IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0048**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

BELL EQUIPMENT ZAMBIA LIMITED **PLAINTIFF**

AND

MECHANISED MINING SOLUTIONS ZAMBIA LIMITED **DEFENDANT**

BEFORE HON. MR. JUSTICE NIGEL K. MUTUNA THIS 7TH DAY OF AUGUST 2015

FOR THE PLAINTIFF: **MS L. MABOSHE AND MR. N. SIAMOONDO OF CORPUS LEGAL PRACTITIONERS**

FOR THE DEFENDANT: **MS K. KAUNDA OF MESDAMES K.N. KAUNDA ADVOCATES**

J U D G M E N T

CASES REFERRED TO:

1) *Jacobs vs. Batavia and General Plantation Trust Limited (1924) 2 A Ch d 287*
2) *Y and B Transport vs. Supersonic Motors Limited Appeal No.106 of 1999*
3) *Kalusha Bwalya vs. Chadore Properties and another Appeal No.222 of 2013*
4) *L'Estrange vs. Graucob Limited (1934) 14 AC 337/(1934) 2KB 394*

5) *Luke Phiri vs. David Tembo (2011) ZR 189*
6) *Printing and Numerical Registering Co. vs. Sampson (1875) 19 Eq 462*
7) *Mumba vs. Zambia Fisheries and Fish Marketing Corporation Ltd (1980) ZR 135*
8) *Chuuya and another vs. Hankwenda SCZ Judgment No.3 of 2002*
9) *Selly Yoat Assets Management Limited vs. Remote Site Solutions Zambia Limited (2010) Vol. 2 ZR 35*
10) *Colgate Palmolive (Z) Inc vs. Chuka and others Appeal No. 181 of 2005 (unreported)*

Other authorities referred to:

1) *Chitty on Contracts: General Principles, volume 1, 29th edn by H.G. Beale General editor, Sweet and Maxwell and Thomson Reuters, London page 4*
2) *Black's Law Dictionary, by Bryan A. Garner, 6th edn, Thomson West USA, page 322*
3) *Sale of Goods Act, 1893 of the United Kingdom*
4) *Companies Act, Cap 388 of the Laws of Zambia*

The Plaintiff, Bell Equipment Zambia Limited, commenced this action on 4th February 2015. The claim as it is endorsed on the writ of summons is for the following relief:

1) Payment of the sum of USD 171,442.06 being the outstanding balance on the purchase price of a new Bell Model L2106 E Front loader supplied to the Defendant by the Plaintiff or any sum found to be due;
2) Interest on the sum found due to the Plaintiff;
3) Damages for breach of the agreement in relation to the payment terms for the new Bell Model L2106E Front loader;
4) Legal costs; and
5) Any other relief the court may deem.

The Defendant counter claimed for: an account of the use of the Bell L2606D Front End loader; an account of the disposal value of the Bell L2606D Front End Loader; damages for loss of profit and deprivation of the use of the Bell L2606D Front End Loader; plus interest and costs.

The undisputed facts of this case are as follows. On or about 22nd December 2011, the Plaintiff and the Defendant entered into an agreement referred to as the loan agreement. By the said agreement the Plaintiff agreed to sell to the Defendant a New Bell L2106E Front End Loader (L2106E) at an agreed price to be paid as follows: an initial upfront deposit in the sum of USD125, 000.00; followed by three equal monthly instalments of USD74, 176.40, each. The first of such monthly installment would begin on 20th January 2012 the other two subsequent payments would be due and payable on 20th February 2012 and 20th March 2012. It was a further term of the agreement that the Plaintiff would charge interest on late payment at the rate 1.50% per month and a further charge of USD50 for any reminder sent to the Defendant by the Plaintiff indicating a late payment. It was also agreed that should the Defendant default in payment of any one installment and the account goes in arrears, the Plaintiff had the right to immediately repossess the L2106E.

On 22nd October 2012, the Plaintiff wrote to the Defendant informing the latter that it intended collecting the L2106E from a person known as Yolonimo Banda, DW. Further that it would hold the equipment at its premises until the Defendant paid the sum of USD160, 460.00 outstanding on its account. At some point the Defendant gave to the Plaintiff the equipment known as Bell L2606D Front End Loader (L2606D) to secure the loan agreement. As a consequence of this, on 20th June 2013, the Plaintiff wrote to the Defendant indicating that it intended repossessing the L2106E and rebuilding it for resale purposes as well as reselling the L2606D. For purposes of achieving its intention to sell the latter equipment, the Plaintiff informed the Defendant that it was in the process of quoting for spares to rebuild the equipment before selling it.

