

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0122

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

MANJEET COTTON ZAMBIA LIMITED

PLAINTIFF

AND

JUSTINE COTTON & OIL COMPANY LIMITED

DEFENDANT

Before the Hon. Lady Justice Irene Zeko Mbewe

For the Plaintiff

Mr. M. Ndhlovu of Messrs MRN Legal Practitioners

For the defendant:

Mr. E. Khosa of Messrs Yalenga & Associates

JUDGMENT

Cases Referred To:

1. *Khalid Mohammed v Attorney General (1982) ZR 99*

By way of Writ of Summons the Plaintiff commenced proceedings claiming for:

- i. Payment of the sum of ZMW573,848 and US\$133,821 advanced to the Defendant by the Plaintiff pursuant to a Lease Agreement ate 18th November 2013 and a Loan Agreement dated 20th November 2013.
- ii. That in the event of failure by the Defendant to pay the sums of ZMW573,848.00 and US\$133,821.00 that the Plaintiff is entitled to exercise its right as provided for in the Loan Agreement dated 20th November 2013 to take possession of and dispose of the cotton ginning and pressing factory on Subdivision Y of Subdivision number 1 of subdivision A of Farm D25 located in Chipata.
- iii. Interest on the monies due.
- iv. Costs
- v. Any other relief the Court may deem appropriate.

In its accompanying statement of claim, the Plaintiff avers that by a written Lease Agreement dated 18th November 2013 between the Defendant as Lessor and the Plaintiff as Lessee, the Defendant let its plant and machinery being the ginning and pressing factor to the

Plaintiff to enable it produce lint and cotton seed. By clause 3 of the Lease agreement, the Plaintiff as Lessee was obliged to pay lease charges at the rate of US\$120 per metric tonne of lint with the latter being responsible for the supply of seed cotton, lint, cotton seed and wool packs. That to facilitate the smooth operation of the ginning and processing factory the Defendant had undertook to do the following:

- i. Provision of labour for unloading and loading of seed cotton.
- ii. Provide wool packs bags and load them, unloading of seed cotton, stacking of seed cotton and processing of seed cotton.
- iii. Making lint bales as specified by the Plaintiff.
- iv. Provide labour for smooth processing of seed cotton as require per shift for ginning.
- v. Provide seed cotton to the Plaintiff after procuring it and also sell lint to the Plaintiff.
- vi. Keep enough spare parts and other required machinery to avoid breakdown of the factory.

The Plaintiff avers that prior to the execution of the Lease Agreement, the Defendant made representation that it was in the process of obtaining a facility from its Bankers to enable it fulfill its obligations under the Lease Agreement. That the Defendant failed to obtain any financing from its Bankers to meet its obligations to the Plaintiff. The Plaintiff avers that at the instance of the Defendant, the Plaintiff advanced ZMW2,183,964.00 to the Defendant on diverse dates from 11th December 2013 to 19th February 2015 which was duly acknowledged by the Defendant's Managing Director or authorised representatives by appending his signature on various payment vouchers in respect of the following:

i. Electricity for factory operations	K 129,651.67
ii. Labour costs and other necessities	1,317,424.00
iii. For firefighting equipment	24,328.05
iv. For purchase and supply of	712,651.00
PP bags, wires for tying cotton lint	
Bales, iron sheets	

The Plaintiff avers that after deducting ginning charges payable to the Defendant pursuant to the Lease Agreement amounting to

ZMW1,610,280.00 there is an outstanding balance of ZMW573,848.00 as at 31st March 2015.

The Plaintiff avers that pursuant to a Loan Agreement dated 20th November 2013 made between the parties herein, the Defendant was advanced United States dollars One Hundred Thousand (US\$100,000.00). The Plaintiff avers that the Defendant was obliged to use the said loan for the acquisition, installation and commissioning of a second ginning and pressing plant at Subdivision Y of Subdivision Number 1 of Subdivision A of Farm, D25, Chipata, Eastern Province. That the Defendant acquired and installed the second ginning and processing plant which as utilised by the Plaintiff to produce lint in 2013 to 2014 season. According to the Plaintiff, the Plaintiff was to have a lien over all factory equipment and machinery on Subdivision Y of Subdivision Number 1 of Subdivision A of Farm D25, Chipata.

