

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
AT LUSAKA

2006/HP/1027

(Civil Jurisdiction)

Between:

MUBYANA SIFUWE

PLAINTIFF

AND

ZAMCAPITAL UNIFIED LIMITED

DEFENDANT



Before Hon. Mr. Justice C. F. R. Mchenga SC

For the Plaintiff: P.W. Mwikisa, PW Mwikisa and Company

For the Defendant: H.A. Chizu, Chanda Chizu and Associates

J U D G M E N T

Cases referred to:

1. The Rating Valuation Consortium V The Lusaka City Council [2004]
Z.R. 109
2. Griffiths v Peter Conway Ltd [1939] 1 AII E.R. 685
3. The Wagon Mound [1961] AC 388
4. Horland and Wolff Limited v Burstall and Company (1901) 84 L.T.

5. Cullinane v British "Rema" Manufacturing C. Ltd [1958] 1 Q.B.292
6. Hardley v Boxendale [1854] 23 L.J.Ex 179
7. Victoria Laundry (Windsor) Limited V Newman Industries Limited
[1949] 2 KB 528
8. Roper v Johnston [1973] L.R. 8C.P. 167
9. Dunkirk V Hever [1878] 9 Ch.D. 20
10. Jewelowski v Propp [1944] K.B. 570
11. Undi Phiri v Bank of Zambia [2007] Z.R. 187
12. Eastern Co-Operative Union Ltd v Yamene Transport Ltd. [1988 - 1989]
Z.R. 126

Legislation referred to:

1. Sale of Goods Act 1893

Works referred to:

1. Chitty on Contracts, 21st Edition Vol. 11

The plaintiff, by writ of summons, seeks the following reliefs:

- i. Damages for breach of contract to construct a working windmill pump;
- ii. refund of K10,500,000 spent on a non functional windmill pump;
- iii. K22,000,000 spent on non-used drip irrigation system;
- iv. K60,000,000 spent on farm inputs and farming equipment;
- v. US\$89,673.83 equivalent to K44,836,715 loss of expected vegetable sales;
- vi. K50,000,000 on disused borehole hand pump;
- vii. Interest on (i) and (vi); and
- viii. costs

The defendant counter-claims K5,982,849.99 being the unpaid balance on the construction and installations costs of the windmill. Interest is also being claimed on the amount.

The plaintiff's evidence was that in 2003, he visited the defendant's stand at the Lusaka Agricultural and Commercial Show and came across a windmill they had displayed. After telling them that he wanted to produce vegetables on a commercial scale, they informed him that it could be fitted on a borehole with a hand pump and used for that purpose. It's cost was K16,482,849.99 and in April 2004, he paid a deposit of K10,500,000, leaving a balance of K5,982,849.99. The windmill was installed in September of the same year.

He also testified that he paid Amiran K33,000,000 for one and a half hectares of irrigation equipment but they found it difficult to install the equipment because the windmill was not pumping water. He said the windmill would only rotate and produce water for about an hour or two and then stop. He said, initially, whenever he complained the defendant would attend to it but later they stopped. He said the windmill only started to operate in the expected manner in 2013, when the head was changed but he cannot now grow vegetables as he has run out of money.

Under cross examination, the plaintiff said in 2004 a relative was staying on the farm and taking care of it but he would go there about three times in a month. He admitted that the windmill the defendant constructed was just like the one he saw at the showgrounds and it was mounted on a working borehole that the defendant found he had already sunk.

He also said it is a relative who was present when the windmill was being constructed and that he was not aware that the defendant prepared a report after construction. When he was shown page 3 of the Defendants Bundle of Documents, he admitted that the report indicates that his relative was interviewed and adjustments or modifications were made when requested.

The plaintiff also admitted that the windmill rotated when there was wind or and even with a breeze but not when there was no wind. He also admitted that whenever he would visit the farm, the windmill would be working. He admitted that a balance of K5,982,849.99 was outstanding.

When re-examined, the plaintiff said though the report indicates that installation was completed in March 2005, the windmill did not work and that is why he did not pay the balance. He is willing to pay

because it is now functioning properly. He maintained that from 2005 no vegetables were produced because of the inadequate water supply.

Hurbert Hachilo Hakayobe, a water engineer, was the plaintiff's second witness (Pw2). His evidence was that in 2005, he went to the plaintiff's farm to have a look at a windmill that had been installed. He observed that it was not a type that he had dealt with. He said that when turned manually, it would pump water. He observed that the mast and the plumb of the tower were not correct and said though everything was intact, it was not able to pump water even when there was wind. He said that a windmill which is not standing straight has difficult pumping water. He also said he was not clear on the size of the motor and the turning mechanism for the pump. Neither did he have supplier's information on its capacity. He said he advised the plaintiff to get back to the defendant so that corrections could be made.

