

IN THE HIGH COURT FOR ZAMBIA
AT THE KITWE DISTRICT REGISTRY
(Civil Jurisdiction)

2009/HK/283

BETWEEN:

TURNPAN-LONRHO ZAMBIA LIMITED

PLAINTIFF

AND

LEASING FINANCE LIMITED

DEFENDANT

Before the Honourable Mrs. Justice R.M.C. Kaoma in Open Court
on this 22nd day of, August, 2013

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

For the Defendant: Mr. H. Chinene - Lumangwe Chambers

J U D G M E N T

Cases refereed to:

1. Hollington v Hewthorn & Co. Limited (1943) KB 587 at 594
2. Bank of Australia v Palmer (1897) AC 540 at 245
3. Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited (2004) Z.R. 151
4. Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited (2001) Z.R. 73
5. Tweddle v Alkinson (1861) 1 B45 393
6. Shanklin Pier v Detel Products (1951) 2 KB 854
7. Alicia Hosiery Limited v Brown Shipley Limited (1970) 11B95
8. Freshmint Limited and Others v Kawambwa Tea Company (1966) Limited (2008) Volume 2, Z.R. 32
9. Union Bank Limited v Southern Province Cooperative Marketing Union Limited (1995-97) Z.R. 13

The plaintiff's claim by writ of summons and statement of claim issued on 14th May, 2009 is for the sum of K6,393,972,197.68 being an account for services rendered and work done as mechanics on the defendant's motor vehicle registration No. NCH 251 at the defendant's own request and instance. The plaintiff also claims any other relief the Court may deem fit, interest and costs.

By its amended defence filed on 14th July, 2009 (page 11 of the Bundle of Pleadings) and the further amended defence filed by leave of court obtained on 25th November, 2009 the defendant has denied the plaintiff's claims.

The plaintiff called only one witness Brian Emmanuel Lombe, the personnel and administration manager. He has worked for the plaintiff for twenty eight years. He testified that the plaintiff has a franchise or distribution agreement for the supply, repair and maintenance of Man trucks and buses in Zambia. On 17th February, 2005 they received a Man horse truck registration No. NCH 251 which was towed into their motor vehicle repair workshop in Kitwe by a hauling company called Coalg Mining Limited. The truck was not starting and had dents on the front. The windscreen was also damaged implying that it was involved in an accident. They opened the job card at page 2 of plaintiff's Bundle of Documents as per procedure to indicate the scope of

work to be carried out, the parts to be drawn by way of repair and the name of the company that took the truck for repair.

He testified that when a job card is opened the workshop draws various parts on an internal invoice for the use of the workshop in their costing purposes. In this case the consumables that were used were grinding and cutting discs, spotty party and mutton cloth. On the repair part it was a windscreen and cocking set. He identified the workshop invoices at pages 3, 4 and 5 of the plaintiff's Bundle.

He testified that during the period the truck was being fixed they were visited by Mr. Ramesh (DW1) then General Manager of the defendant. They had a number of leases with the defendant on motor vehicles and plant and equipment which they were servicing. Mr. Ramesh was on a customer visitation to discuss their progress on the same. He said in the process they went to the workshop and Mr. Ramesh saw the Man truck and informed them that the truck was subject of a lease agreement between the defendant and Coalg Mining Limited, but the latter had defaulted in the lease rentals. He said Mr. Ramesh told them to seize the truck on the defendant's behalf, to keep it in the workshop and to proceed with repairs. He said this was towards end of 2006 and they proceeded as they were requested. Subsequently they ordered a reconditioned engine from South Africa. They would inform Mr. Ramesh about the progress; he would look at the truck whenever he went to their workshop. He

said there was also one bus on lease to White Horse Limited by the defendant which the latter requested them to seize. He said the bus was eventually sold by the defendant, through them, to Chibesa Enterprises and they were paid from the proceeds.

