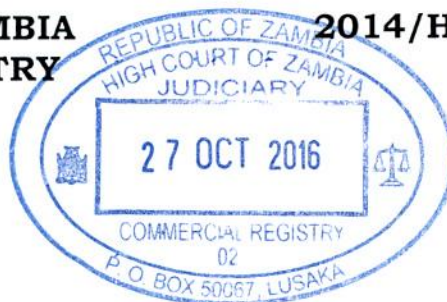


**IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2014/HPC/0418

BETWEEN:

ENGEN PETROLEUM ZAMBIA LIMITED

PLAINTIFF

AND

**PLATINUM MINING & INDUSTRIAL
SUPPLIES LIMITED**

DEFENDANT

**Delivered in Open Court before Hon. Mr. Justice Sunday B. Nkonde, SC this 27th
day of October, 2016**

For the Plaintiff : Mr. Nchima Nchito, SC of Messrs Nchito & Nchito

For the Defendant : Mr. Paulman Chungu of Messrs Ranchod Chungu and
Advocates

J U D G M E N T

CASES REFERRED TO:

- 1) *Khalid Mohammed vs Attorney General* (1982) ZR 49
- 2) *Galaunia Farms Limited vs National Milling Company Limited, National Milling Corporation Limited* (2004) ZR 1

OTHER WORKS REFERRED TO:

- 1) *Sale of Goods Act, 1893*
- 2) *Chitty on Contracts, 29th Edition, 2004*

The Plaintiff's claim is for the Sum of K3, 198,531-98 outstanding balance of the purchase price for the Bitumen supplied by the Plaintiff to the Defendant, interest and costs.

According to the re-amended statement of claim dated 9th May, 2016, in September 2013, the Defendant ordered from the Plaintiff pen grade 50/70 Bitumen at the price of US\$ 929 per tonne and the total supplied by the Plaintiff to the Defendant was 1,801 tonnes. The Plaintiff further averred that the exchange rate agreed upon by the parties was K5.20 to US\$1.00 while the total amounts invoiced amounted to K10,092,314-18 out of which the Defendant has only paid K6,893,782.15 leaving the claimed K3,198,531-98 as balance.

On its part, the Defendant in its defence denied being supplied with 1,801 tonnes of Bitumen by the Plaintiff and instead stated that it was in fact 1,273 tonnes. The Defendant further denied that Invoices amounting to K10, 092,314-8 were ever issued by the Plaintiff and stated that the amount remitted to the Plaintiff by the Defendant was in fact K8, 251,065-30. The Defendant also pleaded that it was to aver at trial that the Bitumen alleged to have been supplied by the Plaintiff was either not delivered to it or that if it was, the payment was effected.

The Defendant further pleaded that the Defendant's records disclosed that all Bitumen procured from the Plaintiff was fully paid for.

On 27th July, 2015, the Plaintiff filed into Court the Plaintiff's Bundle of Documents ("Bundle of Documents") and on 10th February, 2016,

the Defendant filed a Notice to Rely into Court to the effect that at trial, the Defendant intended to rely on the Bundle of Documents.

At the commencement of trial, Learned Counsel for the Defendant confirmed the position that the Bundle of Documents filed by the Plaintiff was an Agreed Bundle of Documents.

The evidence in chief of the Plaintiff's only witness, SHADRICK CHIRWA (PW), who was the Supply and Distribution Manager at the material time, was that the Plaintiff used to supply the Defendant with Bitumen and the normal procedure for delivery was that the Trucks carrying the Bitumen would come from South Africa where the Bitumen was being stored and then the Trucks would go to the Plaintiff's Depot in Kitwe where an Invoice would be issued and then the delivery would be made to the customer. PW referred to page 2 in the Bundle of Documents as proof of the Defendant's Order of the Bitumen valued at US\$1,830-00 inclusive of Value Added Tax. PW further stated that some of the Trucks carrying Bitumen went directly to the Plaintiff's Shed without passing through the Plaintiff's Kitwe Depot and referred to pages 15 to 18 of the Bundle of Documents as the Statement of Account on the 1,801 tonnes of Bitumen supplied. The witness lastly made reference to correspondence from the Defendant to the Plaintiff at pages 4, 6 and 7 of the Bundle of Documents as proof that the Defendant received the subject Bitumen.

