

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

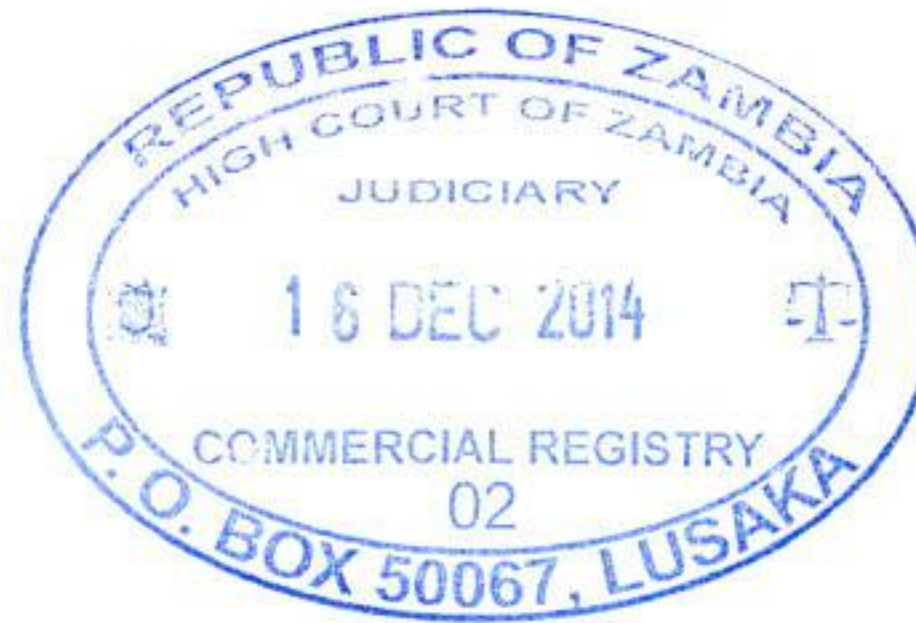
2013/HPC/0083

BETWEEN:

PACIFIC AMOUR

AND

TOM MIYANDA SIMAZUBA



PLAINTIFF

DEFENDANT

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC AT  
LUSAKA IN CHAMBERS**

For the Plaintiff: Mr. J Zimba  
*Makebi Zulu Advocates*

For the Defendant: *No appearance*

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## JUDGMENT

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**List of authorities referred to:**

1. Cheshire and Fifoot
2. Chitty on Contract

This matter was commenced by the Plaintiff by Writ of Summons on 21<sup>st</sup> February, 2013 seeking the following reliefs:-



1. Payment of the K50,000,000.00 (KR 50,000.00) being the purchase price of the motor vehicle.
2. Damages for breach of contract.
3. Punitive damages for fraudulent misrepresentation on the status of the Defendant account.
4. Any other relief the Court may deem fit.
5. Costs.

The Writ was accompanied by a Statement of Claim of even date.

According to the Statement of Claim sometime on or about 14<sup>th</sup> December, 2012 the Plaintiff and the Defendant entered into an agreement that the Plaintiff would sell and the Defendant would buy a non runner Volvo bus Registration No. ALB 8576 at a consideration of K50,000.00 rebased.

Following the said agreement the Defendant issued two (02) post dated cheques in the sum of K30,000.00 and K20,000.00 dated 18<sup>th</sup> December, 2012 and 21<sup>st</sup> December, 2012 respectively.

The Defendant proceeded and towed the Motor Vehicle to his premises, and has since stripped and used the parts to repair his other running buses used in his transportation business.



On his part the Plaintiff proceeded to deposit the cheques on the agreed dates and waited for payment to be effected. However the bank returned the said cheques as the Defendant's account on which they were drawn had long been closed.

The Plaintiff informed the Defendant of the development and the Defendant has since become elusive and un-corporative promising to pay whenever he would be ready and further threatened to have the Defendant deported and/or influence his deportation as the Plaintiff is a refugee resident in Zambia.

In view of the foregoing the Plaintiff prayed that he has suffered loss and damages and requested the Court to grant him the reliefs as endorsed.

On 6<sup>th</sup> March, 2013 the Defendant entered a Memorandum of Appearance and Defence.

In his defence the Defendant admitted entering into an agreement for the intended Sale/Purchase of the Volvo bus registration No.ALB 8575 at the price of K50,000.00 – rebased but that the Plaintiff failed to give effect to the intended sale as he failed to produce any documents evidencing ownership by him of the bus; and that the Plaintiff failed to produce a contract to show that



he had bought the vehicle from the original owner called **Elshadai Transport Ltd** in whose name the bus is registered.

The Defendant also admitted issuing two cheques explaining that he did not put any money into his account to meet the values of the cheques because the Plaintiff failed to produce documents of ownership and also to avoid potential fraud by the Plaintiff. Without prejudice to what has been said, elsewhere the Defendant stated that he is willing to give effect to the agreement if the Defendant provides documents of ownership.