He said since the plaintiff had a business relationship with the defendant, they knew what the latter required when they asked them to seize the truck. He said when the engine came it was fitted on the truck and they rendered an invoice to the defendant. They could not locate Coalg Mining Limited and the defendant had asked them to go ahead and repair the truck and told them that they would be paid. He said the bill came to over K400,000,000. He identified the tax invoice at page 6 of the plaintiff's Bundle dated 28th April, 2009 as the final invoice that was rendered to the defendant and Coalg Mining Limited. He said the total cost was K5,108,529,562.90 inclusive of interest and storage charges and that the overall amount including VAT at 16% was K6,393,972,197.60 which is the amount claimed.

He testified that at the bottom of the job card is a column which stated that invoices not settled within 30 days would attract 5% interest monthly and that the total amount claimed included compound interest from the time they started the repairs to the time that they rendered the invoice. He said the defendant refused to pay on the ground that the truck was not theirs and the truck is still in their yard. On receiving that response they brought the matter to court. He said Coalg Mining Limited did not feature

anywhere after they repaired the truck because instructions to proceed with the repairs came from the defendant, so they expected the latter to pay or to instruct them to find a buyer and to sell the bus on their behalf as they had done with the bus for White Horse.

He said at page 1 of the plaintiff's Bundle of Documents is an invoice that was communicated to the defendant before the final invoice at page 6. The amount was K403,515,335. The invoice stated that the figure excluded interest at 5% per month. He said he was vague on when they started charging interest, but when they decided to bring the matter to court they computed compound interest which is about K2,000,000,000. He could not say that they agreed with the defendant to charge compound interest except that the job card was clear and it is their standard procedure to charge their customers interest on an overdue account.

In cross-examination by Mr. Chinene he said the truck was taken to their workshop by an employee of Coalg Mining Limited and that they entered into a contract to repair the truck with that company, but subsequently they entered into a contract with the defendant to repair the same truck when they raised the job card. He agreed that the invoices he identified and the job card were rendered to Coalg Mining Limited, but not the internal workshop requisitions. He said their contractual relationship with the defendant was to seize the truck, to proceed with the repairs and

to sell the truck once they had rendered an invoice, but the instruction was not in writing as none of their customers gave them instructions in writing. When asked by the court to clarify why the truck is still in their possession if they had instructions from the defendant to sell it, he said they did not sell the truck because the defendant did not give them instructions and disputed the invoice.

Mr. Arunalandan Ramesh, Managing Director of the defendant is the only defence witness. He testified that about five years ago, one Claudia Ventriglia of Itatalazo Limited in Ndola approached them that he wanted the MAN truck that was parked at the plaintiff company. When they checked their records they found that they had leased the truck to Coalg Mining Limited in Kitwe. He told Mr. Ventriglia to approach the representative of Coalg Limited and to discuss his proposal. After that he did not hear anything from him. He said to his knowledge the owner of the truck was Coalg Mining Limited, but they are the absolute owners as shown in the motor vehicle registration book at page 15 of their Supplementary Bundle of Documents. He said they did not do anything when they learnt that the truck was with the plaintiff. They got the writ from the plaintiff three years later claiming for over K6,000,000.00.

His evidence is further that in 2004 they had entered into an equipment leasing agreement (pages 1 to 14 of the same Bundle of Documents) with Coalg Mining Limited for the lease of the truck

and other three trucks. Under that agreement Coalg Mining Limited were responsible for all the repairs and maintenance of the trucks at their own cost. He said they had no arrangement with the plaintiff over the payments for the truck. He said under cl. 6.04 (page 5), the lessee was to carry out all or any repair mechanical or otherwise to the equipment it at its own cost immediately upon any breakdown or damage and was required upon the happening of the same to notify the lessor in writing of the action taken.

He drew my attention to cl. 6.07 (page 6) which provided that the lessee was not to sell, sublet, pledge out, mortgage, charge, encumber, assign transfer, part with possession or otherwise dispose of or deal with the equipment or any part of it or interest therein during the Term to the detriment of the lessor and further would under no circumstances whatsoever pledge the lessor's credit for any repairs to the equipment. He said the lessee wants to do the repairs and charge the defendant. He said the documents at pages 1 to 6 of the plaintiff's Bundle were not served on them and that in the circumstances they do not admit the plaintiff's claim.