Under cross examination, PW stated that he was not actively involved in the subject transactions and further that he was only the supervisor of Friday Simwanza, the Plaintiff's Depot Clerk, who was the person involved. PW, therefore, stated that his evidence in chief

by way of the Witness Statement filed was based on the Plaintiff's records and the report from Friday Simwanza. He also stated that the whole file at the Plaintiff Company relating to the subject transaction went missing and there were no originals of the documents, hence, even the Statement of Account at page 15 to 18 of the Bundle of Documents he was relying on had no supporting documents.

With reference to page 13 to 14 of the Bundle of Documents, PW stated that the same was an attempt by the Plaintiff's Depot Clerk and the Defendant's Managing Director to reconcile the Bitumen volumes but PW at the same time conceded that he was not completely competent to speak to the reconciliation document at page 13 to 14.

In re-examination, PW told the Court that the Defendant's Managing Director, Martin Simumba, did the reconciliation on behalf of the Defendant.

After the close of the Plaintiff's case, the Defendant called no witness and both Learned Counsel opted for written submissions in addition to the already filed respective Skeleton Arguments and List of Authorities.

I must here state that I will make reference to the respective parts of the submissions made only in as far as the same are relevant to resolving the issue of liability as it is the issue that I have decided to deal with. I have taken this approach because I note that in the unamended Writ of Summons and Statement of Claim, the Plaintiff claimed K3, 314, 209-37; in the amended Writ of Summons and Statement of Claim dated 31st August, 2015, the amount changed to

K2, 784, 272-80 and in the re-amended Writ of Summons and Statement of Claim dated 9th May, 2016, the amount claimed again changed to K3,198,531-18. This suggests that from the commencement of the action, the actual amount owed, if any, in Zambian kwacha has not been precisely or conclusively been ascertained by the Plaintiff.

Coming to the submissions, Learned State Counsel for the Plaintiff argued that the Plaintiff supplied and delivered Bitumen to the Defendant and thereby discharged its contractual obligations to the Defendant to have a right to the payment from the Defendant. To support the argument, Learned State Counsel referred the Court to **Section 1** of the **Sale of Goods Act** which provides as follows:

“A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price.”

Also referred to by Learned State Counsel was **Section 49 (1)** of the same **Act** which provides as follows:

“Where under a contract of sale, the property in the goods has passed the buyer and the buyer wrongly neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.”

Learned State Counsel, thus, argued that the Plaintiff's right to the price arose because property in the Bitumen passed when it was delivered to the Defendant. Learned State Counsel went on to submit that the evidence on record showed that the Defendant made a

Purchase Order for 2000 metric tonnes of Bitumen amounting to K10,092, 314-13 plus Value Added Tax.

It was further contended by Learned State Counsel that this is a claim for payment of money owed and to this effect cited **Chitty on Contracts at page 1428** where it is stated:

“The Claimant who claims payment of a debt need not prove anything more than his performance”

In relation to the reconciliation at page 13 to 14 of the Bundle of Documents which was done by the Plaintiff's Depot Clerk and the Defendant's Managing Director, Learned State Counsel contended that it showed Bitumen was supplied by the Plaintiff although some of it was not invoiced but nonetheless received by the Defendant.

Touching on the Bundle of Documents and the contents (documents) therein, Learned State Counsel contended that the Bundle of Documents in this action was an Agreed Bundle of Documents and this was confirmed first, by the Defendants Notice to Rely on the said Bundle and secondly, at trial when Learned Counsel for the Defendant agreed to this position. Learned State Counsel further contended that it was trite law that agreed Bundle of Documents meant that the documents therein were and are authentic and they do exist and therefore required no proof of authenticity. It followed, Learned State Counsel argued, that the authenticity of the Invoices or the Statement of Account which are part of an Agreed Bundle of Documents could not and cannot be questioned by the Defendant.

