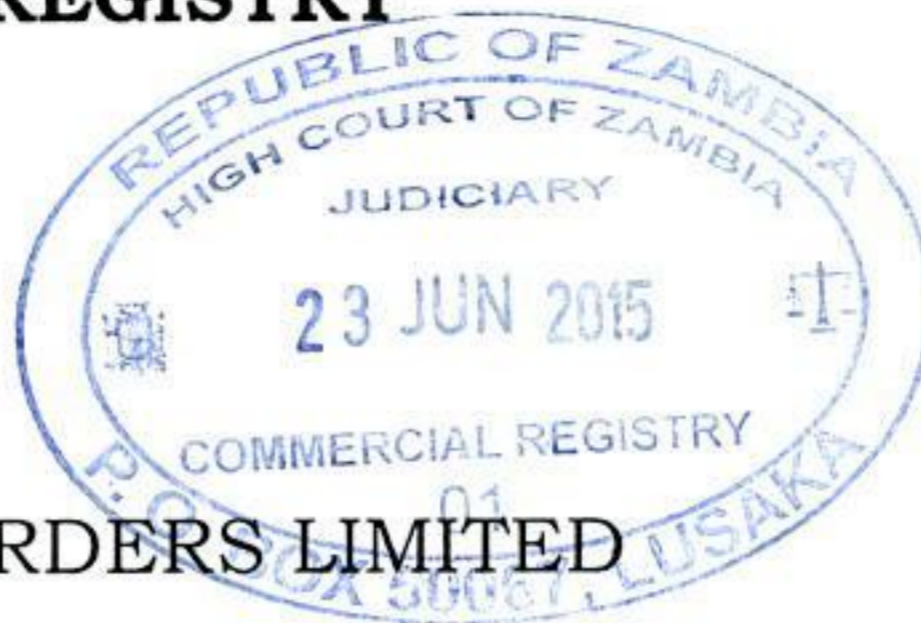


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**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**

2009/HPC/0407

(Civil Jurisdiction)



BETWEEN:

OASIS FREIGHT FORWARDERS LIMITED

PLAINTIFF

AND

FREGAS ENGINEERING LIMITED

DEFENDANT

***Before the Hon. Mr. Justice Justin Chashi in Open Court on the
23rd day of June 2015.***

For the Plaintiff:

NLJ Mushota (Mrs) Messrs Mushota and Associates

For the Defendants:

*C. Salati, Messrs Mulenga Mundashi Kasonde Legal
Practitioners*

JUDGMENT

Cases referred to:

1. Mhango v Ngulube and Others (1983) ZR 61

The Plaintiff Oasis Freight Forwarders Limited, Commenced proceedings herein against the Defendant Fregas Engineering Limited on the 10th day of June 2009 by way of Writ of Summons accompanied by a Statement of Claim seeking the following reliefs:

- 1. K243,600,000.00 plus Statutory Interest and penalties charged by Zambia Revenue Authority (ZRA) being income**

loss as a result of an embargo placed on the Company upon failure, neglect or refusal by the Defendant to remit to the Plaintiff monies owed to ZRA for the special clearance of the Defendants trailers at Nakonde under the Plaintiffs licence, which monies the Defendant is mandated to pay the Plaintiff as the clearing agent for remission to ZRA.

2. Damages for breach of contract referred to in (1) above, the Defendant having cleared its goods under the Plaintiffs licence
3. K10,524,732.00 being the money owed to ZRA for clearing the Defendants trailers which per custom of the trade, ZRA claims from the clearing agent, in this case the Plaintiff who must be put in funds by the Defendant, failure of which has resulted in ZRA slapping an embargo on the Plaintiff.
4. Interest on the claimed sums that the Court will find owing at bank lending rate from 25th March 2007.
5. Any other relief the Court may deem appropriate.
6. Costs of and incidental to this action.

According to the accompanying Statement of Claim, the Plaintiff was at the material time carrying on the business of clearing and forwarding, final clearance and removal of goods in transit, goods at borders of Zambia, in direct dealing with ZRA on behalf of importers and exporters, whilst the Defendant was at all times involved in the business of haulage of goods by road.