On 6<sup>th</sup> June 2013 the matter was scheduled for a Scheduling Conference. There was no appearance from the Defendant either in person or by Counsel despite Notice of hearing having been issued on 2<sup>nd</sup> May, 2013. At that hearing the Order for Directions was issued giving 6<sup>th</sup> August, 2013 as the date for a Status Conference. Liberty to apply was also granted.

On 6<sup>th</sup> August, 2013 the Defendant did not appear by Counsel or in person despite Counsel for the Defendant having informed him personally that the matter was set for hearing on 6<sup>th</sup> August, 2013 as his Counsel of record had withdrawn from representing him. The Defendant intimated to Counsel that he was not interested in prosecuting the matter and would not come to Court.

Attempts to serve documents on him failed as it was not possible to locate his premises.



In the interest of justice I refused Counsel's application to proceed to trial though there was full compliance with the Order for Directions on the part of the Plaintiff but none on the part of the Defendant. I ordered Counsel to serve process on the Defendant by way of substituted service by an advert in a newspaper.

On 19<sup>th</sup> September, 2013 Plaintiff filed an affidavit of service indicating that the following documents were served on the Defendant:-

1. Two Plaintiff's witness statement.
2. List of authorities.
3. Plaintiff's bundle of documents.
4. Defendant's bundle of pleadings
5. Order for Directions was served and acknowledged on 18<sup>th</sup> September, 2013.

All in all there were nine (09) dates of hearing which did not take off because of the none appearance on the part of Defendant.

Eventually the Plaintiff issued a Notice of hearing in the Post Newspaper on 17<sup>th</sup> and 18<sup>th</sup> October, 2014 as indicated in the affidavit of service dated 29<sup>th</sup> October, 2014.



At the date set for trial on 8<sup>th</sup> December, 2014 again there was no appearance on the part of the Plaintiff either in person or by Counsel.

In the event I proceeded to hear the Defendant's evidence on the basis of documents on record and the Defendant called two witnesses as well.

The first witness was **Mr. Pacific Amour**, the Plaintiff herein, aged 30 years old, Congolese National, residing at Plot No. 17135, Makeni who gave evidence describing the circumstances of the sale of the subject bus to the Defendant at the agreed price of K50,000.00.

In his evidence he stated that he encountered difficulties obtaining payment for the said bus. That the two cheques that were offered were not honoured as he was told at the bank that the account had been closed when he tried to deposit the cheques. His further attempts to obtain payment were met by threats by the Defendant to have him deported.

The Plaintiff's second witness was **Mr. Medison Handondo**, aged 36 years old of Kanyama, House No. L152, Lusaka. He was present during the negotiations for the sale of the bus until the price of K50,000.00 was agreed, and the Defendant took possession of the bus.



On or about 19<sup>th</sup> December, 2012 he accompanied the Plaintiff to Barclays Bank to cash the cheque but were told that the account where they were supposed to cash the cheque from was closed and there was no money in the account. This was the case for both cheques. At this point the Defendant started telling the Plaintiff about reporting him to the Immigration so that he could be deported. The Plaintiff has told him that to-date the Defendant has not paid him the money for the purchase of his bus.

From the evidence on record, it is clear that there was a contract or agreement between the parties for the sale of the bus. There was offer and acceptance, so the essential elements constituting a contract were satisfied. As stated by the Learned Authors **Cheshire and Fifoot** in their book at page 26:-

*“.....in order to determine whether in a given case it is reasonable to infer the existence of an agreement, it has long been usual to employ the language of offer and acceptance”.*

**Chitty on Contract** at page 1521 quotes the words of **Fry L J** in his works on Specific Performance thus:-

*“if a contract is made and one party to it makes a default in performance, there appears to result to the other party a right to election either to insist*



*on the actual performance of the contract or to obtain satisfaction for non performance of it".*

It is noteworthy, and evident from the record that on all the nine (09) occasions this matter was scheduled for hearing, the Defendant made no attempt to appear either personally or by Counsel. He also does not deny that he took possession of the bus and to-date has not paid for it. His defence appears to be that until the Plaintiff provides documents of ownership he would not give effect to the agreement. Instead he started issuing threats to have the Plaintiff deported to get away with none performance of his part of the contract or agreement. The Defendant has the option to return the bus, if he feels the Defendant has failed to produce documents of ownership. He cannot have his cake and eat it.

On the facts and authorities cited herein, I find that there was a valid contract between the Plaintiff and the Defendant for the purchase of the bus at K50,000.00. On the evidence adduced the Defendant has not paid for the bus and is in default of the contract as agreed.

**ORDER:-**

1. In the event I find that the Defendant is liable to pay the Plaintiff as agreed the price for the bus i.e. K50,000.00 being the purchase price for



the subject bus with interest at the current lending rate as determined by the Bank of Zambia.

2. I also award the Plaintiff Damages for breach of Contract; and
3. Punitive damages for fraudulent misrepresentation on the Defendant's account.
4. Costs shall follow the Cause, to be taxed in default of agreement.

Dated this... 16<sup>th</sup> ..... day of December ..... 2014



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**Prisca M. Nyambe, SC**  
**JUDGE**