

**IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA**

**2012/HPC/0495**

(Civil Jurisdiction)

BETWEEN:

Elias Tembo T/A Connaissuer Enterprises

**APPLICANT**

**AND**

Zadiv Enterprises  
(Sued as a Firm)

**RESPONDENT**

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN OPEN  
COURT ON THE 3<sup>RD</sup> DAY OF MARCH, 2014**

*For the Plaintiff:*

*R. Mainza, Messrs Mainza and Company*

*For the Defendants:*

*N/A*

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**J U D G M E N T**

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Cases referred to:

1. Holmes Limited v Buildwell Limited (1973) ZR 97
2. Selly Yoat Asset Management Limited v Remotesite Solutions Zambia Limited (2010) ZR Vol.2, 35

Other Works referred to:

3. Chitty on Contracts, General Principles, Sweet and Maxwell.
4. Chitty on Contracts: Specific Contracts, 25<sup>th</sup> edition, Sweet and Maxwell.

The **Plaintiff, Elias Tembo T/A Connaissuer Enterprises** commenced an action herein by way of a Writ of Summons on the 21<sup>st</sup> day of August 2012 against **Zadiv Enterprises** (sued as a firm) the Defendant, claiming the following reliefs:

- 1. Payment of the sum of K323,035 being the balance of the purchase price of goods supplied by the Plaintiff to the Defendant at the Defendant's own instance together with interest accruing thereon at the Commercial Bank lending rate,**
- 2. Damage for loss of use of monies,**
- 3. Costs of the proceedings,**
- 4. Any or other relief the Court may deem fit.**

According to the Statement of Claim of even date accompanying the Writ of Summons, the Plaintiff on or about 22<sup>nd</sup> day of December 2011 supplied the Defendant at the Defendants instance assorted wines and spirits at a consideration of K368,035 as evidenced by Delivery Notes/Invoices on "**Sale and Purchase**" terms, receipt of which was acknowledged by the Defendant.

It is averred that on the 20<sup>th</sup> day of June 2012 the Defendant made a partial payment of K45,000 thereby reducing its indebtedness to K323,035.

It is further averred that by a letter dated 16<sup>th</sup> day of July 2012, the Plaintiff reminded the Defendant to work out a plan on how they intended to pay the outstanding debt, but the Defendant has totally ignored the letter.

Further, according to the Plaintiff, there were no other terms agreed upon between the parties besides the "**Sale and Purchase**" aforestated.

On the 22<sup>nd</sup> day of October 2012, the Defendant settled its Defence and Counter Claim. In the Defence, the Defendant admits that the Plaintiff supplied the Defendant with assorted wines and spirits worth K368,035. However the Defendant avers that the supply was at the Plaintiffs instance and not the Defendants.

Further, that the terms thereof were to pay the Plaintiff as and when the wines and the spirits were sold by the Defendant. To that extent, the Defendant Claims that the term "**Sale and Purchase**" is within the peculiar knowledge of the Plaintiff.

The Defendant also avers that apart from making a payment of K45,000 they made a further payment of K1,250.

As regards the letter of 16<sup>th</sup> day of July 2012, the Defendant states that after receipt of the letter, a meeting was held with the Plaintiff at which it was explained that the wines and spirits were not being disposed of quickly and the stock should be returned to the Plaintiff as it was proving costly to retain. According to the Defendant, the Plaintiff refused to receive the stock and gave the Defendant more time to sell and pay for the stock. That it is for that reason that the Defendant could not pay the Plaintiff.

The Defendant has further averred that the unsold stock is still marooned in a container on the Defendants Motor Vehicle at the Defendants house as the Plaintiff has refused to collect the stock despite numerous pleas to do so.

The Defendant goes on to state that the proforma/delivery note/invoice/ cash sale had no endorsements such as "sale and Purchase" or any other indication to show that the transaction between the parties constituted a sale.

As regards the Counter Claim, the Defendant asserts that it has suffered loss of business for non use of the Defendants Motor Vehicle on which the unsold stock is marooned and as a result has suffered loss and special damage and to that effect claims the following reliefs:

- 1. Damages for loss of business**
- 2. A declaration Order that the unsold portion of the wines and spirits be returned to the Plaintiff**
- 3. A declaration Order that the Defendant renders an account to the Plaintiff**
- 4. Interest on (1) above**
- 5. Legal costs**
- 6. Any other claim the Court will deem fit.**

In the Plaintiffs Reply to the Defence, the Plaintiff reiterates most of the averments in the Statement of Claim. In addition the Plaintiff concedes that on divers occasions his staff did receive a total of K1,250 from the Defendant for fuel. The Plaintiff denied discussing with the defendant the possibility of returning the stock and averred that he is not obliged to take back the goods in question which by virtue of the ownership in the said goods had passed to the Defendant who is obliged to pay for the same.

As regards the Defence to the Counter Claim, the Plaintiff denies that the Defendant is entitled to the Counter Claim and denies that the Defendant has suffered any loss of business and special damages as alleged.