It is averred that the Defendant engaged the Plaintiff to conduct special clearance of their trailers at Nakonde Border per trailer numbers C4174 and C4175 at a total cost of K10, 524,732.00. That the clearing of the goods was done by the 25th of March 2007 and the Defendant obtained special release of the trailers before the entries were assessed which was incumbent upon the Defendant to proceed to Nakonde so that the entries could be assessed and paid for after the release of the trailers and paying ZRA.

It is further averred that the Plaintiff on several and numerous occasions requested the Defendant to pay, but the Defendant has failed, neglected or refused to do so.

According to the Plaintiff, as a consequence of the breach by the Defendant, the Plaintiffs licence has been suspended by the ZRA and remains suspended until the debt is settled. That this has cost the Plaintiff loss of business in excess of K243, 600,000.00.

The Defendant settled its defence on the 20th day of July 2009 and averred that it will prove at the trial that it has fully paid the sum being claimed to ZRA. Further, that the embargo placed on the Plaintiff by ZRA is not attributable to it but due to the Plaintiffs own non compliance of ZRA's operation guidelines. The Defendant also avers that it is not liable to the Plaintiff at all.

In joining issues with the Defendant on its defence, the Plaintiff in reply averred that the Defendant is aware that the Plaintiff's Chief Executive personally visited their offices on more than five

occasions and requested the Defendant to settle what was outstanding to ZRA, but the Defendant only managed to pay for three out of the five trailers around August 2008, when the embargo had already been effected against the Plaintiff, which was done around July 2007.

It is further averred that the Defendant is liable to the Plaintiff for not operating since July 2007 and for the failure to get the licence for 2009-2011.

When the matter came up for trial on the 13th day of March 2015, the Plaintiff only called one witness, Martin Kaoma Mwiinga (PW1) the Managing Director for the Plaintiff. PW1's evidence in examination in chief was as per his witness Statement filed on the 17th day of December 2014 and produced before this Court.

It was PW1's evidence that the Plaintiff as a registered Company had a licence for clearing and forwarding from ZRA from 2005. The last licence was issued in January 2006 and was to expire on the 31st day of December 2008.

According to PW1, the licence was never renewed on account of the Defendants breach of contract.

PW1 testified that the Defendant's representative, Gaston Sichilima (**DW1**) and the Plaintiff's representative Joseph Mutale (deceased) entered into an oral contract at Nakonde on or about the 25th day of March 2007 to clear goods for the Defendant. That most of the consignments were paid for by the Defendant as shown on **pages**

2,5,8,11,14 and **17** of the Plaintiffs additional Bundle of Documents. That however, the consignment for 2 Pan trailers was not paid for.

It was **PW1's** testimony that the trailers got registered for clearance with ZRA under bills of entry numbers **C 4174** and **C 4175** dated the 25th day of March 2007 and were released to the Defendant under "**Special delivery**" facility as the Defendant had no money for the payments. The said documents **C 4174** and **C 4175** appear on pages (6) and (7) of the Plaintiff's Bundle of Documents.

PW1 further testified that by custom the Defendant was required to go back to ZRA at Nakonde and pay for the trailers which they never did. That on the 18th day of May 2007, ZRA wrote to the Plaintiff informing them of non payment, but the Plaintiff could not pay as they had not been put in funds by the Defendant. The said letter appears on page 8 of the Plaintiffs Bundle of Documents.

That on the 1st day of July 2007, ZRA Nakonde put an embargo on the Plaintiff and as such they were not allowed to do any clearing business with ZRA until the outstanding obligations were met. That the embargo situation has remained in force to date.

Further according to PW1, ZRA at Nakonde on the 24th day of January 2008 wrote a reminder to the Plaintiff as per the letter on page 9 of the Plaintiffs Bundle of Documents.

It was PW1's evidence that he has on two occasions written to the Defendant and he has been to see DW1 about five times. One of the said letters appear on page 10 of the Plaintiffs Bundle of Documents. That at all times that he met DW1, DW1 was very apologetic and promised to pay ZRA.

It was also the evidence of PW1 that attempts to seek ZRA's intervention in the matter have failed and when the Plaintiff again wrote to ZRA requesting for a letter of clearance, the response was negative due to the outstanding obligations.

