and maintaining the pump and dispensing equipment as indicated at page 66 of the plaintiff's Bundle. According to PW1 despite all other filling stations belonging to the defendant being up-lifted and supplied with new pumps, and up-lifting of the forecourt, theirs was deliberately left out. In his words he was told that they needed to meet the target first and he was given an ultimatum to meet their sales target. However, there is unchallenged evidence that when DW1 received a complaint from the plaintiff that the pumps were old and were affecting business, the defendant repaired the pumps. She refuted the claim by PW1 that they replaced all pumps in the Province except for Buchi Service Station. She said they only replaced the pumps on a few sites.

It is not clear to me how much loss (if any) the plaintiff suffered as a result of the old pumps and it is no clear whether they continued to suffer loss after the pumps were repaired. Since the pumps were repaired I do not see the existence of bad faith on

the defendant's part which could entitle the plaintiff to the declaration sought.

The other issue raised by the plaintiff is that of the generator. It is not disputed that on average there was a four days supply of electricity in Buchi Compound where the service station was situated. DW1 accepted that she was aware of the blackouts and that three days of a working week were affected by blackouts. I accept that this prompted the plaintiff to ask for a generator.

I accept that the defendant supplied the plaintiff with a generator to help them with the electricity situation. The defendant installed the generator and carried out routine maintenance checks. It seems that between 2007 and 2008 there was a short circuit which damaged the generator. I accept that the plaintiff complained to the defendant, but the generator was not fixed or replaced and it is still in the plaintiff's possession. In PW1's words the damage to the generator was the main reason their sales dropped. DW1 does not dispute that their technicians were responsible for the damage to the generator or that at the time of termination of contract the generator was down. However, it is her evidence that they had a system to assess the impact of the blackouts and that these had a very minimal impact on the profits of the filling station.

I accept that the plaintiff bought the generator from the defendant and that the latter was still responsible for servicing

the generator. Nevertheless, I am not satisfied that the non-repair or replacement of the generator was largely responsible for the plaintiff's failure to meet the sales targets. It is plain that the contract expired in September, 2007 and that defendant indicated in February, 2008 that the contract would not be renewed. However, PW1 is not specific, as to when exactly the generator was damaged. He only said it was sometime between 2007 and 2008. Was it before or after the agreement expired? In addition there is no clear evidence of the actual loss over this period for me to be convinced that the loss of the generator was the main reason the plaintiff's sales dropped.

There is evidence by DW1 which I accept that she visited the filling station several times and that Mr. Mwila visited them and that they had several meetings to try and help the plaintiff; this would run for a few weeks, but the plaintiff would still fall back. In my view if there was any bad faith on the part of the defendant effort could not have been made to help the plaintiff. I am not satisfied that non-renewal of the agreement was actuated by *mala fide*.

In addition, cl. 16.1 of the Agreement clearly provided that the licensee plaintiff shall:

“Not have any claim of any nature against the licensor for any loss, damage or injury which the licensee may directly or indirectly suffer (whether or not such loss, damage or injury is caused through the negligence of the licensor or the licensor's servants or employees or agents) by reason of any latent or patent defects in the premises or the buildings, or fire or theft from the premises or by the reason of the premises, the buildings or any part thereof being in a defective

condition or state of disrepair or any particular repair not being effected by the licensor timously or at all, or arising out of force majeure or casus fortuitous or any other cause either wholly or partly beyond the licensor's control, or arising in any manner whatsoever out of the use of the services in the licensor's premises or the buildings by any person whomsoever, for any purpose whatsoever, or arising from any other cause whatsoever".

Cl. 16.2 also provided that the plaintiff shall:

"Have no claim of any nature whatsoever whether for damages, remission of rent or otherwise, against the licensor for any failure of or interruption in the amenities and services provided to the premises and/or the buildings, notwithstanding the cause of such failure or interruption".

To buttress the point, the contract between the parties had expired and the defendant opted not to renew it because of admitted breaches by the plaintiff which has since vacated the premises.

On the basis of all the foregoing, I am not satisfied that this is a proper case for a declaratory order in the manner sought by the plaintiff. I do not detect any fraudulent deception of the plaintiff, or any intentional or malicious refusal by the defendant to perform some duty or contractual obligation in this case. Accordingly I decline to declare that the plaintiff is entitled to continued occupation of Buchi Service Station and the use of the lubricating equipment and other effects thereat or that the purported notice to terminate is void for *mala fide*.

I come now to the second question for decision of whether the plaintiff is entitled to special damages. It is trite that special damages must be proved by the party claiming; they are not

assumed by the Court. I ought to add that the phrase “special damage” is often used interchangeably with the term “consequential damages”. This is to indicate that the damages are the “consequence” of a contractual breach, though they might not have been directly caused by the breach of contract.

As I have already indicated the special damages claimed by the plaintiff are divided into six. With regard to redundancy payments from termination of employment of the plaintiff’s workers, following the non-renewal of the agreement, PW1 accepted that the employees at the filling station were not employed by the defendant and that under the agreement the defendant was not responsible for payment of redundancy packages to the plaintiff’s employees.

In my judgment the plaintiff has also accepted that the defendant had the right to terminate the agreement whether fairly or unfairly. Moreover cl. 16.4 of the agreement provided that the licensee shall under no circumstances have any claim against the licensor for consequential loss however caused. The plaintiff agreed to this limitation of liability. Therefore, the plaintiff is not entitled to recover from the defendant any money paid to its employees as redundancy benefits. Therefore this claim fails.

