IN THE HIGH COURT FOR ZAMBIA **2012/HPC/0645**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

INDEMNIFIED INVESTMENT HOLDINGS LIMITED **PLAINTIFF**

AND

LAMBDA BUSING CORPORATION LIMITED **DEFENDANT**

Before the Honourable Mr Justice W. S. Mweemba in Open Court at Lusaka

For the Plaintiff: *Mr M.Nzonzo – Messrs MC Mulenga & Nzonzo Advocates.*

For the Defendant: *Mr N. Makayi – N. Makayi & Company.*

JUDGMENT

LEGISLATION REFERRED TO:

1. **The Bills of Exchange Act, 1882.**
2. **The English Law (Extent of Application) Act, Chapter 4 of the Laws of Zambia.**
3. **The Sale of Goods Act of 1893.**

CASES REFERRED TO:

1. **Bartlett V Sidney Marcus Limited (1965) 2 ALL ER 753**

OTHER WORKS REFERRED TO:

1. **Halsbury's Laws of England, 4th Edition Volume 4.**
2. **Cheshire, Fifoot and Furmstones Law of Contract 14th Edition.**

By Writ of Summons taken out on 14th November, 2012, the Plaintiff is claiming the following:-

(i) *The aggregate amount of the cheque in the sum of K458, 300.00.*

(ii) *Interest from the date of the cheque up to payment of the value.*

(iii) *Any other relief the Court may deem fit.*

(iv) *Costs of and relating to this action.*

According to the Statement of Claim it is the Plaintiff's position that during the normal course of business between the parties, the Defendant drew Cheque No. 029799 in the sum of K458,300 and dated 24th July, 2012 in its favour.

That this cheque which was drawn on International Commercial Bank Zambia Limited, Lusaka Main Branch was deposited for payment but it was dishonoured for non-payment and returned marked "Refer to Drawer."

That the Plaintiff's investigation at the Bank revealed that the account upon which the cheque was drawn was insufficiently funded and a demand letter was issued to the Defendant to pay the sum in question within seven days but this had not been done to date.

The Defendant filed a Defence and Counter- Claim on 13th December, 2012. In its Defence it stated that the cheque was issued outside the normal course of business and under duress as the Plaintiff had threatened to sue the Defendant for non- completion of payment for the purchase of two Mercedes Benz buses.

That the Defendant through its officers advised the Plaintiff that despite it being uncommon and unsound banking practise to issue a single cheque for the amount purportedly claimed, the Defendant advised the Plaintiff that the said account did not have sufficient funds and that the said cheque like previous others issued to the Plaintiff were purely for its comfort and the Plaintiff would be advised when to deposit it.

It is averred that the Defendant had not failed to make good of the value of the cheque and it is stated that the goods for which the cheque was to pay

for were sold and delivered to the Defendant in breach of express and implied conditions and warranties contained in a contract of sale of two motor vehicles made between the Plaintiff as seller and the Defendant as buyer.

In its Counterclaim the Defendant states that in the course of oral negotiations at Lusaka made between the Defendant and the Plaintiff in or around May, 2010, the Defendant informed the Plaintiff that it required motor vehicles that were suitable for the terrain and conditions found at Lumwana Mine in the North- Western Province of Zambia.

It is further stated that there were implied conditions of the contract that:

(a) The coaches should be reasonably fit for the purpose for which the Defendant required them, namely for use in its business in Lumwana Mine in North- Western province of Zambia;
(b) The coaches should be of satisfactory quality.

Moreover, that these conditions were an implied condition of the contract, by reason of Section 14 of the Sale of Goods Act of 1893. That in pursuance of the Contract, the Plaintiff delivered the coaches to the Defendant who paid an upfront sum of US$30,000.00, whilst the balance was to be paid in instalments from the proceeds made from the use of the coaches by the Defendant in execution of its service contract with Lumwana Mine Corporation as agreed in the terms of the contract.

It is also stated that in addition to the upfront payment made to the Plaintiff, the Defendant made further payments totalling US$26,000.00 at later dates in the year 2010 in pursuance of settling the purchase price of the coaches.

Further that in breach of the conditions of the contract, the coaches were not reasonably fit for the purpose for which they were required as they were both delivered with defects that ought to have been repaired at the time of delivery and were only in use for almost 3 months at Lumwana Mine and

due to persistent breakdowns had resulted in them being currently parked and out of use, nor were they of satisfactory quality.

It is also Counter-claimed that these defects were communicated to the Plaintiff who had failed to attend to the repairs to date. The particulars of the defects were:

(a) An un-repairable FR control unit.
(b) Persistent failure of the electronics system during the rainy season.
(c) Regular puncturing of tyres due to unknown protrusions from the coaches bodies or chassis.
(d) Faulty air conditioning units, seats and entertainment equipment.

It is also stated that resulting from the non-use of the coaches and in order to avoid the loss of its coach service contract at Lumwana Mine, the Defendant was forced to replace the said coaches by purchasing two brand New Mercedes Benz coaches from Southern Cross Motors Limited for the sum of US$223,228.00 and these were delivered on 17th December, 2010.

The Defendant also stated that the purchase of the brand new coaches was by way of a high payment six month lease plan with Southern Cross Motors Ltd that was later re- financed by a loan of US$200,000.00 that was obtained from the International Commercial Bank Zambia Limited on 14th February, 2012 which the Defendant was currently repaying at US$9,414.69 per month to the lender.

That by reason of the said breach of condition, the Defendant has suffered loss and damage and in particular;

(a) Loss of revenue of US$28,800 per month from 1st June, 2010 to 17th December, 2010. US$ 172,800.00 (being minimum of K9,000km/month at US$1.60/km)
(b) Loss of Revenue due to payment of monthly instalments to a lender from February, 2012 at a monthly rate of US$9,414.69 (and continuing loss at the said rate for 24months)

And the Defendant Counterclaims:

(i) Payment of the sums specifically claimed as loss of revenues and monthly instalments paid to the Defendant's lender.