The Plaintiff's contentions as they are contained in the statement of claim are that it entered into an agreement to supply to the Defendant the L2106E at

the cost of USD347, 529.20. The said purchase price was to be paid by way of an upfront deposit of USD125, 000.00 and three equal monthly instalments of USD74, 176.40. The Plaintiff delivered the equipment to the Defendant and the latter paid the upfront deposit of USD125, 000.00. The Defendant however failed to settle the three monthly instalments which prompted the Plaintiff to engage the Defendant on 30th November 2011, with a view of invoking the default clause by repossessing the equipment. The Defendant failed to release the equipment prompting the Plaintiff to demand payment of the outstanding amount of USD171, 442.06 in full by the Defendant. Despite the Plaintiff's claim the Defendant has failed and or neglected to settle the amount owing.

The Defendant's contentions as they are contained in the defence are as follows. The parties did enter into an agreement for the Defendant to purchase the L2106E by way of a credit sale as alleged by the Plaintiff but that the price was not fixed at USD347, 529.20. That the Defendant is not in default of payment of the agreed monthly instalments but that the equipment is subject to arbitration proceedings between the Defendant and Konkola Copper Mines Plc (KCM). As a consequence of this, the equipment is trapped at the KCM premises, which state of affairs the Defendant communicated to the Plaintiff. In view of the non-availability of the equipment, the Plaintiff sometime in May or June 2012, took possession of the L2606D belonging to the Defendant and holds a lien over the said equipment. Further, that the Plaintiff undertook to sell the said L2606D for purposes of recovering the outstanding balance on the L2106E. This was done on the understanding that the L2106E being trapped at the KCM premises, in view of an injunction, could not easily be removed from the KCM underground premises. That instead of selling the L2606D, the Plaintiff has retained possession of it. The Defendant therefore denied that it is indebted to the Plaintiff but that it is the Plaintiff which should render an account to the Defendant on the proceeds and or sale of the L2606D.

As regards the counter-claim, the Defendant contended that at the time the Plaintiff took possession of the L2606D it was in good and perfect working

condition as such some of the Defendant's customers were ready to hire it for valuable consideration but could not do so as it had been deprived of possession of the same by the Plaintiff. That the Plaintiff has retained possession and custody of the L2606D from the year 2012 and has not accounted to the Defendant what use it has put it to or its disposal value.

In response to the counter-claim, the Plaintiff contended that its possession of the L2606D was subject to the terms agreed upon by the parties. Therefore, the obligation to account does not arise especially that there has been no use or disposal of the L2606D by the Plaintiff. It was also contended that the L2606D was taken as a lien on the outstanding amount on the L2106E and was at the material time not in a good state of repair. That the Plaintiff could not proceed to sell it because the Defendant failed or refused to approve the quotation it had obtained for purposes of putting the L2606D in a sellable condition. Lastly that it put the Defendant to strict proof of its alleged loss and denied that the Defendant had suffered any damages as claimed.

At trial, the parties called a witness each. For the Plaintiff, the witness was Samson Chingozho, PW, whose evidence was as follows; that he was and is the Finance Director in the Plaintiff; that on 24th December 2011, the Plaintiff and the Defendant executed a contract for the sale of the L2106E. The negotiations for the said contract were done by Bruce Paterson and Otto Marais representing the Plaintiff and Defendant, respectively.

The terms of the contract were that the Defendant would make an upfront deposit of USD125, 000.00 and pay the balance of USD222, 529.20 over a period of three months, ending on 20th March, 2012. See page 2 of the contract which is at page 3 of the Plaintiff's bundle of documents. The total price of the L2106E was therefore USD347, 529.20, which amount would attract interest on the unpaid balance at an agreed rate of 1.5 percent per month.

