

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

**2014/HP/1982**

BETWEEN:

**THOMAS PHIRI**

AND

**VERNON NGUMBA**

**AGRIPPA NGUMBA**

**DIDIANA INVESTMENTS LIMITED**



**PLAINTIFF**

**1<sup>st</sup> DEFENDANT**

**2<sup>nd</sup> DEFENDANT**

**3<sup>rd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 11<sup>th</sup> DAY OF  
JANUARY, 2018**

*For the Plaintiff* : *Mr. S. K. Simwanza, with Ms N. Kabwe and Mr. J. Hara, Lungu, Simwanza and Company*

*For the 1<sup>st</sup> Defendant* : *No appearance*

*For the 2<sup>nd</sup> Defendant* : *No appearance*

*For the 3<sup>rd</sup> Defendant* : *No appearance*

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

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WORKS REFERRED TO:

- 1. Chitty on Contracts, Volume II Specific Contracts, 13<sup>th</sup> Edition, Sweet and Maxwell, 2008**

On 12<sup>th</sup> December, 2014, the Plaintiff commenced this action by way of writ of summons claiming;

1. *An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants refund him K35, 000.00, paid as a deposit for the trailers in issue.*
2. *An order that the sale of the trailers in issue between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant is void ab initio for fraud.*
3. *Alternatively an order for specific performance of the contract between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for the sale of the trailers in issue.*
4. *Interest on any amounts found due.*
5. *Any other relief that the court may deem fit.*
6. *Costs.*

According to the statement of claim filed in this action, on or about 9<sup>th</sup> October, the Plaintiff entered into an agreement with the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to purchase two trailers at a cost of K90, 000.00. That the Plaintiff in pursuance of the agreement paid K35, 000.00 in two instalments of K15, 000.00 and K20, 000.00 on 9<sup>th</sup> September, 2014 and 9<sup>th</sup> October, 2014 respectively, leaving a balance of K55, 000.00 to be paid once the 1<sup>st</sup> and 2<sup>nd</sup> Defendants delivered the documents pertaining to the ownership of the trailers.

The statement of claim further states that the Plaintiff was given possession of the said trailers, but on 15<sup>th</sup> October, 2014 a person called Hachaambwa from Livingstone approached the Plaintiff purporting to be an agent of the 3<sup>rd</sup> Defendant, and claiming that the 3<sup>rd</sup> Defendant was the owner of the trailers sold to him by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. It is also stated in the statement of claim that the Plaintiff has never failed to pay for the trailers as agreed, and that he is willing to complete the transaction.

The Plaintiff in the statement of claim further states that the 1<sup>st</sup> and 2<sup>nd</sup> Defendant had represented to him that the trailers in issue were imported from Botswana when in fact not, as he later discovered that they were imported from the United Kingdom. He contends that the registration of the trailers that the 3<sup>rd</sup> Defendant did at the Road Transport and Safety Agency (RTSA) was fraudulent, and therefore null and void.

The particulars of the fraud are stated as;

- i. The bill of lading documents used being from the United Kingdom whereas the trailers bearing Botswana registration numbers.*
- ii. The purported registration being done without inspecting the trailers as the same have been in the Plaintiff's possession, and have never been inspected by the police as required by the law.*

The 3<sup>rd</sup> Defendant filed a defence on 4<sup>th</sup> September, 2014 in which it states that it bought and fully paid for the Super linked trailers registration numbers B496 AAC and B 466 ADA from the owner Reginald Thwane a Motswana national, after the 2<sup>nd</sup> Defendant advertised them for sale, and later linked the 3<sup>rd</sup> Defendant to the owner in Botswana to whom Botswana Pula P70, 000 was paid, and P3, 000 was paid as agency fee to Mr Agrippa Ngumba, the 2<sup>nd</sup> Defendant.