On behalf of the Defendant, Learned Counsel on the other hand argued in the submissions that the subject Statement of Account which is the basis of the claim herein was an incomplete document and that this was conceded to by PW in cross examination.

Learned Counsel also argued that PW's testimony ought not be relied upon as PW relied on records which he conceded were missing and even the documents tendered in Court were incomplete and inaccurate because not all Invoices were exhibited, the Delivery Notes and Invoices issued which ought to have been signed by the Defendant were not signed and the Statement of Account did not have any supporting documentation. Learned Counsel firmly contended that since all the Delivery Notes were lost, it entailed that the Plaintiff had no proof whatsoever that in fact the goods for which it was claiming payment were even delivered.

In this regard, Learned Counsel for the Defendant cited the cases of **Khalid Mohammed v Attorney General¹** and **Galaunia Farms Limited Vs National Milling Company Limited, National Milling Cooperation Limited²** for the principle of law that the burden of proving any allegation is always on the one who alleges. Learned Counsel, therefore, urged the Court to dismiss the Plaintiff's action on the basis that the Plaintiff had failed to prove the claim.

Am grateful to both Counsel for the very useful submissions left for my consideration and I have duly done so in resolving the dispute herein.

From the evidence on record, it is not in dispute between the parties, and I find as a fact that sometime in September, 2013, the Defendant

made an Order for the Plaintiff to supply it with pen Grade 50/70 Bitumen at a price of USD729.04 per tonne valued at USD1, 858, 080.00. Further, that all the documents which are the contents of the Bundle of Documents are re-printed copies and not originals. Also that the purchase Order was signed by the Defendant's Chief Executive, Martin Simumba. The parties attempted a reconciliation of the Bitumen volumes supplied by the Plaintiff to the Defendant and that reconciliation was prepared by Friday Simwanza, Depot Clerk of the Plaintiff who also signed the same with the Managing Director of the Defendant, Martin Simumba, who signed on behalf of the Defendant.

The Purchase Order and the reconciliation referred to are contained in the Bundle of Documents dated 27th July, 2015 which, it is not disputed and which I also find, as confirmed by Learned Counsel for the Defendant at trial, was an Agreed Bundle of Documents.

I see the question that falls to be determined as **whether the Plaintiff is owed any money by the Defendant on the Bitumen supplied and delivered by the Plaintiff to the Defendant.**

It is clear that the Defendant is not contending that no Bitumen was supplied and delivered by the Plaintiff to the Defendant but rather that the Bitumen for which payment is being claimed was either not delivered or if it was, it was paid for by the Plaintiff. This is the plea – unsatisfactory for vagueness as it is - in paragraph 8 of the Defence which is at page 5 to 7 of the 2nd Supplementary Bundle of Pleadings dated 12th July, 2016.

In determining this action, correspondence from the Defendant to the Plaintiff on the subject transactions appear to me to be very relevant. For example, less than two months before this action was commenced, the Defendant wrote to the Plaintiff's advocates, Messrs Nchito & Nchito the letter re-produced here below:

"28th August 2014

***The Managing Partner
Nchito and Nchito Advocates
5th Floor Godfrey House
P.O Box 34207
LUSAKA***

Attn: Mrs. Sashi N. Kateka

Dear Madam,

ENGEN PETROLEUM ZAMBIA LIMITED AND PLATINUM MINING AND INDUSTRIAL SUPPLIES LIMITED – DEMAND FOR K4, 214, 209.37

We acknowledge receipt of you letter dated 14th July, 2014 and we note the claim therein.

Last year in September, our Company ordered 4, 000 Tones of 50/70 Pen Grade Bitumen which were to be supplied and delivered to Sinohydro and China Jiangxi. The price of Bitumen was US\$926.00 per Ton for the commodity that went to Sinohydro and US\$915.00 Per Ton for the one that went to China Jiangxi.