After the parties agreed upon the terms, the Defendant paid the upfront deposit of USD125, 000.00 on 19th December 2011 and the Plaintiff issued receipt No.RCT10033 in acknowledgment of the payment. See page 5 of the

Plaintiff's bundle of documents. In pursuance of the said payment, the Plaintiff delivered the L2106E to the Defendant on 22nd December 2011. Following delivery, the Defendant only made two payments of USD40, 000.00 on 18th June 2012 and USD15, 000.00 on 26th July 2012 respectively. See pages 8 and 9 of the Plaintiff's bundle of documents for the receipts numbered RCT10801 and RCT10883. The total amount paid was therefore USD180, 000.00 which left a balance outstanding of USD162, 614.60 (the outstanding amount) before interest. The Defendant continued to default in making payment which prompted the two parties to hold a meeting in October 2012 at which it was agreed that the Plaintiff should take and hold a lien on the L2606D, an older equipment. The primary purpose of the meeting was for purposes of the Plaintiff enforcing its right to repossess the L2106E but it was not available because it was held subject to an injunction in arbitration proceedings between KCM and the Defendant. Therefore, the L2606D was offered as security pending the Defendant's remittance of the outstanding amount.

The evidence revealed further that the Defendant continued to default and on 19th June 2013 a meeting was held at the Defendant's offices where DW as Managing Director of the Defendant reiterated the Defendant's commitment to settle the outstanding amount. It was also agreed that the Plaintiff could go ahead and sell the L2606D if the Defendant continued to default and if the Plaintiff could find a willing customer. See pages 11 to 14 of the Plaintiff's bundle of documents for the minutes of the meeting, specifically paragraph 3.3.1 at page 13. The Plaintiff then went ahead to examine the L2606D and obtain feedback from potential customers and it wrote to the Defendant on 20th June 2013 to inform the Defendant that the equipment required repairs to be done to it before it could be placed on sale. The letter is at pages 15 and16 of the Plaintiff's bundle of documents. In response to the said letter, DW wrote to the Plaintiff on 24th June 2013 agreeing to the need to repair the L2606D subject to the Defendant's approval of the repair costs. See page 17 of the Plaintiff's bundle of documents for the letter. The Plaintiff went ahead to submit the repair costs to the Defendant but the Defendant did not respond

and later, on 16th January 2014, DW confirmed the Defendant's debt to the Plaintiff as standing at K869, 422.16 which at the then kwacha/dollar rate of K5.35 to USD1, amounted to USD167,532.76. The confirmation was made to the Plaintiff's auditors Messrs Deloitte and Touche by way of letter dated 13th January 2014 which appears at page 18 of the Plaintiff's bundle of documents. As at 30th April 2015 the principal amount outstanding was USD162, 614.60 plus interest in the sum of USD98, 006.61, bringing the total due to USD265, 539.37. This amount remains outstanding and the Defendant has prevented the sale of the L2606D making it impossible for the Plaintiff to recover the moneys due to it.

In cross examination PW's evidence revealed that the total amount claimed by the Plaintiff is USD295, 000.00. As regards the market value of the equipment at the time of the agreement, the evidence revealed that it was approximately USD247, 000.00 while in the agreement at page 2 of the Plaintiff's bundle of documents it is placed at USD293, 500.00. PW explained the differences in the figures on account of the fact that the instalments agreed upon included interest. Further that the Plaintiff has acknowledged receipt of the total sum of USD 180,000.00 as per receipts at pages 5, 8 and 9 of the Plaintiff's bundle of documents. He also explained that the amount of K844, 151.52 appearing at page 29 of the Defendant's bundle of documents converts to the amount claimed in United States dollars in the statement of claim at the rate of K5.33 to USD1.

As regards the remedy for default, the evidence revealed that the contract indicated repossession of the equipment. It also revealed that, the equipment referred to at page 10 of the Plaintiff's bundle of documents is the L2606D which has been in the custody of the Plaintiff since June 2012. Further that it was to be held by the Plaintiff at its Kalulushi premises until the outstanding amount of USD160, 460.00 was paid in full. That if the amount is not paid in full the property will remain that of the Plaintiff as sole owner. It also revealed that the Plaintiff has not sold the equipment because the Defendant has not admitted that it has failed to pay the amount outstanding. Therefore, the Plaintiff now wishes the court to enforce the agreement. In

doing so, the Plaintiff wishes to sell the two equipment and apply the proceeds of sell to the amount outstanding.