In cross-examination by Mr. Simwanza, he said they purchased the truck and leased it to the lessee under the equipment leasing agreement until the latter finished paying the agreed rentals. He said they endorsed their name as absolute owner to protect their interest. He accepted that the lessee could sell the truck only with

their consent and that they did not consent to the sale of the truck. He said he visited the plaintiff to discuss some other transactions, but he did not see the truck nor was he informed by the plaintiff about the truck nor give instructions to repair, seize and sale the truck. He said the lessee was up to date with the payments on the lease agreement; that they never communicated anything directly with the plaintiff over the truck, so he could not have instructed the plaintiff or assured them that they would be paid upon the truck being sold. He said he did not file anything in court to show that Coalg Mining Limited were up to date on the lease rentals.

He said the latter had a number of leases with them, unless he checked his records, he would not be able to tell the court whether the company had serviced its obligations in full under that particular agreement. He admitted that the truck was still under the lease agreement. He said the invoice at page 6 of the plaintiff's Bundle only came to their knowledge through this case after it was filed in court and that the invoice at page 7 of the same Bundle is in respect of another lease they have with the plaintiff. He refused that there was a set-off arrangement with the plaintiff or that they have any role to play in settling the cost for repairs which the lessee might have failed to pay. He said if the truck had to be sold to defray the cost of repair, and if the plaintiff approached them, they would give the consent and for someone to buy the truck they have to remove their name from the white

book, so they have to give consent to RTSA to do that. This is the evidence of the parties.

I have received submissions only from the defendant. I shall refer to the submissions in my judgment where necessary. From the evidence it is quite clear that the MAN truck in question was leased to the company called Coalg Limited by the defendant under the equipment leasing agreement at pages 1 to 14 of the defendant's Supplementary Bundle of Documents. The agreement is dated 20th December, 2004. As stated by Mr. Ramesh by cl. 6.04 of the agreement the lessee was liable to carry out all or any repair to the vehicle or any part of it at its own cost immediately upon any breakdown or damage and to notify the lessor of the action taken.

Under cl. 6.07 of the agreement the lessee also agreed not to sell, sublet, pledge and mortgage, charge, encumber, assign, transfer, part with possession or otherwise dispose of or deal with the equipment or any part of it or interest therein during the lease to the detriment of the lessor and under no circumstances whatsoever pledge the lessor's credit for any repairs to the equipment. Further under cl. 7.05 if the equipment was damaged, destroyed or lost the lessee had the obligation to immediately notify the lessor in writing and to properly and timously do everything necessary to procure payment to the lessor of compensation under any insurance policy.

Furthermore, by clause 7.06, if so required by the lessor the lessee was to repair and reinstate the equipment at the lessee's cost and continue to discharge all obligations on the due dates. In addition by cl. 17.01 the equipment remained the property of the lessor at all times. The lessee had no right to acquire ownership in any manner whatsoever. The motor vehicle registration book at page 15 (same Bundle) confirms that the defendant remained the absolute owner of the vehicle while Coalg Limited was the first owner.

As submitted by counsel for the defendant, the plaintiff's claim relates to motor vehicle registration No. NCH 251. The documents and tax invoices at pages 1, 2, 3 and 6 all relate to the same motor vehicle. In his evidence Mr. Lombe referred to the registration number of the MAN truck they received for repair from Coalg Mining Limited as NCH 251.

In the amended defence filed on 9th July, 2009, and the second amended defence filed on 5th December, 2009, the defendant denied that it is the registered owner of the motor vehicle Man truck registration No. NCH 251. Instead the defendant averred that the motor vehicle registration book No. 0266610 for Man truck registration No. ACH 251 shows Messrs Coalg Limited as the owner and Leasing Finance Company Limited as absolute owner. The plaintiff's reply was to join issue with the defendant on its defence in so far as the same consists of admissions and to repeat the contents of paras 1 to 8 of its statement of claim.

