

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

2012/HPC/0342

(Commercial Jurisdiction)

BETWEEN:

FRANKANS ENGINEERING LIMITED

PLAINTIFF

AND

UNITED QUARRIES LIMITED

DEFENDANT

**BEFORE THE HON. MR JUSTICE JUSTIN CHASHI IN OPEN
COURT ON THE 11TH DAY OF MARCH, 2014**

For the Plaintiff:

Dr. OMM Banda, Messrs OMM Banda & Company

For the Defendant:

N/A

J U D G M E N T

The Plaintiff **Frankans Engineering Services Limited** commenced proceedings herein by way of a Writ of Summons on the 5th day of July 2012 against the Defendant **United Quarries Limited** claiming the following reliefs:

- 1. An Order that the Defendant is indebted to it in the sum of K35,000,000 and that it has lost business as a result of confiscation of its tools**
- 2. An Order for the payment of the sum of K35,000,000**
- 3. Replacement of the confiscated tools or payment of their current value**

4. Damages for loss of business

5. Interest

6. Costs and any other relief the Court may deem fit.

Attendant to the Writ of Summons was the Statement of Claim in which the Plaintiff avers that it was engaged in the repairing of the Defendant's Hydraulic pump and rum for a Volvo Excavator at the cost of **K35,000,000**. That after repairing the pump and rum the Plaintiff requested the Defendant to supply new oil for testing but the Defendant refused and insisted that the Plaintiff uses the old oil which was mixed with water and some particles and was likely to cause damage to the machine which the Plaintiff refused.

It is further averred that the Plaintiff then requested for a down payment to enable them purchase new oil for testing, but the Defendant refused and confiscated the Plaintiff's spanners hence the Plaintiff losing business due to lack of tools to execute further jobs.

According to the Plaintiff, the Defendant despite several requests, reminders and pleas, has refused to pay the Plaintiff, hence the claim.

A perusal of the record shows that the Defendant entered appearance and filed a Defence on the 17th day of July 2012 in which apart from making general denials goes further to deny that there was any agreement for the sum of **K35,000,000** in existence and that the Plaintiffs have no cause of action against the Defendant and that a similar claim under **Cause No.**

2010/HPC/043 was dismissed by the Court for Want of Prosecution.

The Plaintiffs in response to the Defence filed a Reply on the 28th day of August 2012 joining issues with the Defendant on the aforestated Defence.

At the time of the hearing of the matter, the Plaintiff had complied with the Orders for Directions which were issued on the 22nd day of August 2012, whilst the Defendant had not for reasons unknown to the Court. It would however be seen from the time lapse that the Defendant was unduly procrastinating the matter, hence my proceeding to hear the matter in the absence of the Defendant.

At the hearing, the Plaintiff only called one witness namely Francis Kangwa (PW) a Director in the Plaintiff, who testified in tandem with his witness statement which was filed into Court on the 29th day of November 2012.

According to PW, in the first week of December 2009, he met a Mr Shumba, who used to repair the Defendant's electrical heavy duty machines who informed PW that he was assigned by the Defendant to source a person through a Company specialised in hydraulic machines to repair a Volvo Excavator which was not operating. That Mr. Shumba then introduced PW to Mr. Yu, the Managing Director of the Defendant who engaged the Plaintiff to identify the faults.

It was the testimony of PW that after identifying the fault, it was agreed that the repairs would cost the Defendant **K35,000,000** and invoice No. 094 was then issued to the Defendant. That the Plaintiff sourced the spares and repaired the main hydraulic pump and rum of the Defendant's Volvo Excavator.

Further, according to PW, the Plaintiff requested the Defendant to supply 2,010 litres of new oil for testing as the used oil which was removed from the machine was mixed with water and had some particles, but the Defendant refused.

It was PW's further evidence that he refused to use the used oil as it would damage the machine. He requested for a down payment to enable him buy the oil, but the Defendant refused, got upset and, confiscated the Plaintiff's tools, that PW had been using to repair the machine.

It is PW's further testimony that, he later carried out investigations which revealed that the Defendant later purchased new oil and the machine was working properly. That however, the Defendant has refused to pay the **K35,000,000** and to release the tools.

At the end of the trial, Counsel for the Plaintiff indicated that he will rely on the Plaintiffs Skeleton Arguments filed into Court on the 27th day of November 2012 and submitted that this is a proper case in which the Court ought to grant the claims sought.

I have carefully considered the Pleadings, the Defence inclusive despite the non participation of the Defendant at the trial. I have also taken into consideration the documents contained in the Plaintiffs Bundle of Documents and the Plaintiff's Skeleton Arguments.

Let me in determining this matter begin with the Defence by the Defendant. I note that it does not specifically traverse every allegation of fact made in the Statement of Claim.

As earlier alluded to, it mainly contains general and bare denials of allegations of fact and general statements of non admission of the alleged facts. In that respect, the Defence does not meet the requirements of **Rule 6 of Order L111 of The Rules of The High Court, Chapter 27 of the Laws of Zambia.**

That despite, let me state that, the fact that an action was dismissed by the Court for want of prosecution does not bar a party from bringing an action within the statutory limitation period, subject to costs.

Apart from not meeting the requirements of **Rule 6 of Order L111** more harm has been done to the Defendants case by their non compliance with the Orders for Directions and none participation in the proceedings. That said, the Plaintiff has in my view ably demonstrated that there was an oral agreement between the Plaintiff and the Defendant for the repair of the Defendant's Excavator for which invoice No. 094 was issued to the Defendant in the sum of K35,000,000.

Further, that the Defendant has failed and/or willfully neglected to pay the Plaintiff for the said repairs.

Further, the two documents appearing on pages **(1)** and **(2)** of the Plaintiff's further Bundle of Documents which are not without prejudice letters from the Defendants Advocates to the Plaintiffs Advocates, adds credence to the Plaintiffs claim. In the said letters, the Defendants Advocates indicates that the Defendant is prepared to pay for the labour claim only and the legal fees.

This goes to confirm that there was indeed an agreement between the parties for the repair of the excavator and the repairs were indeed carried out. It is boggling to the mind why the Defendant should be prepared to pay for the cost of labour if no repairs were not carried out or if they failed.

In the view that I take, the Plaintiff has proved its case on a balance of probability for the sum of **K35,000,000** as per invoice No. 094.

As regards the claim for the replacement of tools or payment for their current value and damages for loss of business, the legal axiom of he who alleges applies here.

The Plaintiff has not provided the Court with the details of the said tools nor their replacement value. They have also not led any evidence to that effect. Equally the Plaintiff has not led any

evidence on the loss of business. These two claims are therefore dismissed for lack of merit.

For the removal of doubt, the Defendant is hereby Ordered to pay the Plaintiff the sum of **K35,000,000** together with interest at the average short term deposit rate per annum as determined by Bank of Zambia from time to time from the 5th day of July 2012 being the date of commencement of the action 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.

Costs of these proceedings shall be borne by the Defendant. Same to be taxed in default of agreement.

Dated at Lusaka this 11th day of March 2014.

Justin Chashi
HIGH COURT JUDGE