

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

2012/HPC/0115

(Civil Jurisdiction)

BETWEEN:

SHREEJI INVESTMENTS LIMITED

PLAINTIFF

AND

KONKOLA COPPER MINES PLC

DEFENDANT

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

For the Plaintiff:

A. Kalikiti, Messrs MSK Advocates

For the Defendant:

*SM Kateka (Mrs) and C Hamwela, Messrs Nchito & Nchito
Advocates*

J U D G M E N T

Cases referred to:

1. Galaunia Farms Limited v National Milling Limited and National Corporation Limited (2004) ZR 1
2. William David Carlisle Wise v EF Harvey Limited (1985) ZR 179
3. The Attorney General v Roy Clarke (2008) Vol. 1 ZR 38

Legislation referred to:

4. The Sales of Goods Act 1893
5. The English Law (Extent of Application) Act Chapter 11 of the Laws of Zamiba.

On the 9th day of March 2012, **Shreeji Investments Limited, the Plaintiff** herein commenced proceedings by way of a Writ of Summons against **Konkola Copper Mines Plc** the Defendant claiming the following reliefs:

- 1. Payment of the sum of US\$ 16,130.82 being payment for the goods supplied to the Defendant,**
- 2. Interest on all the sums to be found due,**
- 3. Further and other relief,**
- 4. Costs.**

According to the attendant Statement of Claim, the Plaintiff on various dates between the 15th day of October 2008 and 10th day of April 2010 did supply the Defendant the following items:

- (i) 6 Laptops and 6 Usb to serial converters on the 15th day of October 2008 valued at US\$ 7,078.32,***
- (ii) HP Printers and HP Scanners on the 5th day of January 2009 valued at US\$ 1,550.92,***
- (iii) Canon 1R 2018 Photocopier Canon LB 5000 Printer ideal 24023 shredder valued at US\$ 1,287.50 on the 16th day of January 2009,***
- (iv) HP Laptop and HP Printers valued at US\$ 2904.60 on the 23rd day of December 2009,***
- (v) HP Laptops valued US\$ 3,309.48 on the 6th day of April 2010.***

According to the Plaintiff, the Defendant has neglected and/or failed to settle the amount due, hence the action.

The Defendant settled its Defence on the 22nd day of August 2012, which to the most extent consists of a general statement of non admission of the Plaintiffs allegations and then goes on to aver that the Plaintiff has not provided the requisite purchase Orders and proof of delivery and tax invoices to enable the Defendant process payment to the Plaintiff and as such the

Defendant is not in a position to process payment. In the Reply to the Defence settled by the Plaintiff on the 6th day of September 2012, the Plaintiff averred that Proof of delivery, Purchase Orders and tax invoices had been delivered to the Defendants after they requested for the same.

At the hearing of the matter on the 4th day of February 2014, the Plaintiff had fully complied with the Orders for Directions whilst the defendant had not. The Defendant had only been able to file the Defendants Skeleton arguments despite the fact that the Orders for Directions were given on the 4th day of September 2012.

Furthermore, when the matter last came before me on the 10th day of October 2013, I gave the Defendants an extension of three weeks within which to comply. That despite, they elected not to comply. It was on that premise that I decided to proceed with the trial.

The Plaintiff only called one witness, Shivkumar Vaidyanathan, PW, a Director in the Plaintiff's Company. His evidence in chief was as per his witness statement which was filed on the 3rd day of April 2013.

It was PW's testimony that between the 30th day of September 2008 and the 16th day of March 2010 the Plaintiff and the Defendant entered into several agreements where the Plaintiff supplied different equipment to the Defendant. That the **first contract** was number **NSM 121** dated 30th September 2008 wherein the Plaintiff supplied equipment worth **K37,727** to the Defendant on invoice number 7382 dated 15th day of October 2008 and delivery note no. 1168 of even date.

That Mr Vidyasagar Nataraj and Mr Sujeet Patel signed for the receipt of the items.

The **second was contract number CW 1466** dated 6th day of November 2008 for the supply of equipment valued at **K6,863.00** on Invoice number 7678 dated 16th January 2009 and delivery note 1402 dated 15th day of January 2009 and signed for on behalf of the Defendant by Mr Grayson Kayamba.

The **third contract was contract number KDM 710** dated 22nd December 2008 valued at K8,267 under Invoice number 7598 dated 5th January 2009 and delivery note number 1289 of even date signed for on behalf of the Defendant by Wilma Nyondo.

The **fourth was contract number SCX 009** dated 12th December 2009 on invoice number 8730 dated 23rd December 2009 on delivery note number 2779 of even date for the value of **K15,482** and signed for on behalf of the Defendant by Pravin Mahadik.

The fifth was contract number CN 1832 dated 16th March 2010 valued at **K17,640** on invoice number 9163 dated 6th April 2010 and delivered on even date on delivery note number 3614 and received on behalf of the Defendant by Milton Sinyangwe.