(ii) Damages for breach of the written contract made between the Plaintiff and the Defendant on 31st May, 2010.

(iii) Interest on (1) and (2) above.

The Plaintiff filed a Reply and Defence to the Counter claim into Court on 1st March, 2013.

In its Defence to Counterclaim the Plaintiff stated that at no time did the Defendant make particular specifications as a condition of purchase. That indeed the Plaintiff sold and the Defendant agreed to buy two second hand or used Mercedes Benz motor coaches for the sum of US$120,000.00 but the Plaintiff was not privy to the Business dealings of the Defendant with Lumwana Mine.

Further that the Defendant admitted that the coaches were fit for the purpose for which they were bought evidenced by the fact that for more than one year the Defendant had no complaints, and thus proceeded to change ownership into their name.

It was also stated that the Plaintiff would further state that smoke screen complaints only surfaced after the Defendants failed to meet their obligations under the Sale Agreement whose terms they were now in breach of.

Moreover, that though the said payments of US$30,000.00 and US$26,000.00 were acknowledged these did not extinguish the Defendants obligations as an amount of K458, 300.00 plus interest still remained outstanding.

Further that in acknowledging the said obligations of K458, 300.00 due the Defendant issued a cheque on 24th July, 2012 in the like sum which was referred to drawer by its Bank.

Lastly it was argued that the Defendant's Counter-claims were a smoke screen intended to avoid their obligations thus had no merit and ought to fail with costs.

During Trial on **12th November, 2015** the Plaintiff called one Witness Dr. George Mulomboi the Banking and Finance Director of the Plaintiff Company **(PW1)**.

He testified that on 31st May, 2010 the Defendant approached the Plaintiff with a business proposal to purchase two Mercedes Benz buses which the Plaintiff accepted on the contract terms exhibited in the Plaintiff's Bundle of Documents.

That the two buses were registered as ABP 4216 and ABP 4214 and when inspected by the Defendants they were satisfied with their conditions and suitability for whatsoever purposes they intended to use them for.

That on the same day, a Sale Agreement was executed between the parties which outlined the terms of the sale as follows:-

(a) A total price of US$120,000.00 being US$60,000.00 each payable in four instalments on the following terms and conditions:
   (i) Upfront payment of US$30,000.00 payable and this offer was only valid against issuance of receipt in the sum of US$30,000.00 and the Absolute owners to be Lambda Busing Corporation Limited in the sum of US$30,000.00 and the current owner in the sum of US$90,000.00.
   (ii) Upon expiry of 60 days the second instalment of US$30,000.00 shall be due, and Lambda Busing Corporation Ltd shall be absolute owner in the sum of US$60,000.00 and the current owner in the sum of US$60,000.00.
   (iii) Upon expiry of 90 days the third instalment shall be due and Lambda Busing Corporation Ltd shall be the absolute owners of the buses in the sum of US$90,000.00 and the current owners in the sum of US$30,000.00.

(iv) Upon expiry of 120 days, the fourth and final instalment of US$30,000.00 shall be due and upon receipt of the total US$120,000.00 by the current owners of the buses, LAMBDA BUSING CORPORATION LTD shall become the full owner of the buses as the current owner shall have no claim against the buses.

It was also stated that pursuant to the terms of the Agreement the first payment of US$30, 000.00 was paid and acknowledged but the Defendants had difficulties in paying the second instalment as only US26, 000.00 was paid as opposed to US$30,000.00 stipulated in the Agreement.

Moreover, that the Defendants clearly defaulted on the Agreement and no further payment had ever been received by the Plaintiff as agreed in the Agreement though the Defendant had possession of the buses.

Dr Mulomboi testified that on 3rd December, 2010, the Defendant collected the White books of the buses against issuance of post- dated cheques with a promise that they would expunge their obligations in one payment but these did not clear.

That thereafter, the Defendant issued a single cheque of US$86,500.00 as replacement which it later substituted with a Kwacha cheque of K458, 300.00.

PW1 also told the Court that the Defendant acknowledged the amount of K458,300.00 by obtaining the Dollar rate on its own on 24th July, 2012 and converted the US$86,500.00 by issuing the material cheque in the said amount as full settlement.

That this cheque was deposited by the Plaintiff in their account but it was referred to drawer by the Bank as the Defendant's account had insufficient funds to meet it.

Further, that before it was deposited, the Plaintiff told the Defendant to break it into small amounts but the Defendant mentioned that the payment had already been made.

That in the meantime the Defendant proceeded to change ownership of the buses after one year, hence the full settlement by cheque in the sum of K458,300.00 which cheque was referred to the drawer by the Bank.

A copy of the White Book showing that the Defendant is absolute owner of Mercedes Benz Bus Registration Number ABP 4214 is at page 4 of the Plaintiff's Bundle of Documents.

The witness further stated that from the time the Defendant collected the buses to commencement of this litigation, they had never complained of any problems with the vehicles, a fact fortified by their change of ownership after one year.

PW1 lastly stated that the Defendant is truly indebted to the Plaintiffs in the sum of K458,300 plus interest and costs without a Defence.

In cross examination PW1 told the Court that paragraph 5 (a)(i) which stated that the absolute owner was to be Lambda Busing Corporation Ltd meant that whilst Lambda was absolute owner, Indemnified Investments still had a security interest in the vehicles.

That he was aware that the buses were going to Lumwana in North Western Province with whom the Defendant had a transport contract and since he was selling second hand buses he never thought about the terrain of where they were going.

Moreover that in the letter dated 2nd June, 2010 he wrote to Southern Cross Motors at the request of the Managing Director of the Defendant Company and he acknowledged having been informed of the salient features of the Contract between Lambda and Lumwana Mine, in particular that the Defendant would be paid per mileage by Lumwana.

It was also his evidence that he did not profess that the buses were fit for use in Lumwana. Moreover, that Mr Moses Zama the Managing Director of the Defendant changed ownership of the buses and he accompanied him to Road Transport and Safety Agency (RTSA) where ownership was changed.