The main defence is that the defendant has nothing to do with the Man truck of registration No. NCH 251 as it is not the registered owner. Quite clearly the registration number of the vehicle indicated on the motor vehicle registration book is ACH 251. If indeed the defendant is not the registered owner of the motor vehicle in issue, then it can incur no liability whatsoever in repair costs for the motor vehicle. But if one looks at it from the point of view that Man truck registration No. NCH 251 is one and the same as Man Horse truck registration No. ACH 251, considering that the engine number 3768390081B281 and chassis number WMAT 380719M225893 indicated on the documents at pages 1, 2 and 6 of the plaintiff's Bundle correspond with the engine and chassis numbers indicated at page 13 in the lease agreement and on the motor vehicle registration book, the question that arises is whether the defendant is liable to the plaintiff in repair costs for the motor vehicle.

As rightly submitted by counsel for the defendant, the contract to repair the motor vehicle was between the plaintiff and Coalg Limited or Coalg Mining Limited. The truck was taken to the plaintiff's workshop for repair by an employee of Coalg Mining Limited on 17th February, 2005. That was when the job card or tax invoice at page 2 of the plaintiff's Bundle of Documents was issued. The contact person indicated in the top right hand corner of the document was Mr. Boyd Chilwana. The customer's instructions were to "attend to not starting and repair." Work

done indicated “to check and evaluate all spare parts, quote for complete engine overhaul, fitting windscreen found front windscreen frame bend and report to customer”. There are figures indicated on the document and the total figures inclusive VAT appears to be K5,357,266. The same document was signed at the bottom by Mr. Boyd Chilwana on 22nd April, 2005. The document also indicated date completed as 30th April, 2007 and a signature against that date.

It is quite also clear to me that the workshop invoices at pages 3, 4 and 5 dated 26th May, 2005, 20th July, 2005 and 3rd June, 2005 respectively were issued to Coalg Mining. The tax invoice at page 6 which is similar to the one at page 2 was issued on 28th April, 2009 to Leasing Finance and Coalg Mining Limited for the total sum of K6,393,972,197.60. This document was not signed by anyone or acknowledged by the defendant. The rest of the documents at pages 7 to 9 seem to relate to a lease agreement between the plaintiff and defendant which has nothing to do with this matter.

Of course, as observed by Mr. Chinene all evidence which is sufficiently relevant to the issue before court is admissible and all that is irrelevant or insufficiently relevant, should be excluded [Goddard, L] in *Hollington v Hewthorn & Co. Limited* (1)]. It is argued by counsel for the defendant that the testimony of Mr. Lombe on what Mr. Ramesh is alleged to have said tended to contradict, vary, add or subtract from the terms in which the

plaintiff and Coalg Limited deliberately agreed to record their contract on 17th February, 2005, and that that evidence is inadmissible as evidence on the authorities of *Bank of Australia v Palmer* (2) and *Rodgers Chama Ponde and Others v Zambia State Insurance Corporation Limited* (3).

Counsel has also argued that the equipment leasing agreement between the defendant and Coalg Mining Limited did not establish principal and agent relationship for the plaintiff to push its claim to the defendant after failing to trace Coalg Mining Limited with whom it had a contract and that the motor vehicle registration book was a legal document with liability particularly for repairs of the Man truck firmly provided in cls. 6.04 and 6.07 of the equipment leasing agreement. He has cited *Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited* (4). He submits that the defendant was not a party to the contract between the plaintiff and Coalg Mining Limited nor was the latter an agent of the defendant, therefore the defendant is not liable to the plaintiff whose claim is frivolous and vexatious and ought to be dismissed with costs.

I have considered the arguments by counsel for the defendant. I have no difficulty in agreeing with him that generally parol evidence cannot be received to contradict, vary, add or subtract from the terms of a written contract. But the point taken by the plaintiff is that there was a second contract with the defendant relating to the same Man truck. Perhaps I need to consider the

doctrine of privity of contract. In the first place the doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it. The common law reasoned that only a promisee may enforce the promise; if the third party is not a promisee he is not privy to the contract (paras 18-003 to 18-004, Chitty on Contracts General Principles, Thirtieth Edition, London, Sweet and Maxwell, 2008). There is also the principle that consideration must move from the promisee [*Tweddle v Atkinson* (5)].