It was PW's further testimony that the Defendant has failed and or neglected to honour the agreements and as such the Plaintiff has suffered loss and damages.

In cross examination, PW was referred to various documents contained in the Plaintiffs Bundle of Documents which was filed into Court on the 21st day of January 2013. When referred to page 2 of the Bundle, PW asserted that it was a Tax Invoice dated 16th March 2010 from the Plaintiff to the Defendant and contains the Defendant's stamp and a signature by its representative acknowledging receipt.

That on page 8 is another Tax Invoice in respect of Contract number SCX 009 dated 17th December 2009 for the supply of a Lap top and a Printer.

According to PW, the invoice was delivered to the Defendant with Fedex documentation which appears on page 10 of the Bundle. PW conceded that both the Invoice on page 8 and the Fedex document on page 10 do not bear any proof of delivery to the Defendant. That the same applied to the delivery note appearing on page 9 in respect of the same contract.

When referred to page 11 of the Bundle, PW asserted that this was another Tax Invoice relating to contract number CN 1466 for the supply of a shredder. That there is no proof on the invoice that same was delivered. That the Contract in relation to this transaction appears on page 21 of the Bundles.

When referred to clause 7.0 on page 23 of the same contract, PW stated that he understood the clause to mean that payment in respect of the goods delivered was to be made 30 days after delivery and commissioning provided the relevant tax invoice was received by the Defendant, not later than the 25th day of the Month during which the items were delivered.

PW was further referred to page 14 of the Bundle to which he asserted that, that is another Tax Invoice relating to Contract number KDM 710 dated 22nd December 2008 for the supply of a printer and a scanner. That the invoice and the goods were delivered to the Defendant's Lusaka Office as per their instructions and the invoice bears a signature acknowledging receipt. PW conceded that the invoice did not bear the Defendants stamp and he could not remember the Official who received the goods.

As regards the document on page 25, it was PW's evidence that it is an Invoice for the supply of six laptops and 6 USB serial converters. That the goods were supplied to the Defendant and there is a signature of the recipient, although it does not bear the Defendants stamp.

In concluding the cross examination, PW was referred to Clause 4.0 on page 22 of the Bundles which he read.

In re examination, it was PW's evidence that the Fedex documents bears a tracking number which can be clarified with Fedex to confirm that the goods were delivered.

As earlier alluded to, the Defendant did not fully comply as they never filed any witness statement. That therefore marked the end of the case.

In the Plaintiffs Skeleton arguments filed on the 28th day of October 2013, it was the Plaintiff's Advocates contention that the dispute between the parties relate to a commercial contract of sale of goods which contract is regulated among others under the general principles of contract law and **The Sale of Goods Act 1893**⁴ which is applicable to Zambia by virtue of **The English Law (Extent of Application) Act**⁵.

The Plaintiffs Advocates went further to draw the Court's attention to certain Sections under the **Sale of Goods Act**⁴ and citing of Several English and Zambian cases, which I do not find relevant and useful given the facts of this case and the evidence before this Court.

The Defendant's Advocates did as well file skeleton Arguments on the 25th day of November 2013 in which they acknowledge that the Plaintiff and the Defendant did execute formal contracts for the sale of specific goods.

According to the Defendants, apart from Invoice No. 9163 dated 6th April 2010 relating to contract number 1832 in the value of US\$ 3,309.48, the goods allegedly supplied pursuant to invoices 7382, 7598, 8730, 7674 amounting to US\$ 12,821.44 where not received by the Defendants as the goods were not delivered in Chingola to the Group Security Manager and date stamped in acknowledgement as per the terms of the contract. In that respect, reliance was placed on Sections 27 and 29 (1) of **The Sale of Goods Act**⁴

According to the Defendant's Advocates, it is for the Plaintiff to prove their case on the balance of probabilities that delivery of the goods was done as per the contract.

In that respect, the Defendants Advocates drew the attention of the Court to the case of **Galaunia Farms Limited v National Milling Limited and National Corporation Limited**¹ where it was held inter alia that:

“A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him Judgement”.

In conclusion, the Defendant's Advocates submitted that the Plaintiff must prove that the person who received the goods was the Group Security Manager as per the contract. That failure to do so renders a breach of the contract and therefore the Plaintiff cannot claim that they delivered the goods when in actual fact there is no official record of acknowledgement of the goods.

I have carefully taken into consideration the pleadings, the documents contained in the Plaintiffs Bundle of Documents, PW's evidence and the Skeleton Arguments by both Parties together with the authorities cited therein.

Simply put, and restricting myself to the contracts between the parties which contracts are not in dispute, the Plaintiffs case is that they executed five contracts with the Defendant namely Contract number **CN 1832, SCX 009, CN 1466, KDM 710 and NSM 121** on diver's dates.