As regards the sell of the L2606D, the evidence revealed that the Plaintiff did not sell the equipment because the Defendant did not approve a quote submitted to it by the Plaintiff for the repairs intended to be done on the equipment. That the said quotation was not before the court. And that since the equipment was not repaired it is not useful.

In re-examination PW's evidence revealed that the Plaintiff did not repossess the L2106E because it was at KCM under an injunction, but that the Defendant did not give the Plaintiff any documents on the injunction until much later. It revealed further that the Plaintiff had not sold the L2606D because there was need to effect repairs on it and the Plaintiff was hopeful the Defendant would settle the outstanding amount as it kept promising to pay. The evidence also revealed that the Plaintiff was intent on selling both the L2106E and L2606D because the latter equipment was old and it was not expected to fetch an amount that would offset the debt.

The evidence of DW, Yolonimo Banda was that he is a mining engineer and director in the Defendant. That the Defendant was mainly carrying out primary development contracts at KCM, Nchanga underground mine.

The evidence revealed further that the parties have been in business and have developed a commercial relationship whereby the Plaintiff would supply and the Defendant purchase heavy equipment from the Plaintiff on terms specified and incorporated in written documents. These machines were used and deployed for purposes of mining development usually at KCM.

It also revealed that the L2106E which is the subject matter of the dispute was sold to the Defendant by the Plaintiff at the total price of USD347, 529.20. The terms of payment were that an initial deposit of USD125, 000.00 would be paid before delivery of the equipment and the balance would be paid in three equal monthly instalments of USD74, 176.40. The latter condition is as per clause 4 of the loan agreement at pages 1 to 4 of the Defendant's bundle of documents. The Defendant paid the initial deposit of USD125, 000.00 and

the Plaintiff acknowledged receipt through an email dated 29th March 2012 at page 6 of the Defendant's bundle of documents. It is also reflected in the Plaintiff's statement of account produced at page 20 of the Defendant's bundle of documents. Further that, this statement of accounts reflects other payments of K196, 000.00 paid on 18th June 2012 by cheque number 1629 and K73, 500.00 paid on 26th July 2012 by cheque number 00645.

As regards the other terms and conditions of the agreement, the evidence revealed that it was agreed that the Plaintiff would retain ownership of the L2106E until the purchase price was paid in full. That in the event of default of payment of one instalment, the Plaintiff would be entitled to charge interest and retained the right to repossess the equipment. The remedy of repossession, the evidence revealed was the primary remedy that the Plaintiff was entitled to resort to.

The evidence further revealed that on expiry of the three month period provided for the payment of the three instalments, the Defendant had not finished paying for the equipment because the Defendant's contract with KCM in relation to which the equipment was to be used was terminated by KCM. Consequent upon the said termination, the dispute was referred to arbitration before the International Chamber of Commerce, ICC sitting in Mauritius. Following from the termination of the contract and as a result of various breaches committed by KCM, several equipment belonging to the Defendant including the L2106E were held for preservation purposes under a court order in favour of KCM. The equipment is still being held underground at KCM pending the conclusion of the arbitration proceedings. The Defendant was prompted to inform the Plaintiff of this state of affairs especially in relation to the L2106E as is evidenced from the minutes of the meeting held by the two parties on 19th June 2013 at pages 21 to 24 of the Defendant's bundle of documents and a letter from the Defendant to the Plaintiff at page 27 of the same bundle. At the said meeting, the parties agreed that the Defendant would surrender to the Plaintiff the L2606D which it had already purchased so that the Plaintiff could sell it and apply the proceeds thereof to the

outstanding amount on the L2106E. This is evidenced by the emails produced at pages 12 to 19 of the Defendant's bundle of documents.

The evidence also revealed that the Plaintiff took possession of the L2606D in June or July 2012 with the intention of selling it to apply the proceeds of the sell to the outstanding balance on the L2106E of K786, 385.94 as per the Plaintiff's statement dated 14th June 2014 at page 20 of the Defendant's bundle of documents. These facts notwithstanding, the Plaintiff on 20th June 2013, gave notice to the Defendant of its intention to repossess the L2106E as is evidenced by the letters at pages 25 and 26 of the Defendant's bundle of documents. Further, this was despite the Defendant authorising the Plaintiff by letter dated 24th June 2013 to undertake reasonable refurbishment to the L2606D.