PW1 further testified that on 23rd December 2008 when ZRA sat to approve licences for 2009-2011, the Plaintiff's application was rejected as there was no clearance letter from ZRA. The letter of rejection appears on page 12 of the Plaintiffs Bundle of Documents.

That as a result of the embargo, the Plaintiff has lost business and has only mitigated its losses through the use of agents and other third parties.

It is also PW1's evidence that ZRA at Nakonde Office on the 9th day of February 2009 wrote to the Plaintiff confirming that the said declarations C 4174 and C 4175 were still unassessed and outstanding. The said letter appears on page 17 of the Plaintiffs Bundle of Documents. According to PW1, as long as a consignment remains unassessed at ZRA, an agent or the importer cannot pay for it, hence the said letter.

In cross examination, PW1 re-affirmed that the Defendant became their client in 2007 and they had a number of dealings with them at Nakonde. That the Plaintiffs role as agents was to clear importations for the Defendant through ZRA and the Defendants obligations was to pay ZRA whatever duties would be assessed by them.

That upon finishing clearing, the Plaintiff would be paid clearing fee which at the time was K350, 000.00.

According to PW1, no cash was paid to their Mr. Mutale in respect to the two declarations in issue.

When referred to the letter on page 12 of the Plaintiffs Bundle of Documents dated 23rd day of December 2008, PW1 asserted that they were having problems from both the Livingstone and Nakonde border.

According to PW1, apart from the Defendant, the other importers also contributed to the situation the Plaintiff found itself in.

In re examination, it was PW1's testimony that payments are supposed to be made five days after assessment.

That in this case the goods were moved on special delivery, before assessment. The Defendant in its defence, equally called one witness, Gaston Fred Sichilima (**DW1**) Chairman of the Defendant who in his evidence in chief relied on his witness statement dated 8th September 2010 which was produced before this Court.

PW1's testimony was that the Defendant engaged the Plaintiff as its clearing agent at Nakonde border sometime in 2006. That with the matter at hand the Plaintiff was to clear trucks and trailers bearing the following declarations:

1. C 4141
2. C 4173
3. C 4174
4. C 4175
5. C 4176
6. C 9143.

According to DW1, the Defendant sought special clearance of the consignments from ZRA through the Plaintiff, for the consignment to be released before payment of duty. That after special clearance the Defendant in or about September 2007 paid the sums of **K11,000,000.00** in cash and **K18,000,000.00** by bank certified cheque to the Plaintiff in order for them to effect the final clearance of the entire consignment as per the estimated total cost.

That thereafter there were inordinate and unexplained delays on the part of the Plaintiff in effecting final clearance and passing on the documents to the Defendant.

PW1 further testified that he later sought an account from the Plaintiff as to how the money that had been given in cash had been spent because the Plaintiff still had not availed the Defendant with

documentation for final clearance for declarations C 4174 and C 4175.

According to PW1, the Plaintiff failed to account but instead requested for more cash.

It was PW1's testimony that upon making further enquiries and consultations at ZRA in Nakonde it was discovered that the Plaintiff may have misapplied the cash by clearing other consignments thereby causing delay in the clearing of the Defendants consignment.

That in view of the aforestated, it was decided that payments in respect of the declarations C 4174 and C 4175 be made directly to ZRA by bank certified cheque in order to avert undue delays that were being caused by the Plaintiff. As such, the Defendant on the 20th day of August 2008 raised a Finance Bank Cheque Number 110033, bank certified, payable directly to ZRA for the sum of K10, 524, 732.00. PW1 in that respect drew the attention of the Court to page 1 of the Defendant's Bundle of Documents.

That the Cheque was sent immediately to ZRA and the Plaintiffs Officers were notified, so as to enable the Plaintiffs present the customs declaration forms so that the two outstanding consignments could be given final clearance.

It was PW1's testimony that he later discovered that the Plaintiff had not presented the forms as they had been placed on an embargo for another earlier entry which it was clearing on behalf of another client and not the Defendant.