He went on to state that he gave the Defendant all the approvals required to change ownership and that the Defendant never complained about the buses and Mr Zama paid him about US$1000 cash as part payment and not to facilitate a trip to North Western Province.

He also maintained that he did not recall receiving a registered letter in April/ May of 2011 despite being shown the Receipt from the Post Office. Moreover that he was not told that the buses were not performing well and he gave back 3 cheques of US$30,000.00 to the Defendant which were not cleared and got 7 cheques of US$12,500.00 instead which the Defendant felt he could service as they were smaller and that the Defendant also gave him a cheque for US$22,000.00.

According to **PW1** the Defendant told him that he failed to pay him not because the buses were not performing but because of his leasing liabilities with Stanbic Bank Zambia Limited and that he had other buses running at Lumwana apart from his two buses.

He also told the Court that the payment terms in the Agreement were meant to allow the Defendant time within which to settle the purchase price and that he knew that part of the Defendant's income came from running buses and that he was also building houses.

Moreover that the Defendant proposed these payment terms according to what his income would accommodate as apart from the transport business Mr Zama said that he was building houses in Lumwana and that his monthly income was US$45,000.00.

The witness went on to state that Mr Zama agreed to take both buses including the one that had a faulty FR Control Unit and the terms of the Contract were such that he had to pay whether or not he got income from Lumwana.

Further that although he had been told that the buses were going to Lumwana the purchaser never complained that they were not performing but always praised them.

It was his evidence that the reason why the Director of the Defendant suggested that he pay him US$12,500.00 was because he had a lease with Stanbic Bank and the money from Lumwana would go straight into the Stanbic Bank account and Lease rentals would be deducted after which the remainder would not be enough.

Moreover, that the cheque at page 3 of the Plaintiff's Bundle of Documents for K458,300.00 was given in full settlement of the debt and it was not dated but Mr Zama told him to date it.

He also acknowledged that although he was aware of the banking rule that no cheque should exceed K100,000.00 he accepted the one for K458,300.00 because of excitement and due to the way Bank of Zambia Rules changed frequently.

He also confirmed that all the 7 cheques of US$12,500.00 were not cleared and he did not have them because he gave them to Mr Zama in exchange for the cheque of US$86,500.00.

Moreover that Bank of Zambia advised him to cash the cheque through the bank in which it was issued so he opened an account at the International Commercial Bank (Z) Limited.

In Re- examination **PW1** stated that he retained the term absolute owner to show that he had an interest in the property should anything happen to the it with the insurance and should it be sold. In any case that the Defendant was giving him post-dated cheques which he was not sure would clear so there was need to remain part absolute owner of the property.

He also testified that when the Defendant approached him to buy the buses he (Mr. Zama) informed him that Southern Cross Motors who referred him to the Plaintiff had told him that they were good buses. That PW1 even showed Mr Zama the letter from Southern Cross Motors assuring him that they would work on the speedometer which they had damaged when they were servicing it and Mr. Zama said he did not mind as he had been assured that they were good buses.

That his understanding was that the Defendant would meet his payment obligations because it was within the Defendant's facility with Stanbic Bank. That he gave Mr. Zama the White Books and the letter of Sale and he (Mr. Zama) changed ownership but he **(PW1**) was there when change of ownership was done.

Lastly, the witness stated that although there was a claim that the letter from the Defendant was delivered by hand, there was no physical address to show that it had been delivered physically.

The Defendant also called one Witness **Mr. Moses Kayoya Zama** the Director of the Defendant Company **(DW1)** who testified on 23rd June, 2016. It was his evidence that in May, 2010 the Defendant wanted to purchase 2 new 30 Seater buses from Southern Cross Motors Limited but it did not have them in stock and informed the Defendant that the Plaintiff had 33 Seater buses they were selling or hiring out.

That after meeting with the Director of the Plaintiff, a written contract was settled between the Plaintiff and Defendant companies and it was agreed that since the Defendant had a contract with Lumwana Mining Company, a *"Contract to Buy"* Agreement be entered into where the Defendant would put up a US$30,000.00 as deposit and the buses put on the Lumwana Contract and an agreed amount of the proceeds would go towards the purchase of the buses.

It was also his evidence that upon the agreement being signed the Defendant paid the US$30,000.00 by bank transfer into the Plaintiff's Stanbic Bank Account and the buses ABP 4214 and ABP 4216 were handed over to the Defendant who in turn immediately delivered them to service its contract with LMC in Lumwana, in the North- Western Province of Zambia.

That at the time of signing the contract the Plaintiff acknowledged that he was fully aware of the terrain and environment the buses would function in and assured the Defendant that the buses were in fact able and capable to function in Lumwana. To this end the Plaintiff even wrote to Southern Cross

Motors Limited indicating the use for which the buses were intended and their destination.

That the Defendant's agreement with Lumwana was that all their buses should do a minimum of 9,000km monthly as the condition for the monthly payment as the rate was $1.6/km.

DW1 testified that from the very beginning the buses purchased from the Plaintiff could not meet the minimum required mileage as assured by the Plaintiff due to numerous and consistent breakdowns. To prove this, the witness drew this Courts attention to the Tax Invoices relating to all their buses and the mileage covered monthly which according to him showed that the Plaintiff's buses did not reach the set target.

Moreover, that despite bringing these problems to the Plaintiff's attention, the Plaintiff did not do anything about it. It was also stated that resulting from the failure of the buses to meet the minimum conditions, the Defendant renegotiated the Agreement with the Plaintiff to reduce the monthly payments to US$12,500.00 and even paid two more such amounts bringing the total amount paid to US$55,000.00.

That meanwhile the Plaintiff did not do anything regarding the problems of the buses and LMC was threatening to cancel the contract if nothing was done about the reliability of the two buses and the Plaintiff was informed about this fact but continued to ignore the problem.