The evidence went on to reveal that the Plaintiff has gone ahead and instituted this claim for the sum of USD171,442.06 despite it failing to account for the use or sale of the L2606D to the Defendant. Further that, the cost of depreciation that the L2606D has suffered whilst in the possession of the Plaintiff must be borne by the Plaintiff. The Defendant has also lost income it would have earned from hiring out the L2606D whilst it has been in the possession of the Plaintiff.

In cross examination DW's evidence confirmed that the two parties had entered into the agreement for the Defendant to purchase the L2106E at a price of USD347, 529.0.20. That of this amount the Defendant paid the sum of USD170, 000.00 and that there is no amount owing from the Defendant to the Plaintiff because of the repossession document. The evidence also confirmed that the L2106E is still in the possession of KCM on account of a dispute between the Defendant and KCM. Further that there is no document in the Defendant's bundle of documents that shows that the Defendant informed the Plaintiff of the arbitration proceeding in respect of the dispute between the Defendant and KCM.

The evidence also revealed that the L2106E was new at the time the Defendant took possession of it whilst the L2106D had defects when it was surrendered to the Plaintiff. That the Plaintiff communicated this fact to the Defendant.

This was the evidence that was tendered during the trial. At the conclusion of the trial the parties filed submissions. In the Plaintiff's submissions Ms Maboshe and Mr. N. Siamoondo argued that there was a valid agreement entered into between the Plaintiff and Defendant which was witnessed by the loan agreement. They defined contract in relation to **Chitty on Contracts: *General Principles; Black's Law Dictionary*** and the ***Sale of Goods Act 1893.*** It was also argued that in terms section 22(1) of the ***Companies Act,*** the Defendant as an incorporated company has the capacity to enter into a contract. Counsel argued further that the intentions of the party as to when property in the L2106E would pass to the Defendant is stated in clause 6.1 which is that the equipment was to remain the property of the Plaintiff until it was fully paid for. As regards the issue whether or not there was a breach, it was argued that the Defendant breached the agreement because it failed to pay for the L2106E in full. It was also argued that a further breach was caused by the Defendant causing the equipment to be encumbered by the KCM injunction. Counsel argued further that in terms of clause 9 of the loan agreement the consequences of a breach are that the Plaintiff will be entitled to repossess the equipment. This, it was argued, is in line with the provisions of the ***Sale of Goods Act*** which stipulates that an unpaid seller shall hold a lien over the goods he sells.

As regards the L2606D, counsel argued that the said equipment was only taken by the Plaintiff as a lien and not repossessed. It was argued that only the L2106E could be repossessed as it was the subject matter of the loan agreement. The Plaintiff, it was argued, did not therefore have a right to sell the L2606D as this was subject to the Defendant's prior approval of the cost of spares for rehabilitating it.

Counsel argued further that the Plaintiff was unable to exercise its right to repossess the L2106E because as is evidenced by the minutes of the meeting of 19th June 2013 and letter of 24th June 2013, KCM put it beyond the reach

of the Plaintiff. These documents it was argued should be read with the loan agreement as they show that the L2606D was to be sold after it was repaired at a cost to be agreed by the parties. Counsel relied on the case of ***Jacobs vs. Batavia and General Plantations Trust Limited (1)*** in urging the Court to read the loan agreement with the other two documents.

As regards the counter claim, counsel argued that the Plaintiff did not dispose of the L2606D because the Defendant did not approve nor reject the repair costs required to put it in a sellable state. Since it was not sold the Plaintiff cannot be called to render an account. Further, and for the same reason, the Plaintiff cannot be called upon to account for the use of the L2606D.

Counsel prayed that the Plaintiff's claim should succeed and the counter claim fail.