DW1 in that respect drew the attention of the Court to page 2 of the Defendant's Bundle of Documents, which according to him shows the custom declaration for which the Plaintiff was placed on an embargo.

In concluding his evidence, it was DW1's testimony that the two consignments in question namely **C 4174** and **C 4175** were fully paid for directly to ZRA and that the alleged embargo on the Plaintiff by ZRA is not attributable to the Defendants failure to pay taxes.

In cross examination DW1 asserted that he was not aware of any monies which he neglected to pay. According to DW1 proof of payment to ZRA is on page 1 of the Defendant's Bundle of Documents. That the two totals on pages (5) and (6) of the Defendants Bundle of Documents makes up the total of **K10,524,732.00** and as can be seen the two indicate reference to the declaration forms **C 4174** and **C 4175** and also confirms that they relate to trailers.

As regards the receipt from ZRA, DW1 asserted that it should be with the Plaintiff. According to DW1, in this case, the goods were assessed at the point of entry.

At the end of the trial, both parties indicated that they would file submissions. Counsel for the Plaintiff filed theirs on the 20th day of May 2015, whilst the Defendant's filed theirs on the 5th day of June 2015.

The Plaintiff's Counsel after a recap of the pleadings and the evidence, submitted that it is not in dispute that there was a contract between the Plaintiff and the Defendant.

Further that there is no proof that the money owed to ZRA has been paid to date as the Defendant has not produced any evidence to Court as proof of payment. It is the Plaintiff's submission that the burden of proof lies with the Defendant for all monies it claims to have paid to ZRA or to the Plaintiff. On the issue of loss of business it is submitted that the Plaintiff has submitted at pages (13) to (15) of the Defendant's Bundle of Documents, proof of business it made at various ports in the months of March 2007 and January 2008 and how the business dropped.

In conclusion, the Plaintiff submitted that it has proved its case as the Defendant has no defence and only made bare denials and assertions without offering explanations and is therefore entitled to the reliefs being sought.

The Defendants filed their submissions on the 5th day of June 2015. After giving a background to the matter, Counsel for the Defendant submitted that on the Plaintiff's claim for loss of business as a result of the embargo placed by ZRA on the Plaintiff for having

failed to collect from the Defendant and remit **K10, 524, 732.00** being the money owed to ZRA, the central question for determination is simply whether the failure to remit the said remittance resulted in the embargo which was placed on the Plaintiff and consequently led to the losses allegedly suffered by the Plaintiff.

Counsel drew the attention of the Court to the letter on page 8 of the Plaintiffs Bundle of Documents dated 18th day of May 2007 in which the Plaintiff was given eight (8) days to settle the outstanding obligations, failure to which ZRA would recommend to have the Plaintiff placed on an indefinite nationwide embargo.

According to Counsel, no reference in that letter is made to the two entries in issue and that this was confirmed by PW1 and that therefore it follows that the intention by ZRA to impose an embargo as per that letter was not in any way influenced by the two entries.

Further that the letter from ZRA to the Plaintiff dated 24th day of January 2008 which appears on page 9 of the same bundle makes reference to assessed and unpaid entries in the sum of K13,413,990.50 and that, nothing seems to suggest that, that amount is related to the two entries in issue.

It is further submitted that the letter of 23rd December, 2008 which appears on page 12 of the same Bundle makes reference to the Plaintiffs application for a licence not being successful on account of no clearance letters from two operational ports being Livingstone

and Nakonde. That PW1 confirmed in cross examination that other clients also contributed to the outstanding liabilities apart from the Defendant.

In view of the aforestated, Counsel contended that the failure to remit monies relating to the two entries did not on a balance of probabilities result in the embargo which was placed on the Plaintiff. That therefore, the losses cannot feasibly be attributed to the Defendant. On the Plaintiffs claim for the sum of **K10,524,732.00** being monies owed to ZRA, it is the Defendant's submission that the sum being claimed is at variance with the amount that had been assessed and indicated as being owed of **K13, 415, 990.00** and that therefore the Plaintiff cannot be seen to plead an amount that is actually not being claimed by ZRA.