In addition that a further US$1,000.00 was paid to the Plaintiff to help facilitate with the repairs but the Plaintiff still ignored the problem and in December, 2010 the Defendant was forced to order two more new buses from Southern Cross Motors to save its contract with Lumwana which was now at risk at a cost of about US$228,000.00 to cover up for the two buses which were giving problems.

That the Defendant took delivery of the Mitsubishi buses registration numbers ABZ 7444 and ABZ7445 in December, 2010 to save the contract.

Moreover that about December, 2010 the balance of payment due to the Plaintiff was US$64,000.00 and that the Plaintiff had the Defendant's cheques which the Defendant had told the Plaintiff not to deposit due to insufficient funds being generated by the two buses in question and they agreed with the hope of repairing them but nothing was done.

He went on to state that not long afterwards, the said cheques were returned to the Defendant and it was agreed that one undated cheque be written in favour of the Plaintiff with a recalculated interest as a record of the outstanding balance. That the new cheque was for US$86,500.00 with a promise by the Plaintiff that the problems on the buses would be sorted out but this did not happen.

DW1 also stated that the Defendant was still committed to paying for the buses if the Plaintiff addressed their issues. That after several meetings over the repair issues, and stopped payments of cheques issued by the Defendant, the Defendant put the matters in dispute in writing but the Plaintiff refused to acknowledge receipt of the letter and that the Defendant was left with no choice but to send it by registered mail.

However even this attempt at resolving the matter was rebuffed by the Plaintiff who returned the original letter by registered mail without reply. That at this point the Defendant was very suspicious of the motives of the Plaintiff in the first place *vis a vis* the contract for sale by instalments and entering into the Defendant's contract at Lumwana. That the Defendant also suspected that the Plaintiff knew something about the buses that they did not disclose to the Defendant on their reliability and why they opted to put them on contract rather than subject them to a full test before fully purchasing them.

He went on to state that when the Statutory Instrument (S. I.) No. 33 of 2012 was released it stated that all payments must be made in kwacha so the US$86,500.00 was re issued at the insistence of the Plaintiff to a kwacha cheque but still with no date as it was the understanding of the

Defendant that the said cheque was meant to be merely a record of the outstanding amount.

That at some point in the process of the Plaintiff insisting on being paid the balance while the Defendant was not using the buses in question, the Plaintiff tried to deposit the cheque at ZANACO bank but was told that it was above the cheque limit which the Defendant knew and even raised at the time he was writing the cheque but insisted that they just needed one cheque as it was a record of the balance and not for depositing.

He then stated that it had now come to his knowledge that the Plaintiff had researched on the rules surrounding validity of certain values posted on cheques and found that if a cheque was deposited within the same bank where it was issued it would be allowed to go through or be *'referred to drawer'* as the case may be.

That the Plaintiff even opened a bank account at the same bank and on its own volition had already put a date on the cheque at the time of trying to deposit at ZANACO, then deposited and insisted that it be written *"Refer to Drawer"* by the bank after harassing the bank staff.

The witness also testified that the intention of the Plaintiff was to create a criminal case for the Director of the Defendant in order to force him to pay for the unusable buses. That this case was discontinued and the Director discharged after the prosecution's failure to produce certain documents and accusations by the Plaintiff of corrupt conduct by the public prosecutor resulting in the Prosecutor recusing herself.

In addition that the matter was recommenced after a re arrest was effected and was yet to start trial and clearly that it was just being used as a tool to intimidate the Defendant to pay for a service not honoured.

Moreover, that the change of ownership of the buses was done by the Plaintiff itself on 16th April, 2012 and the new books given to the Defendant who had been unable to change the registration books before as they had no

final letter of sale and the books they had were stolen from the safe at the Defendant's offices in July, 2011.

That this process of change of ownership could only be commenced, approved and completed by the actual owner and not by a purchaser as was claimed by the Plaintiff.

Moreover, that the lost books had been handed to the Defendant in December, 2010 for the renewal of road licences and at the time the Plaintiff had the cheques and had been promising to repair the buses and the dispute had not yet been declared.

Resulting from the failure of the Plaintiff's buses to meet the minimum mileage at Lumwana, the Defendant had since lost the contract of transportation services with Lumwana and this gravely affected the company's cash flows to a point where it was not functioning at all.

Due to this the Defendant was not indebted to the Plaintiff and counterclaimed the losses and damages against the Plaintiff as stated in the its Counter-claim.

In cross examination, **DW1** pointed to the contract that embodied the express terms that were agreed by the parties and that the purchase consideration for the two buses was US$120,000.00 which consisted of US$60,000.00 for each of the two buses.

Further that the Defendant made a conditional purchase of the buses and the payment terms were that he would pay US$30,000.00 on the signing of the Contract and that the next payment should have been made after 60 days, thereafter after 90 days and the final payment after 120 days.

He also mentioned that he took possession of the buses right after signing the contract and that the buses had partially worked from the time he took possession under the contract with Lumwana.

He also testified that payments from Lumwana would be based on the mileage that each bus would cover and that they worked below the target of

9,000 km monthly. He also stated that the two other buses he purchased through the International Commercial Bank Loan were 30 Seater buses whose target was 6000 km monthly.

Moreover that this agreement to cover 9000km was an agreement between the Defendant and Lumwana and the Plaintiff was not part of it.

It was also his evidence that the buses began operating in July 2010 and their problems began at that same time. He also added that the problems began in April, 2011 and they discussed them verbally and one bus stopped running.

He also testified that the letter of 29th April, 2011 sent to the Plaintiff was hand delivered but not accepted and that it was reposted to the Defendant by the Plaintiff but that it did not show at the back that it was the Plaintiff who received and sent it back.

He also confirmed that so far the Defendant had paid US$56,000.00 in instalments of US30,000.00, US$12,500, US$12,500 and US$1,000.00. Further that US$64,000.00 was outstanding.