The Plaintiff avers that the Defendant has failed or neglected to settle the loan of US\$100,000.00 which loan has accrued interest of US\$33,821.00 for the period 8th January 2014 to 31st December 2015. The Plaintiff avers that the Defendant has failed to pay

monies advanced to it pursuant to the Lease Agreement dated 18th November 2013. The Plaintiff avers that the Defendant offered to dispose of the plant and machinery at the factory to offset its debt with the Plaintiff. That consequently, the Plaintiff has suffered loss and claims the reliefs stated in the Writ of Summons.

The Plaintiff filed a Witness Statement signed by Mohit Agarwal the Operations Manager in the Plaintiff Company whose evidence is a repeat of what is stated in the statement of claim.

In cross-examination, PW1 testified that pursuant to Clause 6 of the Lease Agreement, it was the Plaintiff's obligation to give an advance to the Defendant herein to set up the ginning plant in Chipata and to thereafter recover the advanced monies. PW1 testified that the Defendant's obligation under the Lease Agreement was to process cotton for the Plaintiff at the agreed price including the payment of all operational expenses to process the cotton. PW1 testified that the loan was to have been paid by 21st December 2013 plus an interest of 15% per annum. That an extension was given to the Defendant to pay by 21st December 2014. PW1 conceded that there was no addendum showing that monies were to be given to

the Defendant. PW1 testified that he arrived at the amount of the Defendant's indebtedness by using the US\$120.00 per metric tonne for the processing of seed cotton. PW1 stated that in arriving at what amount was owing by the Defendant, he calculated the total monies given to the Defendant less the amount advanced. PW1 stated that the Defendant was loaned US\$100,000.00 and that the Defendant has made no payments.

In re-examination, PW1 stated that the Defendant had requested for monies from the Plaintiff and that the season was on going and the Plaintiff had material at the factory. That monies were lent out on the understanding that it would be recovered. PW1 stated that some costs were paid on behalf of the Defendant and that the Defendant never disputed their indebtedness in the sum of ZMW573,848.00 and US\$133,82.00. PW1 testified that there was no dispute as to the amount repayable.

The Defendant did not file a defence and did not call any witnesses. The Defendant failed to comply with the Orders for Directions. The Plaintiff was to file written submissions by 27th October 2017 and

the Defendant's by 13th November 2017. Both parties did not file their written submissions.

I have carefully evaluated the pleadings and documentary evidence including the oral evidence adduced. .

It is common cause that the parties herein entered into a Lease Agreement on 18th November 2013 (Page 1 in the Plaintiff's bundle of documents) wherein the Defendant was in need of a ginning and pressing factory on a lease basis to process seed cotton into lint and cotton seed. It is common cause that the Defendant agreed to pay a lease fee of US\$120.00 per metric tonne of lint. The Lease Agreement was valid for a term of 13 months commencing from 1st December to 31st December 2014.

It is common cause that a second Agreement was executed between the parties herein on 20th November 2013. The object of the Agreement was for the Plaintiff to use and occupy the Defendant's factory premises to procure lint and cotton seed delivered to the factory premises being Subdivision Y of Subdivision 1 of Subdivision A of Farm D25 Chipata. It is common cause that the Plaintiff would advance the Defendant the sum of US\$100,000.00

for the sole purpose of payment of duties, taxes for the purchase of machinery and related equipment into the factory premises. It is a term of the Agreement that the Plaintiff would charge interest at 15% per annum on the advanced amount as stipulated in Clause 3 (a) (b) of the Agreement (Page 8-14 Plaintiff's bundle of documents).

The issue for determination is whether the Plaintiff is entitled to the reliefs sought. Even though the Defendant did not file its defence, I am guided by the case of **Khalid Mohammed v Attorney-General** where the Supreme Court held as follows:

“that a Plaintiff cannot automatically succeed whenever a defence has failed. He must prove his case”.

It is trite that the parties are bound by the terms of their contract unless coercion, fraud or undue influence is pleaded and proved. It is the duty of this Court to uphold the sanctity of lawful commercial transactions such as the Lease Agreement dated 18th November 2013 and the Loan Agreement dated 20th November 2013. I have therefore given effect to the letter and spirit of the two Agreements as parties executed the same willingly.

