

**IN THE HIGH COURT OF ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA**  
*(Civil Jurisdiction)*

**2014/HP/1673**

BETWEEN:

**JUSTIN MUTALE**

AND

**ROSS BREEDERS LIMITED**



**PLAINTIFF**

**DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 14<sup>th</sup> DAY OF MARCH,  
2018**

*For the Plaintiff : In person*

*For the Defendant : Ms Precious Tembo, Mwenye and Mwitwa Advocates*

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## **J U D G M E N T**

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CASES REFERRED TO:

1. *Printing and Numerical Registering Company V Simpson 1857 L.R. Eq 462*
2. *Storer V Manchester City Council 1974 1 WLR 1403*
3. *Butler Machine Tool Co Ltd V Ex-Cell-O Corp Ltd 1977 EWCA Civ 9*
4. *National Drug Company Limited and the Zambia Privatisation Agency V Mary Katongo Appeal No 79/2001*
5. *Galunia Farms Limited V National Milling Company Limited 2002 ZR 35*
6. *Jacques Chisha Mwewa V Attorney General 2011 VOL 2 ZR 35*
7. *Friday Mwamba V Sylvester Ntenge, Monica Kapinga and Derrick Chalwe 2013 VOL 3 ZR 257*

WORKS REFERRED TO:

1. *Chitty on Contracts, General Principles, Volume 1, 23<sup>rd</sup> Edition, Sweet and Maxwell*

The Plaintiff commenced this action 17<sup>th</sup> October, 2014 by writ of summons, which was amended on 24<sup>th</sup> July, 2017, claiming;

1. *Payment of K33, 600.00 being payment for three months in lieu of notice terminating the contract.*
2. *Payment of K16, 500.00 for fuel at a rate of K750.00 fortnightly for eleven months.*
3. *Payment of K10, 000.00 being the cost of servicing the vehicle for eleven months.*
4. *Interest on the amount found due*
5. *Further or other relief*
6. *Costs*

The statement of claim shows that the Plaintiff is the bona fide owner of a Toyota Hiace registration number ALM 7392, which the Defendant hired on or about 13 December, 2013. That the hire charges were paid fortnightly at K5, 600.00, and that the Defendant accepted the terms contained in the agreement letter whose charges were revised. It is stated that the Defendant failed to honour the refuelling and servicing agreement, and only tagged the vehicle. That on or about 14<sup>th</sup> October, 2014, a person called Mr Nyirenda purporting to represent the Defendant called the Plaintiff and informed him that the Defendant was terminating the contract immediately, and that this was done without justification.

The Plaintiff alleges that the termination of the contract was done in breach of the rules of natural justice in that the Defendant was obliged to give him a minimum of three months' notice, and that the termination was done without giving the Plaintiff a warning letter concerning his misgivings. Further that the termination of the contract had resulted in the Plaintiff suffering psychological, emotional and economic distress.

In the defence filed on 5<sup>th</sup> January, 2015, and amended on 10<sup>th</sup> October, 2017, the Defendant states that it had a transportation contract with the Plaintiff, under which the Plaintiff was supposed to pick up the Defendant's employees

using his vehicle registration number ALM 9372, from various locations within Lusaka and drop them at the Defendant's premises in the morning, and pick them up from there in the evening, and drop them off at the locations they were picked up in the morning.

Further that while the Plaintiff alleged that the agreement was entered into on 13<sup>th</sup> December, 2013, the actual agreement was in fact entered into on 7<sup>th</sup> December, 2013. That the Plaintiff was supposed to be paid K250.00 a day depending on the actual trips made. On the termination of the contract, the Defendant's defence is that the same was communicated to the Plaintiff by way of letter on 15<sup>th</sup> October, 2014, and that it was due to the Plaintiff's failure to meet his obligations under the contract as indicated in the complaint letter authored by the Defendant's employees.