Pw2 testified that on a recent visit, he found that the pump was not connected to the windmill. He said it could have broken down because of friction as the wear and tear was visible. He said where the plumb is not correct, wear and tear can lead to a breakdown of the pumping mechanism.

Under cross-examination, Pw2 said he was trained at Natural Resources Development College. He graduated in 1997 and worked for Standards and Lloyds between 1998 and 2005. He is now a freelancer. He said he did not talk to the people who installed the windmill or prepare a report after examining it. He admitted not having literature on the windmill he found and that it was different from the type he was used to. However, he maintained that all windmills operate on same the principle.

When re-examined, he said he did not prepare a report after his visit because he did not think it was necessary. He also said they went to see the defendant's general manager and waited for 2 hours without any success.

The plaintiff's third witness (Pw3) was Martin Kabunda, an agricultural engineer. He testified that in 2004 he used to work for Amiran and plaintiff purchased a drip irrigation system for K33,000,000. After the purchase, he went to confirm the reliability of the water system and on three occasions he found that it was not functioning. Even though there was no water, he installed the system because the plaintiff gave instructions that he goes ahead as he would follow up the water production by the windmill. He said he also gave

the plaintiff a write-up on production, costs, income and profits. He said the costs would be US\$9,000 and the income US\$16,000.

When cross examined, Pw3 admitted not preparing a completion certificate after installation. He said the windmill was not working at the time of the installation but he went ahead because the plaintiff insisted. He also admitted not contacting the installer or knowing when it was installed. He confirmed that the figures he gave the plaintiff were estimates. He said it was possible to have a working windmill and irrigation system but a dry borehole. He also said that poor management could also affect production and that he never went back after installation.

This marked the plaintiff's case.

The defendant's first witness was Shadreck Tembo a machinist. His evidence was that in 2004, the plaintiff came to enquire about a windmill and he was given quotation for K16,482,844.99. He paid K10,500,000, leaving a balance of K5,982,844.99. He said when installing the windmill, they did not change the Mark II pump they found on the borehole. It was his evidence that the windmill worked after it was connected and it pumped water. It was pumping water when

there was wind but it would not rotate and pump water when there was no wind. He also said the caretaker and the other people on the farm used to draw water from it. He said since there was a year's guarantee, they used to check on its performance whenever they were contacted. They only stopped going there when the balance was not paid.

It was also his evidence that they prepared reports showing how it was operating whenever they attended to the complaints and he referred to page 3 of the Defendant's Bundle of Documents. He said since they did not supply the drip irrigation, they had nothing to do with US\$ 44,000 loss the plaintiff alleges he suffered.

When cross-examined, Dw1 he said he trained at Lusaka Trades Training Institute where he attended a machinists course. He specialises in making parts for windmills and he denied the suggestion that the windmill was experimental. He said it was perfect and he carried out a site inspection where he found a hand pump, a borehole and a tank. He said they removed the hand pump but maintained the Mark II pump that was being used with the hand pump, put up a tower, the motor, the turntable (gearbox) and the tail to guide the windmill.

He said the motor did not have any problem and it was only slow when there was no wind. It required lubrication of the bearings and all moving parts and they attended to that because it was still under guarantee. He said he was not aware that the tower was inclined and said that problem was with the way the hand pump was installed. Since they found it in place, they did not break the existing system, they tried to align the tower with it.

It was also his evidence that the windmill stopped working when they stopped servicing it because the plaintiff did not pay the balance. He admitted that the product was still under development and they did not provide its performance characteristics. It was in the consignment of the first windmills that that they installed and that some of them are still working. He said when the plaintiff saw them he did not indicate what he wanted the windmill for and he denied having a discussion with him on what it was going to be used for.

When re-examined, Dw1 said the complaint on page 4 of the Defendant's Bundle of Documents was that it was making a lot of noise and it was addressed by checking the bearings, the rods, the bolts, the nuts and by lubrication. He said their instructions when installing the

windmill where to fix it on an existing pump. He said the windmills he said are still working were installed in Chongwe and Chilanga.

The second defence witness (Dw2) was Henry Mbao and his evidence was that in 2008, he approached the defendant for a windmill. He paid for the one that cost K26,000,000 including accessories. It was installed on an existing borehole and the defendant's workers used to service it regularly service. Because it had a guarantee, for one year it was serviced at no cost. Whenever they delayed, it would produce a noise. He also testified that when there was plenty wind it would run fast but would stop if there is no wind. He said he knows about seven windmills that were installed at the same time as his that are working.