The 3<sup>rd</sup> Defendant in the defence also states that at the time of the sale, the trailers had broken down and were parked in Mazabuka, and upon final payment being made, it had assigned a driver to go and collect the said trailers, but he had found them missing, and the matter was reported to Mazabuka police station where investigations were launched, and the trailers were found to be in the Plaintiff's possession in Namwala.

However despite the Plaintiff being shown all the documentation for the trailers, he had refused to release the same to the driver and the police. It is also the 3<sup>rd</sup> Defendant's defence that the 2<sup>nd</sup> Defendant as agent of the initial owner of the trailers was fully aware that the trailers had been bought and paid for, and ownership changed into the 3<sup>rd</sup> Defendant's name. That on or about 13<sup>th</sup> October, 2014, the 2<sup>nd</sup> Defendant met with the owner of the trailers and a company representative Mr Isaac Kasongo, and it was agreed and a consent signed that the 2<sup>nd</sup> Defendant should surrender the trailers to the buyer.

The 3<sup>rd</sup> Defendant counter claims damages for the Plaintiff unlawfully keeping custody of the trailers, immediate release of the trailers to it, as well as damages for loss of business. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not enter appearance or file any defences. At the trial only the Plaintiff was before court, and he testified and called one witness.

In his testimony, the Plaintiff told the court that he runs a transport haulage business. That sometime in 2014 he saw some trailers that were parked at Parma Meats along the Mazabuka road with a sign post for sale. He stated that the same trailers were later seen parked at a garage in Mazabuka near the road, and he became interested in buying them. As the said two trailers had Botswana number plates, he had asked the 2<sup>nd</sup> Defendant who was selling them to avail him with the documentation for the two trailers so that he could verify them, having earlier bought three horse trucks without trailers.

The Plaintiff further testified that the 2<sup>nd</sup> Defendant had asked him to pay a deposit of K20, 000.00 before the sale could be completed, which he did on 30<sup>th</sup> September, 2014. It was also his testimony that they had further agreed that the Plaintiff pays K15, 000.00, and he gets the trailers and that the balance would be paid after clearance at the Road

Transport and Safety Agency (RTSA), the Zambia Revenue Authority (ZRA), and acquittal. That he paid the K15, 000.00 on 9<sup>th</sup> October, 2014, and he was allowed to take the trailers to Namwala awaiting final payment. The Plaintiff told the court that the 2<sup>nd</sup> Defendant told him that he had been authorized by AMT of Botswana to sell the trailers as they had overstayed, and would attract penalties if they were to be taken back to Botswana.

Still in his testimony, the Plaintiff stated that a week later someone had called him from Livingstone claiming that he had stolen the trailers from Mazabuka, and he was summoned to the police, and the man had produced registration documents for the trailers, which were dated after he had made the first payment. He testified that a Warn and Caution Statement was recorded from him on how he had bought the trailers, but was advised resolve the issue with the person who claimed to have also bought the said trailers.

However the man had gone to Namwala with police officers from Mazabuka, and the Plaintiff came to Lusaka to verify the registration documents for the trailers. He established that the trailers came into the country through the Nakonde border after they were imported from B Forward in Japan, but the invoices showed that they were bought in the UK, and that a physical inspection was done at Mimosa. The Plaintiff stated that it was not possible for the physical inspection to have been done at Mimosa at the time stated, as the trailers were in his possession, and had very few tyres, and he had to put some in order that the trailers could be moved to Namwala.

He then engaged Counsel as he became suspicious. He identified the document at page 2 of his bundle of documents as the sale agreement for the trailers, and the one at page 3 as the one that was signed after he

paid K20, 000.00 and K15, 000.00, leaving a balance of K55, 000.00. The Plaintiff further identified the document at page 4 of his bundle of documents as the one he had obtained from RTSA showing that the trailers came from the UK, yet the trailers had Botswana registration plates. The document at page 9 of his bundle of documents was stated as also having been obtained at RTSA, and that this document indicates the country of origin of the trailers as Japan, while the document at page 7 of the said bundles was identified as the registration documents for the trailer. The Plaintiff asked that the sale agreement be completed, and that he be paid costs.