It is stated that the Plaintiff's poor performance not only affected productivity at the Defendant's company, but also endangered the lives of the Defendant's employees, as the Plaintiff's driver frequently drove the vehicle under the influence of alcohol. That the Plaintiff's vehicle was too small, having only sixteen seats for the over twenty employees for the Defendant. The Defendant denies that it terminated the contract in breach of the rules of natural justice, stating that the rules of natural justice do not apply to the contractual relationship between the Plaintiff and the Defendant, and that the contract between the parties did not provide for the giving of three months' notice to terminate the same. Further that the Defendant was not obliged to give the Plaintiff a warning letter for any breaches of the contract before terminating the said contract.

That the giving of the three months' notice would have been unreasonable due to the fact that the Plaintiff was paid per day, and not fortnightly as alleged.

At the trial, the Plaintiff testified and called no witnesses, while the Defendant called two witnesses. In his testimony the Plaintiff told the court that he approached the Defendant on 6<sup>th</sup> December, 2013 to hire his vehicle to it, and he met Mr Nyirenda, the Administration Manager for the Defendant. That upon



Mr Nyirenda inspecting the vehicle, it was agreed on which points the Plaintiff would pick up the Defendant's employees and drop them off.

The Plaintiff further testified that it was agreed that he would pick up ten employees, and that he should set out his terms as a transporter, and that is how on 12<sup>th</sup> December, 2013 he informed the Defendant of his terms of engagement, and asked if it agreed with the same. He stated his terms as the cost per day for the hire, secondly that the Defendant would refuel his vehicle and thirdly that the Defendant would be servicing his vehicle, and fourthly that the Defendant would recognize the Plaintiff's vehicle as its' own by placing a sticker on it. That the last term that the Plaintiff set out was that the Defendant was to indicate for how long it would require the Plaintiff's vehicle.

It was also the Plaintiff's evidence that on 13<sup>th</sup> December, 2013, Mr Nyirenda called the Plaintiff and asked him to send the driver so that he could start work, and that arrangements for refueling the vehicle were being made. He testified that the Defendant opened an account for him at FNB Bank, and that on 23<sup>rd</sup> December, 2013, he reminded Mr Nyirenda on the need to refuel the vehicle and service it, but no positive results were yielded.

The Plaintiff however testified that a sticker for the Defendant was put on the vehicle, and later he received a letter terminating the contract. Further in his testimony, the Plaintiff stated that despite the agreement being that he would be paid per day, he was paid fortnightly, and that the said vehicle was not refueled or serviced. He prayed that he be paid for three months for failure to give him notice to terminate the contract, and that he be paid money for refueling the vehicle, stating that he would spend K750.00 every two weeks to transport the workers. Further that he serviced the vehicle for eleven months, and he claimed payment for the same.

In cross examination, the Plaintiff stated that the Defendant engaged him to transport its workers on 7<sup>th</sup> December, 2013, and that the document at page 1 of the Defendant's bundle of documents was the agreement that he had with the Defendant. He stated that he could not confirm that the hire charge per day

was K250.00. The Plaintiff agreed that he wrote the letter at page 1 of his bundle of documents, and that in that letter he had referred to the agreement of 7<sup>th</sup> December, 2013. It was his evidence that there was no document before the court showing that the Defendant had agreed to the terms that he had proposed in his letter.

He also agreed to having authored the letter at page 3 of his bundle of documents. That the Defendant did not respond to that letter, but that Mr Nyirenda had said that the Defendant would take care of the fuel. When referred to the letter at page 5 of his bundle of documents, the Plaintiff stated that he wrote it to the Defendant on 15<sup>th</sup> April, 2014 asking the Defendant to review the cost per day, in view of the amount of fuel that the vehicle consumed in order to cover all the routes. The Plaintiff denied that the amount he was paid per day did not cover the cost of fuel.