On the claim for exemplary damages for breach of contract, it is submitted that the Plaintiff having failed to prove that the Plaintiffs action caused the embargo, it follows that the eventual loss suffered by the Plaintiff cannot be attributed to the Defendants actions and therefore the Defendant cannot be held liable in that respect.

Counsel went on to draw the attention of the Court to the case of **Mhango v Ngulube and Others**¹ where it was held that:

“A party claiming special loss must prove that loss and do so with the evidence which makes it possible for the Court to determine the value of the loss with a fair amount of certainty”.

According to Counsel there is no evidence which goes to prove the alleged loss.

In conclusion, it was Counsel's submission that given the totality of the evidence, the Plaintiff has not proved its case on a balance of probabilities.

In determining this matter, I have carefully taken into consideration all the pleadings, Bundle of Documents, the parties' respective **viva voce** evidence and the parties respective submissions.

It is not in dispute and it is in fact agreed by the parties that when the Defendant imported some trucks and trailers from Sweden, it engaged the Plaintiff who were an authorized agent to assist in the clearance of the goods. When the goods arrived at Nakonde, without going into the reasons for doing so as the parties explanation on that point is at variance, special clearance of the goods was sought from ZRA and it was granted. This meant that the goods were released on the 25th day of March 2007 based on the **Exercise and Custom declaration (Form EC 20)** before assessment of the goods and payment of duties.

It is my understanding and indisputably that of the Parties, that the Defendant was to later return, although it is not disclosed as to when, to Nakonde, have the goods assessed and within five (5) days thereafter pay the duties due to ZRA.

It is also not in dispute that the Plaintiff had an embargo placed on it by ZRA on the 1st day of July 2007 due to their failure to settle their outstanding obligations at the time.

A perusal of both the Plaintiffs and Defendants Bundles of Documents and in particular the Plaintiffs Additional Bundle of Documents which contains Release Orders reveals that at the time the embargo was placed on the Plaintiff, none of the goods which had been imported at that time been assessed and paid for, although for some unknown reason the Plaintiff has restricted itself to the declarations C 4174 and C4175. I will in that respect therefore restrict myself to the two declarations copies of which appear on **pages 6** and **7** of the Defendants Bundle of Documents and the stamp from ZRA, Release Office indicates that the Pan trailers in respect to the two declarations were released on the 25th day of March 2007, before the assessment was done.

At the expense of being repetitive at the time of the embargo, the trailers relating to these two declarations had not been assessed and duty paid for. And I will take this as a finding of fact.

The issue which then arises at this stage is whether it can conclusively be said as alleged by the Plaintiff that C 4174 and C 4175 which as earlier alluded to had not been assessed by the time of the embargo can be said to have been part of the all outstanding obligations which gave effect to the embargo.

The letter dated 19th day of May 2007 from ZRA to the Plaintiff titled "outstanding Obligations" in which ZRA was asking the Plaintiff to settle all outstanding obligations within eight (8) days, had an attached list of entries. For reasons only known to the Plaintiff, this list has not been produced before this Court. The production of the list will have gone a milestone in assisting the Court, if indeed C 4174 and C 4175 were part of the entries. The failure by the Plaintiff not to do so, only leaves me with the assumption that they were not.

Otherwise what other inference can be deduced from the Plaintiff's action of leaving out documentation which would have been so favourable to his case.

Furthermore, I am of the view that the entries C 4174 and C 4175 could not have been part of the outstanding obligations as they had not at the time been assessed if at all they were ever assessed.

I am comforted in that respect by the letter from ZRA to the Plaintiff's of 24th day of January 2008, which appears on page 9 of The Plaintiffs Bundle of Documents, which again talks about outstanding obligations. That letter in the second paragraph makes it very clear that the outstanding obligations are in the sum of **K13,413,990.50**. and they relate to assessed and unpaid entries.

C 4174 and C 4175 being un assessed entries could therefore not have been part of the said obligations. Without going into further consideration of other issues, in the absence of any evidence from

the Plaintiff it is my finding of fact that the entries C 4174 and C 4175 had no role to play and therefore did not contribute to the embargo which was placed on the Plaintiff by ZRA on the 1st day of July 2007.

It is an age old axiom of law that he who alleges must prove. In my view the Plaintiff has not done a good job in proving that the two entries were part of the outstanding obligations.