It will be noted from the record that the Defendants were initially being represented by the firm of Messrs AD Gray and Partners.

When the matter came up for hearing on the 27<sup>th</sup> day of February 2014, the Advocates made an ex parte application to withdraw as Advocates citing lack of sufficient instruction which application I granted.

I did at the same time note that despite the Orders for Directions having been given on the 21<sup>st</sup> day of February 2013, the Defendant had to date not fully complied with the directions. I was of the view that the Defendant was unduly and deliberately procrastinating the matter. It was on that basis that I decided to proceed and hear the matter.

The Plaintiff at the hearing only called one witness the Plaintiff (PW) whose testimony was as per his witness statement which was filed into Court on the 3<sup>rd</sup> day of April 2013.

The evidence of PW is in tandem with his pleadings and I therefore see no need to repeat the same.

At the end of the trial, Counsel for the Plaintiff indicated that he shall rely on the Plaintiffs Skeleton arguments which were filed into Court on the 12<sup>th</sup> day of April 2013.

According to the said arguments, it is submitted that at the bottom of every proforma/delivery note/invoice/cash sale contained in the Plaintiff's Bundle of Documents, there is an express term inscribed in handwriting stating that:

**“ Terms: 180 days as per conditions on delivery note”**

That the Defendant has not disputed that express term on payment. Counsel submits that the only permissible construction and/or interpretation of the said terms is that they formed part and parcel of the sale and purchase contract between the Plaintiff and the Defendant. That the terms of the agreement between the parties are the only terms that governed their contract and the delivery notes therefore constitute evidence of a validly executed contract as the Defendant read and signed them. That the averment by the Defendant in their Defence that they were to pay as and when the goods were sold is without basis as there is no evidence to support such a proposition. Counsel contends that, this conduct by the Defendant amounts to introducing of extrinsic evidence to a written contract which is not permissible by law. To that extent, the case of **Holmes Limited v Buildwell Limited**<sup>1</sup> was cited.

Counsel further relied on the learned authors of **Chitty on Contracts**<sup>3</sup> on page 747 where it states as follows:

**“The cardinal presumptions are that the parties have intended what they have in fact said, so that their word must be construed as they stand. That is to say the meaning of the document or of a particular part of it is to be sought in the document itself. One must consider the meaning of the words used, not what one may guess to be the intention of the parties”**

Counsel in that respect further relied on the case of **Selly Yoat Asset Management Limited v Remotesite Solutions Zambia limited**<sup>2</sup> for persuasion.

Counsel for the Plaintiff contends that the Defendant is in breach of his obligations to pay for the supplied wines and spirits valued at K368,035 less the sums of K45,000 and K1,250 already paid and prays that the Court enters Judgment in that respect and damages for the loss of use of the monies and costs.

On the issue of the Counter Claim, it is submitted that the claim has no merits and is without basis in law and fact. According to Counsel, the goods in question were quantified itemised and described in the delivery notes and were delivered to the Defendant which fact has not been disputed but admitted. That the contract therefore relates to specific goods in a deliverable state.

It was submitted that when dealing with contracts that relates to specific goods in a deliverable state, title to them passes at the time of the execution of the contract. Reliance to that effect was placed on **Chitty on Contracts: Special Contracts**<sup>4</sup> at page 1058 paragraph 4198 where it states that:

***“.....where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed”.***

Counsel concluded by stating that the goods having passed on, the Defendant cannot therefore return them and no attention should be given to the purported loss of business for non use of the Defendants vehicle on which the stocks were allegedly kept and that in any case there is no reasonableness in keeping merchandise in a vehicle for years.

I have carefully considered and analysed the pleadings in full including the Defendants defence and Counter Claim. Although the Defendant did not fully comply with the directions nor attend the trial, I have taken into consideration the Defence and Counter Claim. I have also taken into

consideration the evidence of PW, and the Plaintiffs Skeleton arguments together with the authorities cited therein and I am indebted to Counsel in that respect.

In determining this matter, let me begin by stating that the Plaintiffs Bundle of Documents filed into Court on the 20<sup>th</sup> day of March 2013 and the Defendants Bundle of Documents filed on the 24<sup>th</sup> day of April 2013 both more or less contain the same documents and I will to that extent treat them as agreed Bundles as there is no dispute over any of the documents.

I have also taken note that there is also no dispute and in fact it is admitted by the Defendant that the Plaintiff supplied to the Defendant assorted wines and spirits valued at K368,035 out of which the sum of K46,250 has since been paid consisting of a payment by Cheque in the sum of K45,000 and payments on divers dates amounting to K1,250 thereby leaving an outstanding amount in the sum of K321,785.

I have also noted that apart from the documents in the bundles, the parties have not alluded to any other documentation not before Court which may impact on the findings of this Court. I shall therefore restrict myself to the documents in the bundles and the pleadings.