He agreed that item 4 on page 1 of the Plaintiff's bundle of documents refers to the notice to terminate the contract. The Plaintiff further testified in cross examination that as the owner of the vehicle, he employed the driver for it, and that the said driver reported to him. When referred to page 3 of the Defendant's bundle of pleadings, the Plaintiff testified that in 2013, he was not being paid K5, 600.00.

In re-examination, the Plaintiff stated that the Defendant had told him that if they agreed with the terms he had proposed, he would be called to start work. That he was called to start work on 13<sup>th</sup> December, 2013, and he was paid K5, 600.00 every fortnight. That the issue of refueling and servicing the vehicle was communicated to him verbally.

The first defence witness was Charles Nyirenda. In his testimony he stated that he is the Human Resources Manager for the Defendant. That amongst his duties is employing people, carrying out the day to day operations of the company, and taking care of the Defendant's contracts. DW1 testified that the Defendant engaged the Plaintiff as a transporter of their staff in 2013, and the document at page 1 of the Defendant's bundle of documents was executed.



He stated that it was a daily contract with payment at K250.00 a day, and that there were no other terms. Still in his evidence, DW1 testified that the running of the contract started smoothly, but later the employees started complaining that the driver of the vehicle would sometimes be drunk, and that at other times he would pick the staff late, and sometimes would not pick them up at all. He referred to the document at page 4 of the Defendant's bundle of documents which was a petty cash voucher for a taxi, stating that the taxi was hired as the Plaintiff's driver did not show up to pick the employees, and the employees booked a taxi to get to work.

He went on state that on one morning the driver was drunk, and was involved in an accident as he was taking the employees to work, and the employees complained, and boycotted to use the bus. That the employees wrote the complaint letter which was at page 8 of the Defendant's bundle of documents, and management decided to terminate the Plaintiff's contract, and the Plaintiff sued. Over the Plaintiff's claims, DW1 testified that they were unjustified as the contract was a daily one at a rate of K250.00 as payment. He therefore could not understand the claim for K33, 600.00. He stated that the contract did not have a provision for fuel to be given to the Plaintiff or servicing the Plaintiff's vehicle.

In cross examination, DW1 agreed that the Defendant's company logo was put on the Plaintiff's vehicle, but stated that the Plaintiff was responsible for the driver. He stated that the Plaintiff was verbally informed of the driver's behavior when he went to DW1's office drunk. DW1 denied that he terminated the contract after the Plaintiff threatened to take legal action against the Defendant, and that DW1 made the employees to sign something that they did not know. It was also DW1's evidence that they had a day rate payment, paid every two weeks. He denied having agreed to service and refuel the Plaintiff's vehicle.

When referred to the letter at page 1 of the Plaintiff's vehicle, DW1 agreed that he had seen it later, and he did not respond to it. That the logo for the

Defendant was put on the vehicle at the Plaintiff's request, as it did not have a red number plate issued to PSV vehicles, and was facing challenges. DW1 testified that it was agreed that the Plaintiff would carry the Defendant's staff, and not just the production staff. He further stated that the employees would put money together to pay for fuel for the Plaintiff's vehicle as it would not have enough fuel. That the Plaintiff was sometimes paid cash, as he had said it was easier for him to sort out the fuel payments.

It was his evidence that the Plaintiff was called to start work not because the Defendant agreed with the terms he had proposed, but because the Plaintiff had signed the agreement. He denied that the termination of the contract had infringed on the Plaintiff's rights, stating that the Plaintiff had breached the contract by providing a drunk driver who caused an accident. DW1 also maintained that the Plaintiff commenced work on the date of the contract, 7<sup>th</sup> December, 2013.

The last witness called by the Defendant was also Charles Nrirenda, an electrician. DW2 told the court that he had been employed by Nutrifeed a company for the Defendant for the past seven years. That the employees were experiencing difficulties getting to work and a vehicle was organized to be picking them up. However they would sometimes be picked up late or the fuel in the vehicle would run out, or the vehicle would have a break down, or the driver would pick them up whilst drunk, and one time they had an accident near Chelstone. That this prompted the employees to write to management protesting over the driver, and he identified the letter at page 8 of the Defendant's bundle of documents as the complaint letter that they wrote.