The Defendant's final submissions are a 25 page document. Pages 1 to part of page 11 are counsel's recital of the pleadings and evidence. I will not in this judgment repeat this portion of the submissions because I have already summarized the pleadings and evidence in the earlier part of this judgment. In the submissions proper counsel for the Defendant Ms K. Kaunda argued that the relationship between the Plaintiff and the Defendant was governed by the loan agreement. That the said loan agreement terminated on 20th March 2012, when the last instalment fell due and the Defendant defaulted. Further that the instalments remained unpaid for the reasons advanced by the Defendant until two payments of K75, 000.00 and USD40, 000.00 were made on 23rd July 2012 and 18th August 2012. She argued that the evidence shows that there was nothing to suggest any intention to repossess the L2106E by the Plaintiff until 2nd October 2012. It was argued that on this day the Plaintiff took possession of the L2606D for purposes of recovering the outstanding amount of USD160, 460.00 on condition that if the said sum was not paid the equipment would remain the property of the Plaintiff. Counsel argued that the Plaintiff at this point had exercised its right to repossess the L2106E and instead opted to take the L2606D. As such in terms of clause 9 of the loan agreement, the Plaintiff exercised its primary remedy of repossession at its election of taking the L2606D. It was argued that reference

should be made to the decision in the case of ***Y and B Transport vs. Supersonic Motors Limited (2)*** which interprets section 41 of the ***Sale of Goods Act*** 1893 on the rights of an unpaid seller's lien in respect of the goods. Counsel argued that by taking possession of the L2606D and signing the second agreement at page 10 of the Plaintiff's bundle of documents, the Plaintiff consciously bound itself to the terms and conditions of the said agreement. Having done so, the effect of the second agreement is that, extrinsic evidence is not admissible to add to, vary or subtract from the agreement because it is a written agreement. Counsel referred to cases of ***Kalusha Bwalya vs. Chadore Properties and another (3)*** and ***L'Estrange vs. Grancob Limited (4).*** Arguing in the alternative, counsel submitted that the Plaintiff had no right to sue for the recovery of the purchase price because it should have instituted proceedings to recover the L2106E. This she argued is on account of the commitment made by the Plaintiff's director of finance as is evidenced by the minutes of the meeting of 19th March 2011. The Plaintiff, it was argued, as a matter of public policy is bound to the contract it signed as per the holding in the case of ***Luke Phiri vs. David Tembo (5)*** quoting Sir George Jessel in the case of ***Printing and Numerical Registering Co. vs. Simpson (6)***. Counsel went on to argue that if the Plaintiff did not understand the content of the agreement of 2nd October 2012, the onus lies on it to explain that it had a contrary understanding. Further that the allegation that the L2606D is merely being held as a lien is untenable because parole evidence is not admissible. Counsel relied on the cases of ***Kalusha Bwlaya (3)*** and ***Mumba vs. Zambia Fisheries and Fish Marketing Corporation Ltd (7)*** for the two contentions. As regards the latter contention counsel argued that in any event the issue of the lien was not pursued with vigour.

As regards the claim for the outstanding amount, counsel argued that the Plaintiff is not entitled to the said amount as it has exercised its lien over the L2606D. She argued that the essentials of a lien show that it is a debt which gives rise to a lien and it must be due and not accruing. Therefore, since the Plaintiff's claim includes a debt accruing after the possession of the L2606D the same is untenable at law. Further that following the Plaintiff's taking of

possession of the L2606D, there is no justification for continuing to accrue interest because the Plaintiff had in its possession an equipment of value from which it would have generated income. Counsel relied on the case of ***Chuuya and another vs. Hankwende (8)*** in which it was argued that a court could order an inquiry to determine income withheld where a creditor holds in his possession a property belonging to the judgment debtor from which income could be generated.

In her concluding remarks counsel argued that the Defendant is entitled to claim on the counter claim in view of the evidence and documents. The two, it was argued, show that the Plaintiff took possession of the L2606D as per the second contract for purposes of recovering the outstanding amount on the L2106E in the sum of USD160,000.00. The Plaintiff has admitted that the equipment had value. Lastly that there were other commercial entities that could have hired the equipment. Her prayer was that the Plaintiff's claim should be dismissed and the Defendant's counter claim upheld.