I am therefore left with no option but to agree with the Defendant that although at the time of the imposition of the embargo, the Defendant had not attended to assessment and payment of duties, the Defendants failure cannot in any way be related to the embargo and cannot therefore feasibly be attributed to the Defendant.

In the view that I have taken, the Defendant cannot therefore be blamed for any loss or suffering arising from the embargo. It also follows that there cannot be breach of contract in that respect and loss of business apportioned to the Defendant.

On the payment of the sum of K10, 524, 732.00, a glean of the documents before this Court points to the fact that there is no evidence before this Court, in the absence of any receipt, release Order or Bank Statement of Account to show that the Defendant has paid the said amount to ZRA. The production of an unstamped Cheque in isolation dated the 20th day of August 2008 as appears on page **1** of the Defendants Bundle of Documents cannot be taken as proof of payment.

I am sanguined in that respect by the confirmation letter from ZRA to the Plaintiff which appears on page 17 of the Plaintiffs Bundle of Documents that as at the time of the letter being the 9th day of February 2009, the declaration C 4174 and C 4175 had not been assessed and were still outstanding.

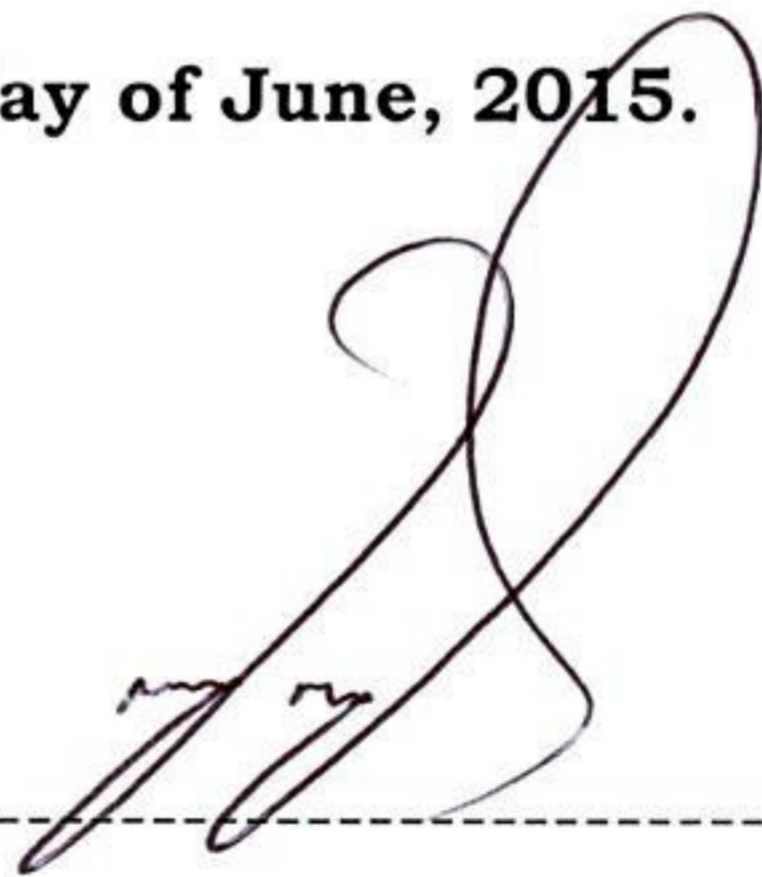
However, the point to be taken is that, there is no evidence before this Court to show that at no time has ZRA said, the embargo or the refusal to renew the Plaintiffs Clearing and Forwarding Agent Licence has anything to do with the two entries as is being alleged by the Plaintiff.

In view of the aforesaid, the Plaintiff has failed to prove its case on a balance of probability and therefore the Plaintiff's case is **dismissed** with costs to the Defendant.

Same to be taxed in default of agreement.

Leave to appeal is hereby granted.

Delivered on the 23rd day of June, 2015.

A handwritten signature in black ink, appearing to read 'Justin Chashi', is written over a horizontal dashed line. The signature is stylized and somewhat cursive.

Justin Chashi

HIGH COURT JUDGE