Under cross-examination, Dw2 said his farm was two hectares and he was using a 4000 litre water tank. He had two taps and at times he uses a sprinkler. He said he does not know the type of windmill that was installed on his farm.

The parties were invited to file in written submissions and at the close of the prescribed period, the only submissions that were received were those filed in behalf of the plaintiff.

Submitting on behalf of the plaintiff, counsel referred to the case of **The Rating Valuation Consortium v The Lusaka City Council (1)** and submitted that even though there is no written agreement between the parties, since it is not in dispute that the defendant sold a windmill to the plaintiff, the court must discern the intention of the parties on the evidence before it. He referred to **Griffiths v Peter Conway Ltd (2)**, Section 14 (3) of the Sale of Goods Act, Chitty on Contracts, 21st Edition Vol. 11 paragraphs 4169 and 4170 and submitted that the seller has a duty to provide goods that are reasonably fit for the purpose for which they are required. He submitted that since the defendant was aware that the plaintiff intended to use the windmill for drip irrigation, his failure to supply and install one which was able to provide water for that purpose meant that they had not met their obligations. The plaintiff is therefore entitled to a refund of the K10,500,000 spent on the non functional windmill.

In support of the claim for a refund, counsel also referred to the cases of **Horland and Wolff Limited v Burstall and Company (3)**, **Cullinane v British "Rema" Manufacturing C. Ltd (4)** and submitted that since the defendant failed to supply a functioning windmill, the plaintiff is entitled to a refund as the goods were not as per contract.

Coming to the claim for US\$135,000 equivalent to K540,000,000 for expected earnings from vegetable sales, counsel referred to the cases of *The Wagon Mound* (5), *Hardley v Boxendale* (6), *Victoria Laundry (Windsor) Limited v Newman Industries Limited* (7) and submitted that the plaintiff's loss of expected earnings could be directly connected to the defendant's failure to install a functioning windmill. He submitted that the loss could be foreseen as the defendant knew that the plaintiff required the water to plant tomatoes, potatoes and cabbages for sale at a profit.

Counsel also referred to the cases of *Roper v Johnston* (8), *Dunkirk V Hever* (9), *Jewelowski v Propp* (10) and submitted that the onus is on the defendant to show that the plaintiff ought to have taken reasonable steps to mitigate his situation. Further, he submitted that even when mitigating his situation, the plaintiff was not supposed to risk huge amounts of money.

Finally, counsel referred to the case of *Undi Phiri v Bank of Zambia* (11) and submitted that the defendant's defence that the windmill stopped functioning because it was not being serviced should be dismissed because it was not pleaded and it lacked veracity.

On the evidence before me I find that in March, 2004 the plaintiff bought a windmill costing K16,482,844.99 from the defendant. He paid a deposit of K10,500,000 leaving a balance of K5,982,849.95. The sale price included construction and installation. I also find that in September 2004, the defendant installed the windmill on the plaintiff's farm. As was agreed by the parties, it was installed on a borehole on which a hand pump had previously been installed and it was supposed to use the same pump that the hand pump was using. Further, it is my finding that at the time it was installed, the plaintiff was not resident on the farm but there was a care taker.

In addition, I find that at or about the time of the installation, the plaintiff paid Amiran K33,000 to install a drip irrigation system. It was installed but was not commissioned by the installer.

What is in dispute is whether the plaintiff disclosed what he wanted to use the water the windmill was going to pump for; whether the windmill worked and pumped any water and if not, why it did not; why the plaintiff did not produce any vegetables and if the defendant can be held liable for the failure.

According to the plaintiff, he told the defendant's employees that he

wanted the windmill because he intended to produce vegetables commercially. But Dw1, the person responsible for the installation, denied the plaintiff's claim that he told them what he wanted to use it for. I find it rather odd that the plaintiff would have approached the defendant and paid for a windmill to replace a hand pump without disclosing why it was the case. I do not believe Dw1's evidence that the plaintiff did not disclose the purpose of the windmill. I accept the plaintiff's evidence that he did and find that before installation, the plaintiff informed the defendant that it was for the commercial production of vegetables.

Coming to the question of whether the windmill worked and pumped water, the plaintiff said it could only run for an hour or two and thereafter it would stop pumping water. Pw2 said it could only pump water if it was manually rotated and it did not work even when there was wind. He said that was because it was inclined. Pw3 said he failed to install the drip irrigation because there was no water on the 3 occasions that he went there. On the other end, Dw1 says that the windmill was functioning properly and water was being pumped when there was sufficient wind. He also said the caretaker and other persons were using the water. Further, he disputed Pw2's evidence that the tower was inclined. He said the hand pump over which the windmill

was constructed was the one that was not properly fitted and they had to align the windmill with it. He said this is because they found a pump already fitted on the borehole and they could not break it.