From a reading of the two Agreements, namely the Lease Agreement dated 18th November 2013 and the Loan Agreement of 20th November 2013, it is evident that there was a contractual relationship between the parties with prescribed terms and conditions. According to the default clause contained in Clause 8 of the Loan Agreement dated 20th November 2012, it reads as follows:

"8. In the event of Yustina Cotton committing a default in complying with its obligations, in particular utilisation and repayment of advance amount for the purpose described in clause 3 (a) of this Agreement or commits breach of any of the covenants and obligations to be observed and performed by the Yustina Cotton as provided in this Agreement and if Yustina Cotton fails to rectify the default after Manjeet Cotton shall have required Yustina Cotton to do so by not less than 15 days written notice, Manjeet Cotton reserves the right to recover the losses occurred to it as it deems fit."

The Defendant having defaulted, I find that the Plaintiff is within its rights to demand for payment of the debt plus interest from the Defendant.

I have further perused the Plaintiff's Ledger Account showing that monies were advanced to the Defendant by the Plaintiff. The Ledger Account shows details of the voucher numbers and the payee's name including the purpose of the payment. The Ledger Account runs from 1st April 2014 to 31st March 2016 with the closing balance as at 31st March 2016 of ZMW2,455,469.09.(Pages 15-19 of the Plaintiff's bundle of documents). The Plaintiff exhibited cash vouchers paid out to the Defendant and received by a Mr. Jesse Kitta the Managing Director in the Defendant Company. The narratives show various cash payments to the Defendant (Pages 20-80 of the Plaintiff's bundle of documents).

I find that the Defendant admitted its indebtedness to the Plaintiff in the sum of US\$116,366.00 as at 31st December 2014 which was to have been paid not later than 31st December 2015. This position is reflected in a letter from the Plaintiff to the Defendant dated 31st December 2014 and the relevant paragraph reads as follows:

"To: Yustina Cotton and Oil Co Ltd,

N75 New Houses

Kapata, Chipata

Zambia

Dear Mr. Kitta,

**Sub: Loan Agreement dated 20th November 2013 -
Demand of loan with interest Ref: Your letter dated 30th
December 2014**

"You are requested to kindly confirm the above by signing the two copies as to your agreeing to amount of USD116,366 due as at 31.12.2014 and your confirmation to arrange the payment at the earliest but not later than 31.12.2015. Kindly note that even though we have agreed to extend the loan with interest for a further one year up to 31.10.2015, but company reserves all rights to claim back or action available in the said loan dated 20th November 2013.

We have attached the working for your record."

The said letter is then agreed to and confirmed by Mr. Mohit Agarwal Director for the Plaintiff and Mr. Jessie Kitta Managing

Director for the Defendant (Page 81-82 of the Plaintiff's bundle of documents) who both appended their signature to the said letter.

In default of payment by the Defendant, the Plaintiff claims for relief to exercise its right and take possession and dispose of the Cotton Ginning and Pressing Factory on Subdivision Y of Subdivision Number 1 of Subdivision A of Farm D25 located in Chipata. I find that this is in accordance with Clause 7 of the Loan Agreement which reads as follows:

"7. Manjeet Cotton reserves the right to create lien over the Factory premises and machineries related equipments installed therein from the day of making the first advance payment to Yustina for the purpose described in clause 3 (a) (i) till the date Yustina Cotton services all the advance payments due to Manjeet Cotton along with the interest on such advance payments."

As stated in the preceding paragraphs, the Defendant has defaulted in settling its indebtedness to the Plaintiff who has a lien over the Cotton Ginning and Pressing Factory and the machinery therein

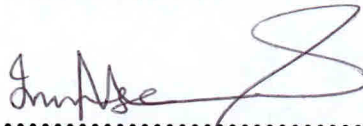
located at Subdivision Y of Subdivision Number 1 of Subdivision A of Farm D25 located in Chipata.

I therefore enter Judgment in favour of the Plaintiff against the Defendant in the sum of ZMW573,848.00 and US\$133,821.00 plus interest at the contractually agreed rate of 15% per annum for both loans until full payment. The said amount shall be settled within fifty-five (55) days from date of Judgment. In the event of failure by the Defendant to pay the Judgment sum, I order the Plaintiff to take possession of and dispose of the Cotton Ginning and Pressing Factory and machinery equipment situate at Subdivision Y of Subdivision Number 1 of Subdivision A of Farm D25, Chipata.

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

Leave to appeal granted.

Delivered this 27th day of November 2017.



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HON. IRENE ZEKO MBEWE
HIGH COURT JUDGE