With regard to losses on delivery of gas oil and petrol for the period 1990 to 1991, the cash sale invoices issued by the defendant from page 2 onwards of the plaintiff’s Supplementary

Bundle of Documents, show that there were shortages in the fuel delivered between 24th December, 1989 and 25th November, 1991. I accept that the summaries on shortages on fuel deliveries are not on the plaintiff's official letterhead and it is not clear who compiled these documents, though PW1 said the one at page 1 was done by his father. However, this is not crucial to the determination of this issue. What is of cardinal importance is that the claim on shortages on fuel deliveries were only made either in 2009 or 2011 when the matter was already in court. According to PW1 the claims were made to the defendant verbally as soon as they occurred and the defendant responded verbally. But he accepted that the only time they raised those claims was June, 2011 when they amended their claim.

Admittedly no action was taken by the plaintiff for a period of twenty years and yet the plaintiff wants this Court to enforce the claim when they sat on their rights for twenty years. It is clear that it was only when the plaintiff was asked to leave the filling station that they felt that they had to settle all outstanding issues including the fuel shortages of 1990 and 1991 for which they had received no compensation. This claim was introduced by amendment in 2011 when the claim was already stale.

In *Zambia Consolidated Copper Mines Limited v Chileshe (2)* the Supreme Court held, inter alia, that where an action is statute barred at the time of amendment of the statement of claim, the amendment can only be made if there are peculiar circumstances justifying the limitation period. In this case though the amendment was allowed there were and there are no peculiar circumstances justifying the limitation period.

This Court will not come to the aid of a litigant who has sat on his rights for such a long period of time. The Limitation Act 1939 (which applies to Zambia) in section 2 of Part 1 provides for a limitation period of six years for all cases in tort and contract. The period runs from the point where the injury or problem was created and not from when it was discovered. In this case the fuel shortages were created in 1989, 1990 and 1991 and the shortages were discovered immediately, but the plaintiff did

nothing. The defendant is entitled to rely on the statute. This claim too fails.

I come to the claim for loss of business from July, 2007 to August, 2008. This is also a claim for special damages, but it is not clear to me what this claim relates to. The plaintiff did not adduce any evidence to substantiate the claim. Therefore, I cannot make any award under this head.

With regard to the replacement value of the damaged generator set, I have already found that the generator was damaged by the defendant's technicians during routine maintenance and that it has not been replaced. I have also referred to cl. 16.1, 16.2 and 16.4 of the agreement which limit the liability of the defendant. The generator had a short circuit during maintenance. There is no evidence that the defendant's servants were negligent or that they deliberately caused the short circuit. There is no evidence that the parties had agreed that the defendant would replace the generator if it was damaged during regular maintenance. For emphasis I reiterate that cl. 16.4 stipulated that the licensee shall under no circumstances have any claim against the licensor for consequential loss however caused. I think that the plaintiff is prevented by cl. 16.4 of the agreement from suing the defendant for replacement of the damaged generator. This claim too fails and is dismissed.

In relation to evaporation losses on leaking and damaged underground tanks, there is no evidence at all adduced by the plaintiff. I have made the point that special damages must be strictly proved. As this claim is not proved, it fails and is dismissed.

The plaintiff has also claimed for value to extensions to the property. According to PW1, they had done renovations to the service station amounting to K180,000,000 as shown by the valuation report at page 131 of the plaintiff's Bundle of Documents. PW1 said that they got permission from the defendant to carry out the extensions, but he has no documentation or receipts for the actual work done. On the other hand the defendant's position is that they never approved the extensions as required by cl. 11 of the agreement, on fixtures and fittings, and that in any case at the time of termination the dealer should demolish those buildings.

Truly under cl. 11.1 of the agreement (page 26), the plaintiff was entitled from time to time to erect on the premises such fixtures and fittings as might be required or was necessary for the carrying on of the plaintiff's business subject to approval by the defendant in writing. Further by cl. 11.2 such fixtures and fittings were required to be removed by the plaintiff at its own cost upon expiration or termination of the agreement. Furthermore, any damage caused to the premises as a result of any such removal was to be made good by the plaintiff at its cost. Further still, the

plaintiff was not entitled to compensation in respect of improvements to the premises approved by the defendant if the plaintiff decided to leave the fixtures and fittings on the premises. This was the clear agreement between the parties. In my judgment there is no evidence to show that the construction of extensions at the filling station was approved by the defendant in writing.

From the letter dated 16th August, 2002 at page 3 of the plaintiff's Bundle the only construction that was approved was of a workshop behind the service station. Even then the cost of demolition of the existing perimeter wall at the rear of the site, the cost of relocating the compressor and of constructing the workshop was to be borne by the plaintiff. The workshop was to be the plaintiff's property as they were said to have title to the plot on which the workshop was to be constructed. For me even if the defendant had approved the extensions to the premises the plaintiff was still obliged to remove them upon termination of the agreement. If the plaintiff decided to leave the extensions on the premises they would not be entitled to any compensation. On this evidence I do not see how the plaintiff's claim for the value of the extensions to the property could possibly succeed. This claim too fails and is dismissed.

The plaintiff has also claimed other damages. From para 9 of the amended statement of claim these damages relate to loss and

inconvenience. However, there is no evidence to support this claim.

The claim equally fails and is dismissed. I conclude that all of the plaintiff's claims fail as they are not proved on the balance of probabilities. Costs are for the defendant to be taxed if not agreed.

Delivered in Open Court at Kitwe this 26th day of June, 2013

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R.M.C. Kaoma
JUDGE