However, there are exceptions to the general rule of privity of contract. One such exception is that a contract between two parties may be accompanied by a collateral contract between one of them and a third person relating to the same subject matter. For instance in *Shanklin Pier v Detel Products* (6) the plaintiffs had employed contractors to paint a pier. They told them to buy paint made by the defendants. The defendants had told them that the paint would last for seven years. It only lasted for three months. The court decided that the plaintiffs could sue the defendants on a collateral contract. They had provided consideration for the defendant's promise by entering into an agreement with the contractors, which entailed the purchase of the defendant's paint. The consideration was the instruction given by the claimants to their contractor.

But there must be an intention to create a collateral contract before that contract can be formed [Chitty (*supra*), paras 18-005, 18-008 and 18-009). In *Alicia Hosiery Limited v Brown Shipley Limited* (7) the owner of goods in a warehouse pledged them to a bank and later sold them. The bank gave the buyer a delivery order addressed to the warehouse, but the latter refused to deliver the goods to the buyer who claimed damages from the bank. It was held that there was a contract between the buyer and the seller, and one between the seller and the bank, but none between the buyer and the bank as no intention to enter into such contract had been shown.

In this case the contract to repair the MAN truck was between the plaintiff and Coalg Mining Limited. As I have already said the latter was the lessee of the vehicle. The defendant who is the lessor and absolute owner of the vehicle was not a party to the contract for repair. Further by cl. 6.04 of the equipment leasing agreement, Coalg Mining Limited was liable to carry out all or any repair to the vehicle at its own cost. In addition the tax invoice or job card and the workshop invoices were issued to Coalg Mining Limited. The job card was signed by an employee of that company. Although the defendant was absolute owner, it was not a party to the contract and cannot be liable for the costs of repair of the vehicle.

However, if the defendant had entered into a collateral contract with the plaintiff then the defendant would be liable to pay the

repair costs. Is there evidence of a collateral contract? Mr. Lombe testified that during the period the truck was being fixed they were visited by Mr. Ramesh, the General Manager of the defendant who when he saw the truck informed the plaintiff that the truck was on lease to Coalg Mining Limited, but the latter had defaulted on the monthly rentals. It is Mr. Lombe's evidence that Mr. Ramesh instructed them to seize the truck on the defendant's behalf, to keep it in the workshop and to proceed with repairs. In Mr. Lombe's words this was towards the end of 2006, clearly over one year from the time the truck was towed to the workshop by Coalg Mining Limited. According to Mr. Lombe, they proceeded as they were instructed by the defendant. They even ordered and fixed a reconditioned engine and Mr. Ramesh would look at the truck whenever he went to their workshop. But when the tax invoice at page 6 of their Bundle was issued the defendant refused to pay. It is also Mr. Lombe's evidence in cross-examination that the contractual relationship they had with the defendant was to seize the truck to proceed with the repairs and to sell the truck once they had rendered an invoice.

However, this instruction was verbal and Mr. Ramesh has disputed that he had any arrangement with the plaintiff over the payments for the truck, or see the truck when he visited the plaintiff to discuss some other transactions or give instructions as alleged to repair, seize and sale the truck.

Mr. Ramesh said he heard about the truck being in the plaintiff's workshop from a Mr. Ventriglia who wanted to buy it. He sent Mr. Ventriglia to the lessee to discuss the modalities, but Mr. Ventriglia never went back to him.

In my judgment he who alleges must prove. The burden is on the plaintiff to show on a reasonable preponderance of probabilities that there was a collateral contract with the defendant. So far there is nothing to convince me that there was a collateral contract other than the words of Mr. Lombe which have been denied by Mr. Ramesh who did not even sign the tax invoice or job card at page 2 of the plaintiff's Bundle which indicates the date completed as 30th April, 2007, nor did he sign the tax invoice at page 6 which was issued two years later on 28th April, 2009. I am inclined to believe that if Mr. Ramesh had truly instructed the plaintiff to seize, to proceed with repairs and to sale the truck, the defendant would not have reneged after the invoice was rendered because the defendant stood to benefit from the sale if Coalg Mining Limited had been in arrears on the equipment leasing agreement relating to the truck.

