

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

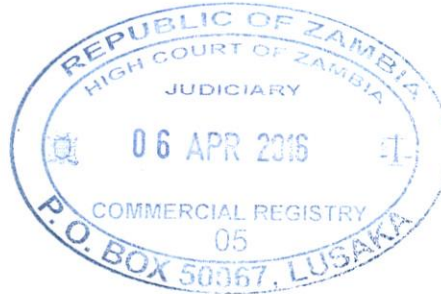
2015/HPC/0253

BETWEEN:

METHOD NIMBONA

AND

KUMAWA LIMITED



PLAINTIFF

DEFENDANT

Before the Hon. Mr. Justice Justin Chashi in Open Court on the 6th Day of April, 2016

For the Plaintiff:
For the Defendant:

Dr. MK Mwanawasa, Messrs Levy Mwanawasa & Co.
N/A

JUDGMENT

Cases referred to:

- 1. Photo Bank Limited v Shengo Holding – SCZ Judgment No. 10 of 2008*
- 2. William David Carlisle Wise v EF Harvey Limited (1985) ZR 179*

Legislation referred to:

- 3. The High Court Act, Chapter 27 of the Laws of Zambia*

Other works referred to:

- 4. McGregor on damages – 15th edition.*

The Plaintiff **Method Nimbona** commenced the action herein against the Defendant **Kumawa Limited** on the 9th day of June 2015 by way of Writ of Summons claiming the following reliefs:

1. ***The sum of US\$ 32,600.00 being monies paid by the Plaintiff to the Defendant for transport charges .***
2. ***Interest at the current bank rate.***
3. ***Costs***
4. ***Any other relief the Court may deem fit.***

According to the accompanying Statement of Claim of even date, the Plaintiff was at all material times a businessman carrying on the business of importing and exporting goods, whilst the Defendant, a Limited Company Incorporated under the laws of Zambia and having its registered office at Lusaka operated as a transporter.

It is averred that by a verbal agreement between the parties, the Plaintiff engaged the Defendant to transport goods on his behalf to various destinations outside Zambia and paid a lump sum in advance. That the Defendant transported maize to Burundi and out of the deposit paid, the balance of US\$ 32,600.00 is still being held by the Defendant who has refused to hand over the money by

claiming that the money was a non refundable deposit which condition was not part of the contract.

It is further averred that the Defendant was requested to transport goods to Tanzania but refused to do so, claiming that the only route they wanted to transport goods to was Burundi and that was never part of the contract. That according to the Defendant, it could not go anywhere else as they had goods to pick from Burundi on the return trip. It is the Plaintiff's averment that at the time the Defendant was requested to transport goods to Tanzania, it was holding on to the sum of US\$ 32,600.00 to the credit of the Plaintiff. That the Plaintiff has been denied access and usage of the money since the 23rd day of November 2012. That despite several demands to pay back the money, the Defendant has failed, ignored and refused to pay the Plaintiff resulting in the Plaintiff suffering loss of business, earning and profits.

The Defendant settled its Defence and counter Claim on the 25th day of August 2015.

In its defence, the Defendant denied owing the Plaintiff and averred that the agreement was for the Defendant to source maize for the

Plaintiff for 1,000 tonnes and to deliver the same to Mpulungu for a transportation fee of US\$ 100.00 per ton per Kilometer.

In its Counter Claim, the Defendant avers that the Plaintiff is indebted to the Defendant in the sum of US\$ 120,000.00 being the commission for sourcing 1,000 tonnes of maize at the agreed rate which sum has not been paid despite demands.

In its reply and Defence to the Counter Claim settled on the 2nd day of September 2015, the Plaintiff denied the allegation that it owed the Defendant the sum of US\$ 120,000.00 and averred that the Defendant in its letter dated the 10th day of September 2015 admitted owing the Plaintiff the sum of US\$ 32,600.00.

The Order for Directions in this matter was given on the 27th day of August 2015. When the matter came up for compliance on the 17th day of November 2015, the Plaintiff had complied with the Order whilst the Defendant which was being represented by the firm of Messrs Chibundi & Company had not. I did on that date set the 10th day of February 2016 as the date for trial.

It will be noted from the record that apart from filing a Defence and Counter Claim, the Defendant never filed any document in compliance with the Order for Directions and neither did Counsel

for the Defendant make any appearance in person before this Court.

When the matter came up for trial on the 10th day of February 2016, the Defendant's Advocates sent a Ms M. Chilambwe, an Advocate from the firm of Messrs Mosha & Company to seek an adjournment to enable the Defendant's advocates obtain the necessary documents from their client. Despite the strong objection from the Plaintiff's Advocates, the Court was magnanimous and granted the adjournment to the 24th day of March 2016 for trial.

Despite the adjournment, nothing positive was done on the Defendant's part. What instead followed was a Notice of withdrawal as Advocates from the Defendant's Advocates.

It is with that background that when the matter came up for trial, the Court had no choice but to proceed to hear the Plaintiff's case.

At the hearing, the Plaintiff gave evidence in pursuit of his claim. The Plaintiff's evidence in examination in chief was as per his Witness Statement filed on the 21st day of March 2016.