The determination of this matters lies in the interpretation to be given to the loan agreement entered into by the parties, the letter signed by the parties on 2nd October 2012, the minutes of the meeting held on 19th June 2013 and the correspondence passing between the parties subsequent to the meeting of 19th June 2013. I will begin with the loan agreement. The loan agreement at clause 2 provides for the description of the equipment sold to the Defendant as being New Bell Model L2106E Front End loader. The purchase price and mode of payment is provided for under clause 4 thus: USD125,000.00 being the upfront deposit; and thereafter three equal monthly instalments of USD74,176.40, which brought the total purchase price to USD 347 529.20. Of crucial importance is the penalty clause which is clause 9 and states as follows:

> *"An interest or late payment will be charged at 1.50% per month on any late payment received. Interest will be charged from the day the monthly repayment is due. Any reminder that Bell Equipment Zambia sends out to the customer (the first one being 10 days after payment is due) will be charged at USD50 (United States Dollars Fifty).* ***Should the client***

default on any of the repayments and the loan agreement goes into arrears, Bell Equipment Zambia has the right to immediately re-possess the equipment".

(The underlining is mine for emphasis only).

What is clear from the clauses I have referred to above is that the parties contracted for the sell of the new Bell front and loader L2106E which I have referred to in this judgment as the L2106E from the Plaintiff to the Defendant at the price of USD 347 529.20. The said purchase price was to be paid by an upfront deposit of USD125, 000.00 and the balance settled in three equal monthly instalments of USD74, 176.40. The parties also provided for interest. The clause also makes provision for the remedy open to the Plaintiff in case of default by the Defendant, being repossession of the L2160E.

The next document which is the letter dated 2nd October 2012 is rather confusing because on the one hand it suggests that the parties have agreed that the Plaintiff collect the L2106E and on the other hand the details of the equipment to be collected are given as those of the L2606D. I am inclined to make a finding that the intention of the parties in the said agreement was for the Plaintiff to collect the L2606D and not L2106E because this is clear from the evidence and arguments of the parties and most importantly from the hand written deletions in the said letter which has been exhibited in the Plaintiff's bundle of documents, which deletions show that the parties substituted the L2106E with the L2606D.

It is evident from the said second agreement that the Defendant surrendered possession of the L2606D to the Plaintiff and the Plaintiff was to hold the L2606D until the Defendant paid the outstanding amount of USD160, 460.00 on the L2106E. Failing such payment the L2606D was to remain the property of the Plaintiff.

The last document is the minutes of a meeting held between the Plaintiff and Defendant on 19th June 2013. It is the document at page 11 of the Plaintiff's bundle of documents. The crucial portion of the minutes is minute 4.0, the conclusion. This minute suggests in the first paragraph that the parties were

agreed on the position that the L2606D was surrendered to the Plaintiff for purposes of the Plaintiff selling it and recovering part of the outstanding amount on the L2106E.

What is clear from the three documents is that the parties appear to be in agreement that although the Defendant was in default, the L2106E was beyond the reach of the Plaintiff for purposes of enforcing clause 9 in the loan agreement at page 1 of the Plaintiff's bundle of documents. Having made this acknowledgment and entered into the second agreement dated 2nd October 2012, at page 10 of the Plaintiff's bundle of documents, I find that the parties varied the first agreement to the extent that they substituted the L2106E with the L2606D. Further, the substitution was for purposes of the Plaintiff holding onto the L2606D until such a time that the outstanding amount was paid by the Defendant, failing which the equipment, L2606D would become the property of the Plaintiff. This can be discerned from the last paragraph of the agreement which states as follows:

> *"Bell Equipment Company Zambia Ltd will hold the above mentioned unit in our premises in Kalulushi until the outstanding amount on this unit of USD160, 460.00 is paid in full.* ***If this amount is not paid, the unit will remain the property of Bell Equipment Company Zambia Ltd and they will be the sole owners".***

(The underlining is mine for emphasis only).

The portion I have quoted, in particular the sentence I have underlined clearly shows the parties variation of the loan agreement to the extent that the L2106E was no longer subject to repossession and sell. In its place, the L2606D was to be taken and kept by the Plaintiff, in the event of the Defendant's failure to settle the outstanding amount. My finding that the loan agreement was varied is based on the parties' inherent right to vary any agreement they enter into unless the agreement is indicated as not being subject to variation. This is as has been endorsed in ***Chitty on Contracts: General Principle's*** Volume1, 30th edn. at pages 1465 to 1466 which states as follows:

> *"The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement ... As in the case of a rescission of a contract, the terms of an instrument may be varied by a subsequent agreement, whether oral or written".*

By the said authority, parties enjoy the liberty to vary a contract by modifying its terms or altering them. The parties may also vary it by entering into a subsequent agreement. This is what happened in this case when the parties executed the contract dated 2nd October 2012.