According to our records, Engen supplied and delivered 1, 378 Tons to Sinohydro and 349 Ton were delivered to China Jiangxi. This brought the total Tonnage delivered to our clients to 1, 727 Tons. In monetary terms the Bitumen that was supplied to Sinohydro translated US\$1, 2776, 028.00 or K6, 635, 346.00, while the one that was delivered to China Jiangxi translated to US\$319, 335.00 or K1, 660, 542.00. This brought the total figures that were due to Engen to K8, 295, 888.00. The dollars were converted at a rate of K5.2 to a dollar which was the rate prevailing then.

We have made several payments to Engen by Cheque and bank transfer and to date we have not received any form of acknowledgement let alone receipts or invoices. We are aware that we owe some money to Engen (although not the extent mentioned in

the demand letter) and we have not paid them due to the fact that our client are also owed money by the National Road Fund Agency.

We do not believe that this matter should go to litigation as we would like to settle it amicably. However the biggest drawback has been that we have not sat down as parties concerned and reconciled the figures.

It is against this background that we would like to request for a full reconciled statement and we should also be furnished with the invoices for the funds that we have paid so far. We remain available to meet with you at your earliest possible time. Attached to this letter is our response to Engen and the two Purchase Orders we issued to them.

Should you need any further clarification, please do not hesitate to contact the undersigned.

Yours Sincerely,

Martin Simumba
Chief Executive Officer (Emphasis added)

This letter is at page 11 to 12 of the Bundle of Documents; which is an Agreed Bundle.

The contents of the above letter, in particular where underlined (for emphasis), where the Defendant was admitting owing the Plaintiff money but not to the extent of the then demanded K4, 214, 209-37 are in sharp contrast to the plea in paragraph 8 of the Defence that:

“Its [Defendant’s] records disclose that all Bitumen procured from the Plaintiff was fully paid for.”

This letter followed similar ones at pages 4 and 6 to 7 of the Bundle of Documents. It is also worth re-producing the letter at page 4 which is dated 15th April, 2014 here below:

"15th April, 2014

**The Commercial Manager
Engen Petroleum Zambia Limited
LUSAKA**

Dear Sir,

**CONFIRMATION AND COMMITMENT TO HONOUR OUTSTANDING
OBLIGATION TO ENGEN ZAMBIA LIMITED**

Reference is made to our recent conversation where it has been discovered that some Bitumen slipped through your system and ended up at our clients (Sinohydro Zambia Limited) Sub Camp Chambeshi and we apologize for this oversight. The Bitumen is at Sinohydro along Chingola Road.

I am sure you are aware that there has been very minimal flow of funds from the Government which has affected most contractors' ability to honor their obligations.

We write to confirm that we are in possession of about 800 Tones of Bitumen some of which is at Sinohydro and about 300 tones is at China Jiangxi International. We have been pushing the two companies to pay and commit to pay K2 Million on Tuesday 22nd April, 2014. We shall pay the balance in two week's time.

Should you need any further clarification pleased do not hesitate to contact me.

Yours Faithfully,

**Martin Simumba
CHIEF EXECUTIVE OFFICER"**

As for the letter from the Defendant to the Plaintiff dated 24th June, 2014 which is at page 6 to 7 of the Bundle of Documents, its heading and the first paragraph read as follows:

"24th June, 2014

***The Managing Director
Engen Petroleum Zambia Limited
Plot 3132
P.O Box 36521
LUSAKA***

Atten: Mr. Jean Ollomo,

Dear Sir,

PAYMENT OF OUTSTANDING FUNDS TO ENGEN PETROLEUM ZAMBIA LIMITED

Reference is made to your letter dated 28th May, 2014 and our several conversations regarding the above mentioned matter. I am sorry that this particular Account appears to be giving you problems in your organization. I must state from the onset that it has not been intentional to hold onto your funds but we are also owed money because Government has not paid our client....

(Emphasis added)

This letter was equally signed by Martin Simumba.

I find these letters at pages 4, 6 to 7 and 11 to 12 as admissions by the Defendant that the Bitumen was supplied by the Plaintiff to the Defendant-and received by the Defendant-and further on liability for some price that was not fully satisfied as at respective dates the letters were written.