DW2 when cross examined by the Plaintiff, stated that he did not know who was responsible for servicing of the vehicle or refueling it. That it was not his duty to report the drunkenness of the driver and the accident to the police, and that they reported to management. He denied being DW1's young brother or that he had bought a bus that had led to PW1's contract being terminated, and that neither was it DW1. He also denied having authored the letter at page 8 of



the Defendant's bundle of documents with DW1. He further denied knowing the Plaintiff.

The Defendant filed written submissions on 22<sup>nd</sup> February, 2018. In those submissions the Defendant stated that the court in this matter should determine the following issues;

1. *Which contract the court should give effect to?*
2. *Whether the Defendant breached the contract that it had with the Plaintiff*
3. *Whether the Plaintiff is entitled to the reliefs sought?*

On the first question, it was the Defendant's submission that there was a contractual relationship between the Plaintiff and Defendant, but the issue was whether it was the contract dated 7<sup>th</sup> December, 2013 or the alleged contract dated 12<sup>th</sup> December, 2013. The Defendant referred to the case of **BUTLER MACHINE TOOL CO LTD V EX-CELL-O CORP LTD 1977 EWCA Civ 9** which counsels that first, it must be established whether a contract has been entered into, and secondly which terms apply to the contract. That it was their argument that on 7<sup>th</sup> December, 2013, the parties entered into a contract which governed the relationship between the parties, until the contract was terminated on 15<sup>th</sup> October, 2014. This was based on the fact that the Plaintiff acted on the basis of the contract dated 7<sup>th</sup> December, 2013, even before he wrote the letter dated 12<sup>th</sup> December, 2013.

The Plaintiff further submitted that the Plaintiff testified at the trial that the Defendant did not agree to his terms contained in the letter dated 7<sup>th</sup> December, 2013, and that this went to show that what bound the parties was the contract dated 7<sup>th</sup> December, 2013, and the Plaintiff was estopped from denying this, as he acted on the basis of that contract. It was stated that in the case of **STORER V MACHESTER CITY COUNCIL 1974 1 WLR 1403**, Lord Denning had stated the following in relation to the creation of a contract between parties;



***“In contracts, you do not look into the actual intent in a man’s mind. You look at what he did and said. A contract is formed when there is to all outward appearances, a contract. A man cannot get out of a contract by saying ‘I did not intend to contract’, if by his words he has done so. His intention is to be found only in the outward expression....”***

Further, that in the case of **JACQUES CHISHA MWEWA V ATTORNEY GENERAL 2011 VOL 2 ZR 35**, the court citing the case of Freeman V Cooke held that ***“where one by his words or conduct, with the intention that the belief which is induced should be acted upon, causes another to believe in the existence of a certain state of things, and induces him to act on that belief, the former is precluded from averring against the latter a different state of things as existing at the time”***.

The Defendant also relied on the case of **GALUNIA FARMS LIMITED V NATIONAL MILLING COMPANY LIMITED 2002 ZR 35** where the Supreme Court stated that ***“the basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct”***.

That in this case it would be unfair or unjust to allow the Plaintiff to depart from the state of affairs that he created, when the Defendant took it to be settled that there was a contract created on 7<sup>th</sup> December, 2013. That the Plaintiff’s letter dated 12<sup>th</sup> December 2013 was merely an invitation to treat with the hope of entering into another contract, but which terms the Defendant did not accept. Therefore the contract dated 7<sup>th</sup> December, 2013, is what bound the parties in this matter, and with reference to the case of **NATIONAL DRUG COMPANY LIMITED AND THE ZAMBIA PRIVATISATION AGENCY V MARY KATONGO APPEAL No 79/2001** where it was stated that ***“it is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract, and the role of the court is to give efficacy to the contract when one party***

*has breached it, by respecting, upholding and enforcing the contract*”, submitted that the contract in this matter should be given effect.