It was also his evidence that the Plaintiff did not hide the fact that one bus had a problem with the FR Control Unit and they took the buses with full knowledge that one had a problem.

Moreover that he was stopped from testing the vehicles and only did so after taking them in his possession immediately after signing the Contract.

DW1 then told the Court that the Plaintiff was not in the business of selling buses and that he issued the cheque of K458,300.00 from the Plaintiff's office in settlement of the Defendant's indebtedness but that their account was not debited with the said amount.

Moreover, that he had a problem with change of ownership of the buses but when it was finally done, he accepted the White Books which were in his Company's name and he still had them. It was also his evidence that he was

found guilty of issuing a cheque on an insufficiently funded account and was fined K10,000.00.

Lastly it was his position that his contract with Lumwana Mine was terminated although he had no documents to show this on the record. He also stated that he was threatened by the Plaintiff countless times but did not report him to the police as he was committed to paying him. That he was no longer committed to paying him because the buses had never benefited him and that he had made US$130,000.00 which was very little compared to what he was making before.

In re- examination **DW1** told the Court that the Plaintiff had made a lot of investigations about him and his credibility and ability to pay and when he found that he was credible, he agreed to sign the contract with the Defendant.

That the contract was varied because after they began having challenges with making payments from the beginning and after discussing it sometime in December, it was agreed that the amount of US$30,000.00 should be reduced to US$12,500.00 monthly as shown on page 40 of the Defendant's Bundle of Documents.

Further that he paid US$1,000.00 cash to enable the Director of the Plaintiff to go to Lumwana to inspect the buses and that the estimation of US$140,000.00 was not profit as there were a lot of mechanical problems and the buses used to switch off and it was later discovered that although an FR Control Unit was sent to Kitwe it was discovered that it was for an automatic bus and not for a manual one such as the one they bought from the Plaintiff.

Lastly that they issued a cheque for US$86,000.00 and after this was disallowed, a Kwacha cheque was issued for K458,300.00.

Counsel for the Plaintiff filed both Skeleton Arguments and written submissions into Court.

In the Skeleton Arguments he submitted that it was not in dispute that the cheque subject to this action was issued by the Defendant and at the time of its issue the Defendant's account had insufficient funds and the only defence raised by the Defendant was that it was issued under duress because *"the Plaintiff had threatened to sue the Defendant for non – completion of payment for the purchase of two Mercedes Benz buses"*.

Counsel cited Section 2 of the Bills and Exchange Act 1882 which defined holder as **"the payee or endorsee of a bill or note who is in possession of it or the bearer thereof."**

Counsel contended that in this case the Plaintiff was the payee of the cheque and had every right to sue upon it. That one of the characteristics of bills of exchange was that one could sue upon the bill without proving consideration.

That the **Halsbury's Laws of England 4th Edition Volume 4** at paragraph 302 stated that:

> **"The outstanding characteristics common to bills of exchange, cheques and promissory notes which found expression in the cases decided before 1882, and were embodied in the codifying statute were (1) that a valuable consideration is presumed, so that there is no necessity to state it; (2) that such instruments may be transferred from one person to another by endorsement or by delivery, so as to enable the transferee to enforce it in his own name; and (3) that the transferee who takes such an instrument in good faith and for the value obtains a good title in spite of any defect of title in the transferor."**

That at paragraph 379, it was further provided that:

> **"Bills of exchange and promissory notes, unlike other forms of simple contract, are presumed to stand upon the basis of a valuable consideration. Not only is this so in the case of the immediate parties to the bill or note, but it is so also in the case**

of the immediate parties to the bill or note, but it is so also in the case of those who become parties to it subsequently by endorsement, for every party whose signature appears on a bill is prima facie deemed to have become a party to it for value.

The effect of the presumption, therefore is to shift the burden to proof from the claimant who relies upon the instrument to the Defendant who impugns it.

But when, in an action on a bill or note, it is admitted or proved that the acceptance, issue or subsequent negotiation of the instrument is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted unless and until the holder proves that subsequent to the alleged fraud or illegality, value has been given for the instrument in good faith."

According to Counsel for the Plaintiff, all that was needed to be proved by the Plaintiff was that the cheque was issued in its favour and had been dishonoured.

On the issue of Duress Counsel for the Plaintiff cited authorities from the learned authors on **Chitty on Contracts** as well as **Cheshire, Fifoot and Furmstones Law of Contract, 14th Edition** which state that a threat forming the basis of duress must be illegal or illegitimate and that a threat of litigation over a breach of contract surely could not amount to duress.

In response to the Counterclaim of the Defendant it was contended by Counsel that the Contract relating to the sale of the motor vehicles was plain and did not disclose specifications as to proper use or purpose.

It was further contended that the Witness Statement showed that the Defendant had a chance to inspect the vehicles to their specification. Therefore it was argued that there could be no implied warranty under **Section 14 of the Sale of Goods Act of 1893**.

Moreover, that even assuming that there was a warranty, it had already been met as the Plaintiff had never until the commencement of this action raised any issue on the defects it was now alleging.

In its written submissions learned Counsel for the Plaintiff stated that he wished to reiterate that the moment the Defendant issued the cheque payment of K458,300.00 there arose a presumption of valuable consideration having been furnished by the Plaintiff.

Thus the Cause of action here accrued when the Defendant's cheque was dishonoured and the Plaintiff was entitled to have sued, as it did, on the basis alone of the fact that the cheque was issued and dishonoured.

That the burden of proof was on the Defendant where it was argued that there was no valuable consideration furnished in exchange of the value of a cheque payment. In *casu*, the Defendant contended by Counter-claim that the buses it purchased from the Plaintiff were not fit for the purpose they were intended.

That it was however established at trial that the purpose for which the buses were intended was not expressed in the written contract between the parties. Further that a perusal of the letter to Southern Cross Motors confirmed that the Plaintiff did not hide the fact that one of the buses purchased by the Defendant had an issue with the FR Control Unit, which Southern Cross Motors was obliged to work on and this letter was dated 2nd June, 2010 barely two days after the Contract for the Sale of buses was executed.