It was the Plaintiff's testimony that he entered into a verbal agreement with the Defendant for the Defendant to transport goods on his behalf to various destinations outside Zambia.

The Plaintiff drew the attention of the Court to the Statement of Claim and the Reply and Defence to the Counter Claim. He then went on to place reliance on pages 1 and 2 of the Plaintiff's Bundle of Documents.

According to the Plaintiff, he fulfilled his part of the agreement by paying the Defendant a lump sum. That the Defendant only transported goods to Burundi and not other destinations and that out of the lump sum paid the Defendant is still holding on to a balance of US\$ 32,600.00 which he is now claiming was a non refundable deposit which was not agreed upon.

It is the Plaintiff's further testimony that the Defendant has failed to abide by what was verbally agreed upon and has refused to transport goods to Tanzania or pay back the money.

It is the Plaintiff's evidence that he should be paid back the money with interest as he had been denied access and usage of the money since 2012 as a result of which he has lost business, earnings and profits.

On the 1st day of April 2016, the Plaintiff's Advocates filed their written submissions urging the Court to find in favour of the Plaintiff on its claim.

In doing so, reliance was placed on the learned authors of **McGregor on damages**⁴ at pages 29-30 where they had this to say:

“Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss of the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the Plaintiff is entitled to compensation for the loss to his bargain ...”

On the Defendant's Counter Claim it was submitted that the Defendant has failed to prove the Counter Claim and that the Defendant did not plead any facts in supporting the Counter Claim. The Court's attention was drawn to the case of **Photo Bank Limited v Shengo Holdings**¹ where the Supreme Court observed on the Counter Claim as follows:

“The learned trial Judge in his ruling put the matter in this way: it is my considered view that the Defendant admits the Plaintiff's claim. The Defence raised a Counter Claim.

A Counter Claim is a claim in its own right which has still to be proved”.

The Plaintiff’s Advocates also made reference to the case of **William David Carlisle Wise v EF Harvey Limited²**.

In determining this matter I have carefully taken into consideration the pleadings, the evidence before the Court and the Plaintiff’s submissions.

I hasten to state that although the Defendant did not comply with the Order for directions and did not therefore take part in the proceedings at the trial, I have however taken into consideration the contents of its defence and Counter Claim.

I will proceed by addressing the Plaintiff’s claim first and thereafter the Defendant’s Counter Claim.

Although there is not in existence a formal written agreement between the parties, it is common cause that indeed there was a contractual relationship between the parties as that is not disputed by the Defendant in its defence which consists of bare denials and does not specifically transverse every allegation of fact made by the Plaintiff in its Statement of Claim as required under Order 53/6(2) and (3) of **The High Court Rules³**.

What the Defendant did in its defence was simply to duck the Plaintiff's claim of US\$ 32,600.00 and make no mention of it despite the fact that in their letter of 16th day of September 2013, the Defendant acknowledged being in receipt and holding on to the sum of US\$ 32,600.00 although contending that it was a non refundable deposit awaiting transportation orders from the Plaintiff.

However, I note that the issue of the sum of US\$ 32,600.00 being a non refundable deposit awaiting transportation order was not pleaded by the Defendant in its defence and Counter Claim.

What adds a damning complexion to the defence was their failure to comply with the Order for directions and participate in the Court proceedings and therefore being able to controvert the Plaintiff's claim.

In view of the aforesaid, I have no difficulty in finding in favour of the Plaintiff on its claim.

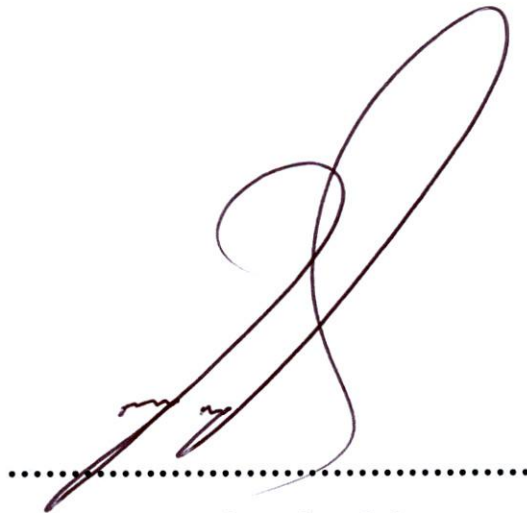
As for the Counter Claim, I totally agree with the submissions by Counsel for the Plaintiff that the Defendant failed to prove the Counter Claim and neither did they plead facts to support the same.

The situation here as well was worsened by their failure to comply with the order for directions so as to be able to file their Bundle of Documents as well as adduce evidence in pursuit of the Counter Claim. The Counter Claim is accordingly dismissed.

The sum total of this is that Judgment is hereby entered in favour of the Plaintiff in the sum of US\$ 32,600.00 together with interest at the short term dollar deposit rate as approved by Bank of Zambia from the 9th day of June 2015 to the date of Judgment and thereafter at the commercial lending rate till full satisfaction of the Judgment debt.

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

Delivered at Lusaka the 6th day of April 2016.

A handwritten signature in dark ink, consisting of a large, stylized loop and a long, sweeping tail that extends downwards and to the left. The signature is positioned above a horizontal dotted line.

Justin chashi
HIGH COURT JUDGE