The case of **FRIDAY MWAMBA V SYLVESTER NTENGE, MONICA KAPINGA AND DERRICK CAHLWE 2013 VOL 3 ZR 257** which cited the case of **PRINTING AND NUMERICAL REGISTERING COMPANY V SIMPSON 1857 L.R. Eq 462** was stated as having upheld the principle in the above case, when it was stated that *“if there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily, shall be enforced by the courts of justice”*.

As to whether the Defendant breached the contract with the Defendant, it was submitted that having established that the contract that bound the parties was the one dated 7<sup>th</sup> December, 2013, any allegations that the terms of the letter written by the Plaintiff on 12<sup>th</sup> December, 2013 were breached, lacked merit, as the said letter was not a contract. That in the letter dated 15<sup>th</sup> October, 2014 to the Plaintiff terminating the contract, reference was made to the Plaintiff's failure to meet his obligations under the contract, such as his driver driving the employees in a drunken stupor, and at one time having caused an accident. That driving whilst intoxicated was a violation of Sections 156 and 157 of the Road Traffic Act No 11 of 2002, and by implication the transportation contract of 7<sup>th</sup> December, 2013.

Further, that there was evidence on record to show that the employees were not transported to work at all, or were picked late, contrary to the time stipulated in the contract. Therefore there was breach of contract on the Plaintiff's part, and that **Chitty on Contracts, General Principles, Volume 1, 23<sup>rd</sup> Edition, Sweet and Maxwell** at paragraph 1331 at page 621 states that *“a contract may be discharged by breach, that is to say, one party to it may be discharged from further liability to it by reason of the other party's default”*. Further at paragraph 1335 at page 623, it states that



***“where the innocent party is entitled to, and does treat the contract as discharged by the other party’s breach, he is thereby absolved from future performance of his obligations under the contract”.***

It was also submitted that the contract dated 7<sup>th</sup> December, 2013 did not stipulate the notice period required to be given when terminating the contract, and the letter dated 15<sup>th</sup> October, 2014 notified the Plaintiff of the termination due to the breach. That it consequently followed that the Plaintiff is not entitled to the payment of K33, 600.00 in lieu of notice, as there is no basis for the same.

I have considered the evidence. In this case it is not in dispute that the Plaintiff and the Defendant entered into a contract in which the Plaintiff was to be picking up the Defendant’s employees to and from work using his vehicle at a charge, and that this contract was performed up to 15<sup>th</sup> October, 2014, when the Defendant terminated the contract for breach of its’ terms. The question to be resolved is what terms governed the contract, and whether the Plaintiff is entitled to the reliefs that he claims. The Plaintiff in his testimony stated that after he met DW1 and they had agreed on the points which the Plaintiff’s vehicle would pick up the Defendant’s employees, DW1 had told him that he should stipulate the terms of the contract.

That he did so on 12<sup>th</sup> December, 2013, which is the letter at page 1 of the Plaintiff’s bundle of documents. However the evidence on record shows that the Defendant did not respond to this letter, and the Plaintiff worked under the contract according to the terms stipulated at page 1 of the Defendant’s bundle of documents. The document at page 1 of the Defendant’s bundle of documents shows that the transportation agreement cost K250.00 a day. The document shows the times, places and officers to be picked in the morning, as well as the times for picking up the officers in the afternoon.

The letter at page 1 of the Plaintiff’s bundle of documents which the Plaintiff wrote to the Defendant on 12<sup>th</sup> December, 2013 in the first paragraph refers to the contract awarded to him on 7<sup>th</sup> December, 2013, and states that the terms

of the said contract are attractive, and he then goes on to propose his own terms, which include stipulating the period of the contract, and the Defendant providing fuel for the vehicle. This letter was not responded to by the Defendant, and the Plaintiff worked on the basis of the terms of the contract dated 7<sup>th</sup> December, 2013. Therefore the contract that bound the parties in this matter was the one dated 7<sup>th</sup> December, 2013, and the Plaintiff by his letter dated 12<sup>th</sup> December, 2013 tried to vary the terms of the contract he had entered into with the Defendant, which was not accepted.