That they invoiced the goods as evidenced by the respective invoices and delivered the goods to the Defendant for which delivery notes were issued and some were signed for in acknowledgement of receipt whilst others were not.

On the other hand, the Defendant does not dispute having entered into contracts with the Plaintiffs. The Defendant however as per its defence simply puts the Plaintiff to strict proof on the contents of the Statement of Claim and states that its failure to effect payment is due to the fact that the Plaintiff has not provided the requisite purchase Orders, proof of delivery and tax invoices.

After perusal of the aforestated contracts, I have noted that the contracts were standard and some of the germane terms which will assist in the determination of this matter are **Clauses 4.0, 5.0, 6.0, 7.0 and 9.0** (refer page 5 of the Plaintiffs Bundle of Documents) which Clauses state as follows:

“ 4.0 LIQUIDATED DAMAGES

If the Seller shall be unable to deliver goods by the contracted date then they shall pay by way of liquidated damages, a sum representing one per cent of the contract price for every week of delay or part of a week beyond the contractual delivery date up to a maximum of five per cent of the contract price,

5.0 TIME AND PLACE OF DELIVERY

Delivery of.... will be ex stock and to the Purchasers Capital Stores in Chingola KCM Zambia the sellers unqualified and unconditional acceptance of the terms and conditions herein. And time for delivery shall be of essence of this contract,

6.0 INDEMNITY

The Seller shall indemnify the Purchaser against all claims, costs which the buyer may incur and which may arise directly or indirectly from the sellers breach of any of its obligations under the contract,

6.0 PAYMENT TERMS

Payment in respect of the goods delivered under this contract shall be due after 30 days of delivery,

7.0 DEFAULT AND TERMINATIONS

The Purchaser may terminate this contract for any reason on giving 14 days notice in writing thereof to the seller.

9.0 ACKNOWLEDGEMENT

The contractor is requested to acknowledge and confirm acceptance of the contract on terms and conditions stipulated within a period of 14 days of the date hereof. Failure to comply with the request will signify the contractor's unqualified acceptance".

I have taken the task of reproducing the germane terms of the contract because of some of the contentions forming part of the Defendants Skeleton arguments. Also in view of the fact that parties are bound by their pleadings. Parties can therefore only adduce evidence or submit on that which is pleaded.

I am in that respect fortified by the case of **William David Carlisle Wise v EF Harvey Limited**² where the use of pleadings was emphasized as follows:

"Pleadings serve the useful purpose of defining issues of fact and of law to be decided. They give each party distinct notice of the case intended to be set by the other and they provide a brief summary of each party's case from which the nature of the claim or defence may be apprehended".

In addition, in the case of **The Attorney General v Roy Clarke**³ it was held inter alia that:

“A party cannot rely on unpleaded matters except where evidence on the unpleaded matters has been adduced in evidence without objection from the opposing party”.

As earlier alluded to, no evidence was adduced by the Defendant in this matter. It is therefore surprising that the Defendants Advocates would in their Skeleton arguments submit and contend that the goods were not officially received by the Defendant and that it was an express term of the contract that delivery was to be effected on the Defendants Group Security Manager in Chingola and stamped for by the Group Security Manager as per the contract.

I am totally at a loss as I cannot find any like terms under any of the contracts as is being contended by the Defendants in their Skeleton arguments and neither was this pleaded in the defence.

The Defendants Skeleton arguments in that respect are on a tangent with the terms of the contracts as well as the Defence as the averment in the Defence was that the Plaintiff have not provided the requisite purchase Orders and proof of delivery and tax invoices to enable the Defendant process payment to the Plaintiff. In my view the Defendant does not expressly deny having received the goods contained in the contracts from the Plaintiff.

All the Defendant is saying in the Defence at the expense of repetition is that there is need for the Plaintiff to provide the requisite purchase Orders and proof of delivery and tax invoices to enable the Defendant process payment to the Plaintiff.

In the Plaintiff's Reply to the Defence filed on the 6th day of September 2012, the Plaintiff did aver that proof of delivery, purchase Orders and tax invoices have been delivered to the Defendant and the Defendant should therefore

now be able to process payment. It would seem this Reply did not satisfy the Defendant needs.

The Plaintiffs Bundle of Documents which was filed on the 21st day of January 2013 seems to contain various documents ranging from the contracts, tax invoices and delivery notes which I will revert to later.

The first page of the Bundle contains a Statement of Account contains information relating to the Tax Invoices which were raised, the date on which they were raised, the Local Purchase Orders together with the contract numbers, the value of the goods and the names of persons who handled the transactions on behalf of the Defendant. Indeed, it is the duty of the Plaintiff to prove his case on a balance of probability. However having been provided with such information, the Defendant bore the evidential burden of proof to rebutt the Plaintiffs evidence.