Further that if the buses had any major issue following their remittance to the mine, the Defendant as a prudent business entity would have immediately brought this to the attention of the Plaintiff, however no evidence was adduced to show that it did. That the only evidence adduced was that the Defendant utilised the buses and never made it known to the Plaintiff that the mileage covered by the buses was less than what was alleged to have been contracted with Lumwana Mine.

It was also pointed out that the Defendant recorded the distance the buses covered and Lumwana mines was accordingly billed and did pay for the services without evidence that Lumwana complained over the mileage of the buses. That if the alleged problems over the buses were true, a prudent party would have taken verifiable steps to address the problems. That if written demands were being ignored for the supplier to remedy any problem, a prudent purchaser would have either returned the buses in issue and repudiated the contract, or would have commenced legal action. That none of these steps were taken yet the Defendant continued to make money off the buses in excess of USD$150,000.00 over a space of 9 months. That the Defendant even failed to produce an independent expert or mechanic who should have been engaged to assess the buses and confirm the problems they were alleged to have had.

Counsel also pointed out to the Court that the only time that the Defendant claimed to have written to the Plaintiff over the alleged defects on the buses was in May, 2011 and this letter was returned undelivered with no evidence that it had been received by the Plaintiff.

That the conduct of the Defendant was inconsistent with that of a reasonable man who would not be expected to continue making promises to pay and in fact make some payments on the contract amidst the alleged problems with the buses.

Counsel also urged this Court to further note that the Defendant paid US$30,000.00, then US$26,000.00 after which it issued 7 dishonoured cheques of US$12,500.00 between February and August, 2011 therefore it defied logic and reason how the Defendant could continue to issue cheques to cover payment of the balance amidst the alleged issues, which were never brought to the Plaintiff's attention.

Furthermore, that the Defendant issued a cheque of USD86,500.00 in February, 2012 which was nearly two years after the execution of the Contract but later retrieved it and issued a Kwacha cheque payment of K458,300.00 on 24th July, 2012. It was again stated that a reasonable

person would not issue payments against a background of defects on goods supplied to it.

Moreover that although the Defendant tried to argue that the cheques were issued under threat there was no evidence to this effect. In any case that even if these allegations had been true, the Defendant had the option to engage the appropriate authorities to complain against the Plaintiff but this was not done.

That alternatively if the threats were to report the Defendant to the police for bouncing a cheque or to sue it for breach of contract, a commitment to pay by issue of subsequent cheques could not be said to have been made under duress or threat if imprisonment would be lawful or the Plaintiff would have a cause of action to sue for the civil wrong.

Further that in the case before this Court, a civil wrong was committed giving rise to this action and the Defendant's witness admitted that he was successfully prosecuted for issuing the cheque payment without sufficient funds in the Defendant's bank accounts.

Finally that the Defendant contended that the change of ownership was done by the Plaintiff but the position was actually that this change of ownership was at the instance of the Defendant. Moreover that regardless of who did the change, the Defendant did not dispute this change for the buses to have been registered in its names as owner and absolute owner.

That in any event, the Defendant collected the White Books for the vehicles confirming that it had taken full ownership of the vehicles therefore it remained liable to settle whatever balance was due to the Plaintiff on the Contract.

In conclusion Counsel for the Plaintiff argued that the Plaintiff had demonstrated during trial that the amount claimed being the agreed balance sum on the sale of the two vehicles to the Defendant was due to it and thus payable. That the buses were utilised by the Defendant and it obtained value from them in excess of the contract price thus to allow the Defendant

to walk away without completing its payment obligations under the contract would be unjust enrichment of the Defendant. It was then submitted that the Plaintiff had proved its case on a balance of probabilities and was entitled to have the Judgment in its favour.

On the other hand that the Defendant had failed to prove its Counter-claim against the Plaintiff thus it should wholly fail and be dismissed.

I am grateful to Counsel for the Plaintiff for the written submissions which I have considered together with the evidence on record. Counsel for the Defendant's did not file any written submissions or skeleton arguments but I still considered the Defendant's Defence and the evidence of **DW1** during the trial.

It is not in dispute that the parties herein entered into a Sale Agreement on 31st May, 2010 whereby the Defendant was to purchase two buses from the Plaintiff on the following terms:-

> ***(a) A total price of US$120,000.00 being US$60,000.00 each payable in four instalments on the following terms and conditions:***
>
> ***(i) Upfront payment of US$30,000.00 is payable and this offer is only valid against issuance of receipt in the sum of US$30,000 and the Absolute owners to be Lambda Busing Corporation Limited in the sum of US$30,000.00 and the current owner in the sum of US$90,000.00.***
>
> ***(ii) Upon expiry of 60 days the second instalment of US$30,000.00 shall be due, and Lambda Busing Corporation Ltd shall be absolute owner in the sum of US$60,000.00 and the current owner in the sum of US$60,000.00.***
>
> ***(iii) Upon expiry of 120 days, the fourth and final instalment of US$30,000.00 shall be due and upon receipt of the total US$120,000.00 by the current owners of the buses, LAMBDA BUSING CORPORATION LTD shall become the full owner of the buses as the current owner shall have no claim against the buses.***

It is also not in dispute that the Defendant knew that one of the buses had a problem with the FR Control Unit.

It is also common cause that the Defendant only paid US$ 56,000.00 from the agreed total sum of K120, 000.00.

What is in dispute is whether or not the Defendant owes the Plaintiff the sum of K458, 300.00 being the balance owing on the purchase of the two buses.

A summary of the evidence of the Plaintiff is that the Defendant issued it with a cheque of K458,300.00 which was dishonoured due to insufficient funds in the account of the Defendant.

Further that when this cheque was issued a presumption of valuable consideration arose and the cause of action in this case accrued when the cheque was dishonoured and the Plaintiff is entitled to sue.