The Plaintiff once he saw that the Defendant did not respond to his letter dated 12<sup>th</sup> December 2013, had the option to terminate the contract, but opted to continue working under the contract dated 7<sup>th</sup> December, 2013. As rightly submitted by the Defendant, if there is something that public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting, and that where their contracts are entered into freely and voluntarily, they shall be enforced by the courts of justice. The Plaintiff having freely and voluntarily entered into the contract dated 7<sup>th</sup> December, 2013, he is bound by it.

That being said, the next issue is whether the Plaintiff is entitled to the reliefs sought. The Plaintiff testified that the Defendant terminated the contract in breach of the rules of natural justice as he was not given sufficient notice to terminate it. He claims payment for three months in lieu of notice. The Defendant denied the claim stating that the Plaintiff was in breach of the contract which entitled the Defendant to treat the contract as discharged. The breaches committed by the Plaintiff included providing a driver who reported for work drunk and at one time even caused an accident, thereby endangering the lives of the employees that were on the bus. Further that the driver would at times not show up to pick the employees or was late or did not have enough fuel in the vehicle prompting the employees to put money together to buy the fuel.



The Plaintiff did not discredit these allegations in any way, and they are therefore credible. I therefore find that the Plaintiff was in breach of the contract, as he failed to honour the obligation of transporting the Defendant's employees to and from work. Further there was an implied term in the contract that the Plaintiff would provide safe transport to the employees and this entailed that the driver would be sober and exercise due care when driving the vehicle.

The Defendant made reference to paragraphs 1335 at page 623 and paragraph 1335 at page 623 of ***Chitty on Contracts, General Principles, Volume 1, 23<sup>rd</sup> Edition, Sweet and Maxwell***, which states that a contract may be discharged by breach, and the innocent party is absolved from future performance of his obligations under the contract. Therefore the Plaintiff having breached the contract, the Defendant was entitled to discharge the contract, and it did so by terminating the contract through the letter written to the Plaintiff on 15<sup>th</sup> October, 2014, which is page 7 of the Defendant's bundle of documents.

The Defendant by terminating the contract on the grounds of breach, did not breach the contract. The Plaintiff claims that he was supposed to have been given three months' notice to terminate the contract. The contract at page 1 of the Defendant's bundle of documents states that the payment was K250.00. DW1 testified that it was a daily contract, and did not provide for a termination period. It is trite that where a contract is silent on termination, reasonable notice is required to be given. The contract was also silent on what would happen if either party breached it.

The contract in this case having been a daily one, it would be reasonable to give a day's notice to terminate it. Therefore by the Defendant terminating the contract without notice, when there was breach of the contract, did not amount to breach. The Plaintiff is therefore not entitled to be paid K33, 500.00 in lieu of notice, and the claim shall fail. He also claims for payment of K16, 500.00 for

fuel and K10, 000.00 for service of the vehicle. The Defendant denied that the contract dated 7<sup>th</sup> December, 2013 provided for the same.

Indeed the contract at page 1 of the Defendant's bundle of documents which governed the agreement of the parties does not state that the Defendant would refuel the Plaintiff's vehicle and service it. The Plaintiff in his letter at page 1 of his bundle of documents proposed the same which was not accepted. Therefore the two claims will fail, as they were not agreed. All the Plaintiff's claims fail, and they are dismissed with costs to the Defendant. Leave to appeal is granted.

**DATED THE 14<sup>th</sup> DAY OF MARCH, 2018**

  
**S. KAUNDA NEWA**  
**HIGH COURT JUDGE**