As matters stand, the Defendant does not dispute having entered into the contracts nor having raised the Local Purchase Orders, neither did they call the persons named in the statement of accounts to come and give evidence to the effect that they never dealt with the transaction and received the goods.

That as it may be, let me now deal with each specific contract and determine whether the necessary proof of delivery was effected.

Let me begin with Contract number CN 1832 dated 16th March 2010, which appears on pages 4 and 5 of the Plaintiffs Bundle of Documents. The Tax Invoice relating to that contract appears on page 2 of the same Bundle and bears a signature and the Defendants stamp acknowledging receipt. The delivery note appears on page 3 and equally bears a signature and stamp acknowledging receipt. The value of that contract is US\$ 3,309.48.

As earlier alluded to, this transaction and receipt of goods is not disputed by the Defendant, although the Defendant has not made any effort to ameliorate the situation by paying for the same.

The amount of US\$ 3,309.48 is therefore on that basis due and payable to the Plaintiff.

Secondly, Contract number NSM 121 dated 30th day of September 2008. The Tax Invoice number 7382 dated 15th day of October 2008 valued at US\$ 7078.32 appears on page 25 of the Bundle. The delivery note appears on page 26. Both the invoice and the delivery note bear the signature of Vidyasagar Natarajan. There is no allegation of the signature having been forged or fraud and neither was this person called to rebut the evidence that he received the goods on behalf of the Defendant.

It is on that basis my finding of fact that the Defendant received the goods and the documents on pages 25 and 26 of the Bundle suffice as proof of delivery. The amount of **US\$ 7, 078.32** is therefore due and payable to the Plaintiff.

Thirdly, contract number CN 1466 dated 6th day of November 2008, appears on page 21 of the Bundle. The Tax Invoice number 7674 relating to the same appears on page 11. The delivery notes are to be found on pages 19 and 20 of the Bundle and they both bear the signatures and stamps acknowledging receipt of delivery. The amount outstanding on this contract is the sum of **US\$ 1,287.60**.

In my view, there is proof of delivery and therefore the amount of **US\$ 1,287.60** is due and payable to the Plaintiff.

Fourthly, contract number KDM 710 dated 24th December 2008 appears on page 16 of the same Bundle. The Tax Invoice number 7598 appears on page 14 and the same bears a signature of receipt. According to the Statement of Accounts, the dealing Officer on behalf of the Defendant was Wilma Nyondo.

The delivery note number 1289 bears the same receiving signature. Although the addressee is indicated as KCM Chililabombwe, the signature of the recipient is not disputed, neither is there an allegation of fraud nor forgery. On that basis it is my finding of fact that there is proof of delivery and therefore the amount of US\$ 1,550.92 is due and payable to the Plaintiff.

Lastly, contract number SCX 009, the Tax Invoice number 8730 appears on page 8 of the Bundle in the value of US\$ 2,904.60. The delivery note appears on page 9. Although there is no acknowledgement of proof on both the Invoices and the delivery note. The delivery note bears a Fedex way bill number as proof of delivery. That is not disputed nor was the dealing Officer Pravin Mahadik called to come and testify that the goods were not delivered. It is also my finding of fact here that the amount of US\$ 2,904.60 is due and payable to the Plaintiff.

As regards all the relevant documentation contained in the Bundle of Documents which points to acknowledgement of the goods by the Defendant, the Defendant has not pleaded **non est factum**.

I did earlier in this Judgment capture some relevant terms of the Standard Contract entered into between the Plaintiff and the Defendant in relation to these transactions.

Assuming the Plaintiff had not delivered the goods as enshrined in the standard contracts, the Plaintiff then would have been in breach of the contract and the Defendant would have been at liberty to invoke Clauses 4.0, 5.0, 6.0 and 7.0 of the contract. Since the Defendant has not invoked the aforestated Clause, it is a clear manifestation that the Plaintiff fully performed its obligations under the contracts and it follows that the Plaintiff was not at any time in breach of the contract. Neither has the Defendant sued nor counter claimed for breach of contract.

It can therefore clearly be deduced from that , that the Defendant is indebted to the Plaintiff and has willfully neglected and/or failed to settle the outstanding amounts.

In the view that I take, the Plaintiff has proven its case on the balance of probability. The Plaintiff is therefore entitled to the Kwacha equivalent of the sum of US\$16,130.82 at todays exchange rate.

The Kwacha amount due will attract interest at the average short term deposit rate per annum as determined by the Bank of Zambia from time to time from the 9th day of March 2012 being the date of commencement of these proceedings and thereafter at the correct Commercial Bank lending rate as determined by Bank of Zambia till full satisfaction of the Judgement.

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

Dated at Lusaka this 11th day of February 2014.

JUSTIN CHASHI
HIGH COURT JUDGE