On the evidence before me, I find that the windmill was producing some water but with difficulty. I note that the product was in its developmental stage and there were no details on its production capacity at the time. Though Dw1 disputed Pw2's evidence that the tower was inclined, it is apparent that it was the case. If all was in order, he would not have said that the "problem" was with the way the pump had originally been fitted. Even if we have no contract setting out the terms on which the defendant was going to provide the windmill, the defendant has in the counter claim demanded the balance on the "cost of construction and installation". This establishes that the defendant's responsibilities did not end with the construction of a mechanically sound windmill, it extended to its installation in a manner that enabled it to function properly.

I find that the windmill failed to pump the amount of water that the plaintiff required because it was not properly installed. I accept Pw3's evidence that on three occasions that he visited the farm he

failed to commission the irrigation system because there was no water. Dw1's evidence that it was producing sufficient amounts of water is not true and I do not accept it.

The defendant cannot escape liability by claiming that the agreement was that the windmill was to be fixed on an existing pump which turned out to have not been properly fitted. If the problem was with the manner in which the pump was fitted, they should have informed the plaintiff before attempting to "align" the windmill with the improperly fitted pump. Had they done so and the plaintiff had insisted that they go ahead, they could have rightly claimed that its failure to function was not their fault. Given that the product was in its developmental stage the defendant should have exercised caution but they did not.

Having found that the windmill did not pump water because it was not properly installed, I accept the submission on behalf of the plaintiff that his failure to grow the vegetables was on account of the defendant's failure to provide adequate water. Consequently, the defendant must be held responsible for the loss of earnings the plaintiff suffered because he could not grow and sale vegetables. The

loss was foreseeable because defendant knew what the water was going to be used for watering a commercial crop of vegetables.

In the case of **Eastern Co-Operative Union Ltd v Yamene Transport Ltd.**

(12) it was held that:

A plaintiff who has a profit-making chattel damaged beyond economic repair is under obligation to replace that chattel and the poverty or otherwise of the plaintiff is irrelevant. Credit should be given for the salvage when limiting the period within which the respondent should have mitigated his loss by purchasing a replacement chattel of similar age and value.

It follows, that even if the windmill's inability to provide water was not rectified until recently, the plaintiff should have mitigated his situation by taking steps to rectify the problem and ensure that after the first planting season, there was sufficient water to irrigate the next crop. He did not.

I will now revert to the claims as they have been set out in the writ:

1. The claim for damages for breach of contract to construct a working windmill pump; the plaintiff lost the opportunity to earn profits from the sale of vegetables because the defendant failed to install a working windmill. This being the case, I find that the damages he is entitled to will be in the form of lost earnings from vegetable sales.

2. The refund of K10,500,000 spent on a non functional windmill pump; the evidence before me is that the windmill is now functional and the plaintiff is willing to pay the outstanding balance, this being the case, I find it inappropriate to order a refund.
3. The claim for K22,000,000 spent on non-used drip irrigation system; the failure to use the irrigation system denied him the opportunity to grow vegetables and as with the other claims, the only damages that arise are loss of earnings from sales. This claim fails.
4. The claim for K60,000,000 spent on farm inputs and farming equipment; this expenditure will be taken into account as the profit he lost from vegetable sales are being determined, it cannot be claimed separately.
5. The next claim is for US\$89,673.83 equivalent to K44,836,715 loss of expected vegetable sales. I have found that the defendant was responsible for the plaintiff's failure to plant a crop in the first season and that the plaintiff was supposed to take steps to mitigate the situation. This being the case, the plaintiff is only entitled to damages for the loss of vegetable earnings for one season in 2004/2005. The amount is to be assessed by the learned Deputy Registrar who will consider how much the plaintiff would have earned on the one and a half hectares.

6. On the claim for K50,000,000 for disused borehole hand pump; other than the failure to earn profits from the sale of vegetables, I find no evidence to support the claim for this amount.

Coming to the counter-claim, I am satisfied that the claim for the unpaid K5,982,849.99 has been proved, in fact the plaintiff does not dispute that the money is outstanding.

Both the plaintiff's award for loss of earnings and the defendant's awards for the unpaid balance will attract interest at the short term deposit rate from the date of writ to the date of judgment and thereafter, at the current bank lending rate till payment.

The parties will bear their own costs.

Delivered in Open Court at Lusaka this 14th day of January, 2015


C. F. R. MCHENGA SC
JUDGE