The Plaintiff's case as I understand it at the risk of over simplifying it is basically that the Defendant at its instance requested the Plaintiff whose business base is in Lusaka to supply it with assorted wines and spirits at Ndola, whose value amounted to K368,035. That at the time of delivery on the 22<sup>nd</sup> day of December 2011, the Plaintiff issued the Defendant with Proforma/delivery note/invoice/cash sale No.1035, 1036, 1037, 1038, 1039, 1040 which for ease of reference I shall refer to as the delivery notes which were pre printed. On receipt, the Defendant signed for the same in acknowledging receipt of the supplies. The said delivery notes stated that the terms of payment was **"sale and purchase"** which to the Plaintiff meant cash sale. Meaning payment was to be with immediate effect upon delivery.

It is also the Plaintiffs case that the Defendant on the 30<sup>th</sup> day of June 2012 paid the sum of K45,000 and subsequently the sum of K1,250 towards liquidation of the amount owing. It would however be noted from the Plaintiffs letter dated the 16<sup>th</sup> day of July 2012 addressed to the Defendant that by agreement of the parties the terms of payment were varied as endorsed on the delivery notes (handwritten) that payment was to be effected 180 days after delivery.

According to the Plaintiff, the Defendant has failed to settle the outstanding amount, hence the claim. That basically is the Plaintiffs claim.

On the other side, the Defendant does not dispute receiving the assorted wines and spirits but insists that it was at the Plaintiffs instance. The Defendant does not also dispute acknowledging receipt and signing for the same on the delivery note.

The Defendants case is based on the terms of payment. The Defendant disputes that this was either a cash sale or were the Defendant to effect payment after 180 days of delivery. According to the Defendant payment was to be on as and when the wines and spirits are sold. That it is on that basis that the Defendant requested that they return the unsold stock to the Plaintiff having failed to sell the same which the Plaintiff has refused. It is also on that basis that the Defendant's Counter is founded

In my view the issue of whether the supply of the wines and spirits was at the Plaintiffs instance or the Defendants is immaterial and is therefore neither here nor there.

The fact is that the Plaintiff supplied and the Defendant accepted the same.

It is trite law that a contract of sale is an agreement by which the seller in this case the Plaintiff and the buyer, the Defendant undertake mutual obligations. At the very least the seller agrees that the buyer shall become the owner and the buyer agrees to pay a price. The number and extent of the obligations can be ascertained only by reference to the terms expressly



agreed in the contract and to those extra terms which the law implies into it. That is what amounts to an enforceable contract and for the same in **Casu**, I am totally in agreement with Counsel for the Plaintiff that what forms the Contract between the Plaintiff and the Defendant are the delivery notes. Therefore in resolving the dispute, I am to be guided by the terms expressly stated on the delivery note and any extra terms (where applicable) which the law implies into it (if any).

As earlier alluded to, the delivery notes are common documents to both parties and were signed in acceptance by the Defendant. The

Defendant has not pleaded **non est factum**. I therefore, on the face of the delivery notes have no difficulty in finding that there was a variation to the terms of the agreement which was known and agreed to by both parties that payment for the goods was to be effected immediately upon the lapse of 180 days from the date of delivery.

I cannot find anywhere either express or implied that the Defendant was to effect payment as and when he sold the goods. That assertion is a complete afterthought on the part of the Defendant which should not be entertained.

Having made that finding, I hasten to add that the goods in this case were identified and agreed upon and therefore are specific goods. That is not in dispute. In that respect I also agree with the Plaintiff that the property passed on to the Defendant. Property in specific goods passes to the buyer at such time as the parties intend it to be transferred as per the terms of the contract and the conduct of the parties.

However, it is trite law that where there is unconditional contract for the sale of specific goods in a deliverable state the property in the goods passes to the buyer when the contract is made and it is immaterial whether the time of payment or the time of the delivery or both be postponed.

The Defendant therefore has no right to return any of the wines and spirits as there is no basis at all for doing so and the Defendants defence fails.

In the view that I take, the Plaintiff has proved on the balance of probability his claim for payment of the sum of K321,785. The said amount is to attract interest at the average short term deposit rate per annum as determined by the Bank of Zambia from time to time from the 21<sup>st</sup> day of August 2012 being the date of commencement of these proceedings to the date of this Judgment and thereafter at the current Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgment debt.

I decline to consider the claim for loss of use of the monies as no evidence was led in that respect. In any case, the same shall be taken care of by the award of interest which I have made.

As regards the Defendants Counter Claim, having found for the Plaintiff as I have done, and the Defendant not having adduced or led any evidence to prove its claim, the Counter Claim is thereby dismissed. In any case the said Counter Claim has no merits as I do not find it reasonable and even tenable that the Defendant would have chosen to store the goods on a Motor Vehicle for so many years. If indeed this was done, it was at the Defendants own peril and self inflicted damage and the Defendant cannot pass the blame on to the Plaintiff. The Defendant is therefore not entitled to any loss of business and special damages nor declaratory Order.

Costs of these proceedings shall be to the Plaintiff. Same to be taxed in default of agreement.

**Dated at Lusaka this 3<sup>rd</sup> day of January 2014.**

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JUSTIN CHASHI  
**HIGH COURT JUDGE**