PW2 was Steve Chirwa. He told the court that in 2014 he decided to buy trailers with his nephew, the Plaintiff, as they do business together. He confirmed that the said trailers were parked in Mazabuka, and had Botswana registration details, and that the purchase price was agreed at K90, 000.00. PW2 further confirmed that they were asked to make a down payment of K20, 000.00 and they did so on 30<sup>th</sup> September, 2014, and paid K15, 000.00 on 9<sup>th</sup> October, 2014, and towed the trailers to Namwala on that day.

He added that some days later police officers from Mazabuka phoned saying that the 2<sup>nd</sup> Defendant had been arrested for selling the trailers to two people, and that the doctor who was the other buyer had produced documents showing that the trailers had been registered in Zambia. He like PW1 became suspicious of the registration documents as the trailers could not have been inspected at the time, as they were in Mazabuka. That they later sued, and he stated that they had incurred loss of business as the trailers had been parked at their premises since 2014.

I have considered the evidence. It is not in dispute that there are sale agreements that were entered into between the Plaintiff and the 1<sup>st</sup> and

2<sup>nd</sup> Defendants, as evidenced at pages 2 and 3 of the Plaintiffs bundle of documents, for the sale of two Scania trailers at K90, 000.00, and that K20, 000.00 and K15, 000.00 were paid as down payment towards the same. It is also not in dispute that the 3<sup>rd</sup> Defendant claimed to have bought the said trailers, and produced registration documents for the said trailers. The question is whether the Plaintiff is entitled to the reliefs sought?

The evidence on record as seen from the documents at pages 3 and 5 of the 3<sup>rd</sup> Defendant's bundle of documents shows that Reginald Thwane of Botswana as at 14<sup>th</sup> October 2014 was registered owner of Trailer registration number B496AAC, and Trailer registration number B466ADA. The evidence as adduced by the Plaintiff was that the 2<sup>nd</sup> Defendant was engaged by Reginald Thwane to sell the two trailers in issue. The 3<sup>rd</sup> Defendant in paragraph 4 of its' defence states that 2<sup>nd</sup> Defendant was an agent in the sale, and that the 3<sup>rd</sup> Defendant was connected to Reginald Thwane to whom it made the payment of P70, 000 as purchase price for the two trailers, and P3, 000 to the 2<sup>nd</sup> Defendant as agency fees.

The evidence therefore establishes that the 2<sup>nd</sup> Defendant was engaged by Reginald Thwane, as an agent in the sale of the two trailers. Therefore the question that arises is what were the 2<sup>nd</sup> Defendant's powers as an agent in the sale? *Chitty on Contracts, Volume II Specific Contracts, 13<sup>th</sup> Edition, Sweet and Maxwell, 2008* in paragraph 31-001 at page 1, defines agency as **"the body of general rules under which one person, the agent, has the power to change the legal relations of another, the principal"**.

Paragraph 31-020 of the said *Chitty on Contracts* states that the relationship of principal and agent is created by either express or implied

agreement, which may not be contractual, by ratification of the agent's acts by the principal, and by operation of the law, such as in cases of agency of necessity, and in certain other situations.

With regard to the agent's authority, paragraph 31-042 of *Chitty on Contracts* earlier cited states that an agent's power to affect the legal position of his principal rests upon his authority, and that it can be said that the agent's authority is his power to affect the principal's position. In this case the only evidence before court is that the 2<sup>nd</sup> Defendant in this matter was an agent for Reginald Thwane, the seller of the trailers. The extent of the powers that the 2<sup>nd</sup> Defendant as agent had in relation to the sale are unknown. However as can be seen from the document at page 10 of the 3<sup>rd</sup> Defendant's bundle of documents the 2<sup>nd</sup> Defendant on 13<sup>th</sup> October, 2014 agreed that he would surrender Reginald Thwane's trailer to the buyer.