It was also stated that although the Defendant stated in its Counter-claim that the buses purchased were not fit for the purpose they were intended, it was established at trial that the purpose was not expressed in the written contract.

Moreover that the Plaintiff did not hide the Defendant the fact that one of the buses had a problem with the FR Control Unit and that if the buses later had any major issue this should have been brought to the attention of the Plaintiff.

The Defendant on the other hand stated in Defence that the cheque was drawn by the Defendant in favour of the Plaintiff but was issued under duress. Moreover that the Defendant had advised the Plaintiff that the said account did not have sufficient funds and the cheque was purely meant to comfort the Plaintiff.

That the Defendant had not failed to make good the value of the cheque but it was the buses sold and delivered to the Defendant which were in breach of

express and implied conditions and warranties contained in the Contract of Sale of the two buses between the parties.

The Defendant also brought in a Counter-claim for:

(i) Payment of the sums specifically claimed as loss of revenues and monthly instalments paid to the Defendant's lender.

(ii) Damages for breach of the written contract made between the Plaintiff and the Defendant on 31st May, 2010.

(iii) Interest on (1) and (2) above.

As already indicated, evidence on the record has shown that the parties executed a Contract on 31st May, 2010 for the Plaintiff to sell two buses to the Defendant and that payment was to be made in instalments as outlined in the Contract. Although the Defendant's witness claimed that this Contract had been varied by the parties, there is no evidence to this effect on the record.

It has also been shown by the Plaintiff that they informed the Defendant of the fact that one of the buses had a problem with the FR Control Unit. The Defendant's Director Mr. Moses Zama claimed that he was not allowed to inspect the buses. In my view he should have insisted on conducting a full examination of the buses before receiving them as a diligent purchaser would.

It has also been shown that the Defendant only paid US$56,000.00 in total leaving a balance of US$64,000.00 for which **DW1** finally issued a cheque of K458,300.00 as the balance outstanding.

However, when the Plaintiff deposited this cheque it was dishonoured because the account of the Defendant was insufficiently funded.

From that time to date, the Defendant has not fulfilled its obligation under the Contract to pay the balance outstanding on the buses.

In his letter dated 29th April, 2011 (which is at pages 39 and 40 of the Defendant's Bundle of Documents) to the Executive Chairman of the Plaintiff Company Mr. Moses K. Zama the Chief Executive Officer of the Defendant states thus in the last paragraph:

> **"We propose that we finish paying for the buses we had to buy over and above the buses we purchased from Indemnified, and then we shall have enough revenue to pay for the balance outstanding to Indemnified Investments Holdings Limited".**

This is a clear admission by the Defendant Company that it purchased buses from the Plaintiff Company and that there was a balance of the purchase price outstanding. The balance of the purchase price is K458,300.00 the amount for which the Defendant issued a Kwacha Cheque No. 0Z9799 drawn on International Commercial Bank Zambia Limited dated 24th July, 2012 payable to the Plaintiff. As the said cheque was dishonoured by non-payment, an immediate right or recourse against the drawer i.e. the Defendant accrued to the holder i.e. the Plaintiff.

In the premises I therefore find that the Plaintiff has shown this Court on a balance of probabilities that the Defendant owes it the sum of K458,300.00 being the balance owing on the Contract of Sale executed on 31st May 2010 for the sale of two buses by the Plaintiff to the Defendant.

The Defendant in its Counterclaim relied on **Section 14 of the Sale of Goods Act of 1893** to aver that there was an implied condition of the contract that the coaches would be reasonably fit for use in its business at Lumwana mine. This provision states that:

> **"Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows :-**
>
> > **(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or**

judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose:

(2) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:

(3)An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade:

(4)An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

The provisions of the Sale of Goods Act, 1893, apply to the above contract between the Plaintiff and the Defendant. By **Section 2(c) of the English Law (Extent of Application) Act, Chapter 4 of the Laws of Zambia, the Sale of Goods Act, 1893** is applied to Zambia.

Section 16 to 19 of the Sale of Goods Act contain rules for determining when the property or ownership in goods is transferred to the buyer. One of the reasons why it may be important to know at what particular moment of time ownership is transferred is because at that moment, by virtue of Section 20, the risk of any loss or damage to the goods generally passes to the buyer.

Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties, regard is had to the terms of the contract, the

conduct of the parties, and the circumstances of the case **(Section 17 of the Sale of Goods Act 1893)**. The parties to a contract for the sale of specific goods can expressly agree on the exact time at which property in them is to pass. It is not, however, normal to do so and Section 18 of the Act gives rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

Rule 1 states that –

> **"Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed".**

In *Casu* the terms of the Contract for the Sale of the 2 Mercedes-Benz Buses dated 31st May, 2010, the conduct of the parties and the circumstances make it clear that the property in them passed to the Defendant as buyer when the Contract was made. It is immaterial that apart from the initial sum of US $30,000.00 paid on execution of the contract of sale the balance of the purchase price was to be paid in three agreed instalments. I accept Dr. George Mulomboi's explanation that the Defendant Company became absolute owner of the Buses from the time the initial payment of US $30,000.00 was paid to the Plaintiff company and that thereafter the Plaintiff only had a residual security interest in the buses.

The assertion by **DW1** (Mr. Moses K. Zama) that the Contract was a conditional purchase and that the Contract of Sale was varied when he took back 7 cheques for US $12,500.00 each the Defendant had issued to the Plaintiff in exchange for one cheque in the sum of US $86,500.00 on 10th February, 2012 is a red herring and flies in the teeth of the terms of the executed Contract of Sale.

Section 14 of the Sale of Goods Act which the Defendant relies on in its Counter-claim starts with a statement of the general principle of **caveat**

emptor i.e. that there is no implied warranty or condition as to quality or fitness for a particular purpose of goods supplied under a contract of sale except as provided by Section 14.