As regards the minutes of the meeting, these in my considered view, do not demonstrate a meeting of minds by the parties. I say this because the minutes at 3.2.2 and 3.3.1 indicate that the parties were not in agreement as to whether or not the first agreement was varied. Their interpretation of the second agreement is also at variance. Therefore, the minutes, do not aid the parties in determination of their respective positions. There was therefore no mutual agreement reached at the meeting witnessed by the minutes and I accordingly dismiss the Plaintiff's argument that the intention of the parties should be ascertained from the minutes. The only area of agreement appeared to be the agreement by the parties that the Defendant is indebted to the Plaintiff and it remains committed to settle the amount owing. Further the letters dated 20th June 2013 and 24th June 2013, which followed the meeting of 19th June 2013 at pages 15 and17 of the Plaintiff's bundle of documents, do not also assist in ascertaining the intention of the parties because they have different interpretations of what transpired at the meeting as witnessed by the minutes.

Having found that the parties varied the loan agreement, the question that arises is what is the remedy, if any, that the Plaintiff is entitled to? The answer lies initially in the fact that it is clear from the pleadings, evidence and indeed the documents that the Defendant does not deny that there is an outstanding amount on the loan agreement. This, however, did not add to or subtract from the second agreement which I have found to have varied the loan agreement. The Plaintiff's remedy therefore lies in the agreement reached by the parties in the second agreement. I am in this respect, obliged as a court

to respect the agreement of the parties and enforce it as such however harsh it may be on one party. I am persuaded in reaching the foregoing findings by my decision in the case of ***Selly Yoat Assets Management Limited vs. Remote Site Solutions Zambia Limited (9)*** in which I held, and quoting from the case of ***Colgate Palmolive (Z) Inc. vs. Chuka and Others (10)*** as follows at page 35:

> *"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracts and that their contracts when entered into freely and voluntarily, shall be sacred and shall be enforced by the courts of justice".*

This principle was also quoted and relied upon by the Supreme Court in the ***Kalusha Bwalya*** case referred to me by counsel for the Defendant.

I once again adopt these words and reiterate that this is the position that I take in this case. By way of enforcing the said second contract and having found that the Defendant is indeed in default, I order and direct that the Plaintiff do retain possession of the L2606D as sole owner in accordance with the second agreement of the parties dated 2nd October 2012. I therefore dismiss the claim for USD171, 442.06 and damages for breach of contract. The reason for my dismissing the claim for USD171, 442.06 and damages for breach of contract is that the agreement of 2nd October 2012 provided for only one remedy for breach which is the one that I have awarded. It does not provide for payment of moneys and damages along with the Plaintiff's right to reposses and own the L2606D. Once again I am respecting the wishes of the parties in acknowledging and enforcing their intentions as reflected in the second contract dated 2nd October, 2012.

Having considered the Plaintiff's claim, I now turn to determine the Defendant's counter claim. It is for: an account of the use of the L2606D and its disposal; damages for loss of profit and deprivation of use of the L2606D; and interest and costs. It has been contended by the Defendant that when the Defendant handed the L2606D to the Plaintiff it was with a view to the Plaintiff disposing of it and applying the funds to settling of the outstanding

balance owing from the Defendant to the Plaintiff. Further that the L2606D was in good order at the time and would have earned the Defendant income in hiring it out to its customers. The Plaintiff on the other hand has contended that it could not sell the L2606D because the Defendant did not approve the repair costs to enable the Plaintiff to proceed to repair it and sell it.

In the light of my findings on the effect of the second contract dated 2nd October, 2012, I have no difficulty in dismissing the Defendants counter claim for being unmeritorious. The facts leading up to the second contract that varied the loan agreement, show that the Defendant willingly handed over the L2606D to the Plaintiff for it to take possession and hold it as sole owner in the event of failure by the Defendant to settle the balance outstanding. The default has occurred and the Defendant can therefore have no further hold on, or claim to the L2606D. I accordingly dismiss the counter claim.

As regards the costs, in view of the fact that both the claim and counterclaim have failed, I direct that each party bear its respective costs.

Delivered at Lusaka this 7th Day of August 2015

NIGEL K. MUTUNA
HIGH COURT JUDGE