This document was executed after the documents at pages 2 and 3 of the Plaintiff's bundle of documents were signed, selling the trailers to the Plaintiff. At page 7 of the 3<sup>rd</sup> Defendant's bundle of documents is a sale agreement in which Reginald Thwane sold the two trailers to the 3<sup>rd</sup> Defendant, and the document indicates that the first payment made towards the purchase of the trucks of P10, 000 was made on 23<sup>rd</sup> July, 2014. This was before 30<sup>th</sup> September, 2014, when the same trailers were sold to the Plaintiff.

The 3<sup>rd</sup> Defendant in paragraph 4 of the defence states that payment towards the purchase of the trailers was made to Reginald Thwane in Botswana Pula, and the document at page 7 of its bundle of documents supports this position. Going by this evidence it can be said that the 2<sup>nd</sup> Defendant's role in the sale of trailers extended to finding prospective buyers, and connecting them to the seller Reginald Thwane to complete



the transaction. Having done so when the 3<sup>rd</sup> Defendant transacted with Reginald Thwane and he was paid his commission, the 2<sup>nd</sup> Defendant's role as agent was extinguished. He however went on to transact with the Plaintiff on 30<sup>th</sup> September, 2014, knowing fully well that the trailers had been sold, and when he did so, he was no longer Reginald Thwane's agent, and could therefore not bind Reginald Thwane in the transaction done with the Plaintiff.

That being the position, there was no valid contract that was executed between the 2<sup>nd</sup> Defendant and the Plaintiff, as the 2<sup>nd</sup> Defendant could no longer bind Reginald Thwane in the sale of the trailers as they had been sold to the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant on the other hand had no authority whatsoever to sell the trailers as he was not Reginald Thwane's agent, and could therefore not enter into a valid contract with the Plaintiff for the sale of the said trailers.

There being no valid contract, the Plaintiff can only claim the money that he paid towards the purchase of the trailers in restitution. On that basis he succeeds in his claim against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant for the payment of K35, 000.00, and I accordingly enter judgment in his favour for the said amount, with interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

As regards the claim that the sale of the trailers between the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the 3<sup>rd</sup> Defendant is null and void ab initio for fraud, this claim cannot succeed on the basis that the sale agreement was between Reginald Thwane and the 3<sup>rd</sup> Defendant, and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants did not execute the said contracts. The 2<sup>nd</sup> Defendant was just an agent engaged to find a buyer for the trailers. However it is worth noting that the documents used to register the trailers here in Zambia were not

genuine as in one breath, the documents show that the trailers were registered in Reginald Thwane's name as seen at pages 3 and 5 of the 3<sup>rd</sup> Defendant's bundle of documents, yet the Zambia Revenue Authority customs clearance certificate for motor vehicle which is at page 9 of the Plaintiff's bundle of documents shows that the trailers were imported from Japan. This claim will fail.

The last claim which is in the alternative, is for specific performance of the contract of sale. I have already said that Reginald Thwane sold the trailers to the 3<sup>rd</sup> Defendant on 23<sup>rd</sup> July, 2014, which was before the 30<sup>th</sup> September, 2014, when the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sold the same trailers to the Plaintiff, and by which date the 2<sup>nd</sup> Defendant could no longer transact and affect Reginald Twane's legal position in relation to the said trailers, as they were already sold. Thus the claim for specific performance cannot succeed, and it fails on that basis.

The 3<sup>rd</sup> Defendant did not prosecute its counterclaim, and the claims for unlawful custody and damages for loss of business have not been successfully proved, and they will fail. I however order that the said trailers be released to the 3<sup>rd</sup> Defendant forthwith, and the Plaintiff is awarded costs against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to be taxed in default of agreement. Leave to appeal is granted.

**DATED THE 11<sup>th</sup> DAY OF JANUARY, 2018**



**S. KAUNDA NEWA  
HIGH COURT JUDGE**