Section 14 implies two conditions into every sale by a trader; that the goods are of satisfactory quality and that they are fit for a particular purpose. The requirement of Section 14 that the sale must be *"in the course of a business"*, means that the implied terms of quality and fitness cannot apply to sales by private individuals. So, if one buys something privately and it is defective or unsuitable, one cannot complain under Section 14.

In *casu* the Plaintiff did not sell the two Mercedes-Benz Buses in the course of a business. The Plaintiff is not a motor vehicle dealer and did not therefore sell the buses in the course of a business. The Plaintiff did not have any skilful knowledge in the buses since it was not in the business of selling them as this was a once off transaction. The fact that the Plaintiff wrote to Southern Cross Motors Limited on 2nd June, 2010 asking them to work on the FR Control Unit for one of the buses is evidence that the Defendant as buyer herein did not depend on the Plaintiff's skill or judgment as seller of the buses. The Defendant who was told by Southern Cross Motors Limited that the Plaintiff had 2 Mercedes Benz Buses for hire or sell knew that the Plaintiff was a private seller before the Contract of Sale was made on 31st May, 2010.

As the sale of the buses was not in the course of a business for purposes of Section 14 of the Sale of Goods Act, 1893 I find and hold that the implied condition as to merchantability i.e. quality and fitness for any particular purpose did not apply.

It is trite law that for the buyer to rely on the provisions of **Section 14(1) of the Sale of Goods Act, 1893** he must have made known to the Seller expressly or by implication the particular purpose for which the goods are required. In *casu* it is clear that although the Plaintiff was not a party to the transportation contract between the Defendant and Lumwana Mining Company Limited, the Plaintiff knew that the buses were being purchased to

inter alia service the transportation contract between the Defendant and the said Lumwana Mining Company Limited. I will therefore consider the Defendant's Counter-claim herein as if the implied terms as to merchantable quality and fitness for purpose applied.

I have considered Section 35 of the **Sale of Goods Act, 1893** on Acceptance and it states that:-

> **"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them."**

The facts of this case show that the two buses were immediately delivered after the Contract was executed on 31st May, 2010. The only evidence showing that the Defendant was not happy with their performance emerged in a letter **DW1** claimed to have delivered to the Plaintiff in April, 2011 which letter the Plaintiff disputes having received.

I find it very difficult to accept the evidence of **DW1** (Mr. Moses K. Zama) that from the very beginning the buses purchased from the Plaintiff could not meet the minimum required mileage as assured by the Plaintiff due to numerous and consistent breakdowns. If this evidence is true it is surprising that the Defendant made the second instalment payment of US $25,000.00 towards the purchase price in the last quarter of 2010. As a reasonable businessman Mr. Zama would not have paid the second reduced instalment of the purchase price of US $12,500.00 per bus if he was having trouble with the 2 buses from the time of delivery.

I also find the evidence that the Defendant brought these problems to the Plaintiff's attention but the Plaintiff did not do anything about it unconvincing. I would have been convinced if apart from the Defendant's letter to the Plaintiff dated 29th April, 2011 which letter the Plaintiff disputes having received, other written evidence of this was produced or if the drivers

who drove the buses in the first few months after delivery of the buses had given evidence and corroborated that of **DW1**.

In its Counter-claim the Defendant states that the 2 buses purchased from the Plaintiff were only in use for almost 3 months after delivery at Lumwana Mine. However the Tax Invoices contained in the Defendant's Bundle of Documents issued to Lumwana Mine by the Defendant and found at pages 1 to 33 of the said Bundle of Documents show that –

(a) The Bus bearing Registration No. 4214 was in use for at least 7 months i.e. July, 2010 to January, 2011 as per Tax Invoice No. 067 dated 24th January, 2011 at page 19 of the Defendant's Bundle of Documents.

(b) The Bus bearing Registration No. 4216 was in use for at least 11 months i.e. July 2010 to June, 2011 as per Tax Invoice No. 082 dated 22nd June 2011 at page 32 of the Defendant's Bundle of Documents.

I therefore find it very difficult to accept the evidence of **DW1** on this issue.

The Defendant purportedly made some complaints about the vehicles but it did not reject the buses immediately or within a reasonable time of say 2 months and treated the contract as rescinded, as it was entitled to do, but it has kept the buses up to the time the Plaintiff instituted this action on 14th November, 2012 some 2 years 6 months later and approbated the contract by paying 3 instalments of the purchase price and issuing a Cheque for K458,300.00 being the balance of the purchase price.

In my view the Defendant accepted the buses as they were since it retained them for at least 11 months without intimating to the Plaintiff that it had rejected them.

The Defendant bought second-hand Mercedes-Benz buses and he was warned that the FR Control Unit for one of the buses was defective and Southern Cross Motors Limited the dealers agreed to repair it. As these

were second-hand buses I am of the considered view that the Plaintiff cannot reasonably expect the highest standards of quality. Having bought second-hand buses defects were bound to appear sooner or later. This principle was espoused by Lord Denning MR in the case of **BARTLETT V SIDNEY MARCUS (1)** in which he pointed out that:

> **"A Buyer should realise that when he buys a second-hand car defects may appear sooner or later".**

In the circumstances, I find that the 2 buses sold by the Plaintiff to the Defendant were in good and road-worthy condition. They were of merchantable quality.

Based on the foregoing, I find that the Defendant has failed to satisfy the Court that the 2 buses were not fit for the purpose for which they were bought. For avoidance of doubt the Defendant has failed to prove its Counter-claim.

I therefore enter Judgment in favour of the Plaintiff against the Defendant for the payment of the sum of K458,300.00. The said sum is payable with interest at the Commercial Bank Short Term Deposit Rate from the date of the Writ of Summons (14th November, 2012) to date of Judgment and thereafter at the Commercial Bank Lending Rate as determined by Bank of Zambia until full payment.

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

Leave to appeal is granted.

Delivered at Lusaka this 27th day of September, 2017.

.....

WILLIAM S. MWEEMBA
HIGH COURT JUDGE