With regard to the issue of agency that has been discussed by Mr. Chinene, the concept of agency is an exception to the doctrine of privity in that an agent may contract on behalf of his principal with a third party and form a binding contract between the principal and third party; such as where a husband booked tickets

on a cross-channel ferry for himself and his wife and children and it was said that there was a “contract of carriage between the wife and the carriers, presumably made by the husband as his wife’s agent. [See para 18-012, Chitty on Contracts (*supra*)]. Mr. Chinene referred me to *Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited* (4) where the Supreme Court held that where an agent, in making a contract discloses both the interests and names of the principal on whose behalf it purports to make a contract, the agent, as a general rule, is not liable on the contract to the other contracting party; and where an agent is a contracting party he will be held personally liable even if he names his principal. In the present case, as submitted by counsel for the defendant the equipment leasing agreement did not give a mandate to Coalg Mining Limited to enter into a contract with the plaintiff for repair of the MAN truck, on behalf of the defendant. The great problem here is that under the equipment leasing agreement, Coalg Limited was responsible for all repair costs. Therefore it could not have entered into the contract with the plaintiff as an agent of the defendant. If the plaintiff has failed to trace the contracting party it has only itself to blame. The plaintiff’s claim cannot succeed under the doctrine of agency. To take this point further, even if Mr. Ramesh had entered into a collateral agreement with the plaintiff, I do not think that he would have bound the defendant company. In *Freshmint Limited and Others v Kawambwa Tea Company (1966) Limited* (8) the Supreme Court has held, inter alia, that only

contracts entered into on behalf of a company by authorised agents will bind a company.

It is clear from that case that such agents are normally authorised through resolution of a company; and that it was not for the respondent company to prove that it had, in fact, not given such power, it was for the appellants to have been on guard to prove that the 2nd appellant had in fact acted within the authority given to him. In the present case this was not established. I therefore agree with the defendant that it cannot be liable to the plaintiff for repair costs to the truck as there was no collateral contract and Coalg Mining Limited did not enter into the contract for repair of the truck on behalf of the defendant.

It is to my interest also to comment on the plaintiff's claim of K6,393,972,197.68. From the tax invoice at page 6 of the plaintiff's Bundle this figure includes an amount of K10,188,750.00 for removal of engine, evaluation of spares etc, K252,000,000.00 for storage for 4 years and 2 months, K137,500,000.00 for replacing the engine with MAN service exchange and K5,108,529,462.90 interest. It also includes VAT at 16% of K881,927,199.60. Surprisingly in his evidence Mr. Lombe failed to justify the exorbitant figure claimed as interest. He was vague on when they started charging interest. All he knew was that they computed interest which was about K2,000,000,000. He was not sure whether the interest goes back to 2005 when they started the repairs on the truck and he could not answer

whether they agreed with the defendant to charge compound interest.

With such unreliable evidence there is no basis for me to find that the plaintiff had agreed with Coalg Mining Limited or with the defendant to charge compound interest. As the Supreme Court has said in *Union Bank Limited v Southern Province Cooperative Marketing Union Limited* (9) and other cases on the point, compound interest is legal where there is express agreement or acquiescence. In this particular case there was be none. The statement on the job card issued to Coalg Mining Limited indicating that interest would be charged at 5% on delayed payments was not sufficient. For this reason the amount of K5,108,529,462.90 is stuck out as being unlawful and unconscionable.

Let me next say a word about the Man truck that is still in the plaintiff's custody. It is admitted by the defendant that the plaintiff must get their authority if the truck has to be sold to defray the cost of repair and if the plaintiff approached the defendant they could give the consent. I think that this is the step the plaintiff must take if it has to recover the cost of repair of the truck, and such costs must be reasonable and justifiable. However, the claim against the defendant fails and I dismiss it with costs to be taxed if not agreed.

Delivered in Open Court at Kitwe this 22nd day of August, 2013

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R.M.C. Kaoma
JUDGE