Inevitably, when these letters are looked at in the context of the plea in paragraph 8 of the Defence, as I have carefully done, the liability of the Defendant in this action becomes firmly cemented because, in fact, and as it turned out, the Defendant's "records" referred to in the Defence were not availed to the Court by the Defendant at trial by way

of discharging the evidential burden placed on it of proving or showing that all the Bitumen procured from the Plaintiff was fully paid for as asserted by the Defendant.

I hasten to observe that if there was any difficulty in the Defendant showing the Defendant's "records" at trial, it was not in any way suggested. Ordinarily, therefore, I do not see any difficulty in a Defendant who, confronted with a claim as herein and who asserts that he or she satisfied the claim, readily demonstrating at trial that the claim has indeed been satisfied.

Further, the fact that the Defendant chose to rely on the Plaintiff's filed Bundle of Documents as Agreed Bundle of Documents is also significant. In agreeing to the Bundle of Documents, no reservation was made by the Defendant as to the authenticity or truthfulness of all or some of the contents of the Bundle of Documents. This is my finding from the record. I, therefore, make the conclusion that the contents of the Agreed Bundle of Documents dated 27th July, 2015 are authentic and presumed to be a true presentation of the events or matters therein.

In the circumstances, I also find nothing improper in PW whose knowledge of facts was based on the records and information he came across by virtue of his work at the Plaintiff Company making reference to the contents of the Agreed Bundle of Documents in his evidence. After all, in view of the averment in the Defence that the Bitumen alleged to have been supplied by the Plaintiff was either not delivered to it or that if it was, the payment was effected, the Defendant was at liberty to call witnesses who could have spoken to the contents of the

Agreed Bundle of Documents but did not. If anything, and specifically in relation to the reconciliation document at page 13 to 14 of the Bundle of Documents, I find and add that in the absence of any evidence to the contrary, the said Martin Simumba is assumed to have signed this reconciliation document with his "eyes fully open" and the document speaks for itself. At page 13, it is stated in the document "Bitumen with the client but not invoiced 217.2 MT" and at page 14 is stated in the document "Total Bitumen not invoiced 1034.2 MT"

In answer to the question, therefore, which is **whether the Plaintiff is owed any money by the Defendant for Bitumen supplied and delivered by the Plaintiff to the Defendant, it is that YES, the Plaintiff is owed money.**

In a nutshell, on the basis of the uncontroverted oral testimony of PW, the contents of the Agreed Bundle of Documents (the documents therein), including the letters at pages 4, 6 to 7 and 11 which I earlier accepted as being admissions as to receiving of the Bitumen by the Defendant from the Plaintiff and on liability as to some price from the Defendant to the Plaintiff which was not fully satisfied as confirmed in the said letters, and also taking into account the failure by the Defendant to discharge its evidential burden that it fully paid for the Bitumen it procured from the Plaintiff as asserted in its Defence, I am satisfied that the Plaintiff has proved its case on a balance of probabilities but only to the extent that there is money owed to it by the Defendant for Bitumen supplied and delivered. In terms of the actual amount due for payment, I make the following Orders:

1. The amount due shall be assessed in **Zambian Kwacha** by the Deputy Registrar taking into account my finding that the **Bundle of Documents** filed into Court on **27th July, 2015** is an **Agreed Bundle** and there is no question as to the authenticity of the contents therein.
2. In assessing the amount due, the Deputy Registrar should also take into account my finding that the reconciliation at page 13 to 14 of the **Bundle of Documents** was signed by the Defendant's Managing Director, **Martin Simumba** freely or "**with his eyes fully open**" and therefore speaks for itself.
3. The amounts found to be due shall attract interest at the average of the short term deposit rate from the date of the action to the date of judgment and thereafter at the **Current Bank Lending rates** as determined by the **Bank of Zambia** from time to time until full payment.
4. The costs shall be for the Plaintiff to be taxed in default of agreement.

Dated at Lusaka this 27th day of October, 2016.



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE