

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

**2017/HPC/0343**



**BETWEEN:**

**ORIX HOLDINGS LIMITED**

**PLAINTIFF**

**AND**

**DAEWOO ENGINEERING AND  
CONSTRUCTION LIMITED**

**DEFENDANT**

**CORAM: Honourable Lady Justice Dr. W. S. Mwenda at Lusaka this  
27<sup>th</sup> day of May, 2020**

*For the Plaintiff: Mr. M. Mutemwa and Mr. W. Siyumbano of Mutemwa  
Chambers*

*For the Defendant: Mr. J. Akafumba, Mr. M. Cheelo, Ms. M. Kosamu and  
Ms. K. Mumbi of MAK Partners*

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## **JUDGMENT**

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**Cases referred to:**

1. *D. P. Services Limited v. Municipality of Kabwe* (1976) Z.R.110.
2. *Base Chemicals and Another v. Zambia Air Force and Another*, SCZ Judgment No. 9 of 2011.
3. *Tolhurst v. Associated Portland Cement Manufacturers Limited* (1903) A.C. 414.
4. *The Novasen SA v. Alimenta SA* (2011) Lloyds Rep.648.
5. *Dunlop Pneumatic Tyre Company v. Selfridge Limited* (1915) A.C. 847.
6. *Smith 4 Snipes Hall Farm v. River Douglas Catchment Board* (1949) 2 K.B. 500.
7. *Heilbut Symons and Company v. Buckleton* (1912) UKHL 2.
8. *MacDowell v Fraser* (1779) 1 Doug, 260.
9. *Shanklin Pier v. Detel Products Limited* (1951) 2 K.B. 854.

10. *Lee Cooper Limited v. C.H. Jeakins and Sons Limited* (1965) 1 All E.R. 284.
11. *Cavmont Merchant Bank Limited v. Amaka Agricultural Development Company Limited* (2001) Z.R.73.
12. *Paul Roland Harrison v. The Attorney General* (1993) S.J 58 (S.C.).
13. *Andrew Tony Mutale v. Crushed Stone Sales Limited* (1994) S.J. 98 (S.C.).

**Works referred to:**

1. H. G. Beale (ed) *Chitty on Contracts-Specific Contracts*, 28<sup>th</sup> Edition, Volume 2 [Sweet & Maxwell, 1999] at page 30, paragraph 32-55.
2. H. G. Beale (ed) *Chitty on Contracts-General Principles*, 30<sup>th</sup> Edition [London: Sweet & Maxwell, 2008], paragraphs 18-003 to 18-004.
3. Henry C. Black, *Black's Law Dictionary*, 2<sup>nd</sup> Edition [West Publishing Company, 1910].
4. Bryan A. Garner (ed) *Black's Law Dictionary*, 10<sup>th</sup> Edition [Thomson Reuters, 2014].
5. *Halsbury's Laws of England*, 5<sup>th</sup> Edition, [London: Butterworths LexisNexis, 2012], Volume 22, paragraph 233.

On 3<sup>rd</sup> August, 2017, the Plaintiff commenced legal proceedings against the Defendant for the following remedies:

- i. USD431,930.46 plus interest thereon, being money due to the Plaintiff for materials, equipment and services ordered by the Defendant and delivered to its project site between 13<sup>th</sup> September, 2016 and 8<sup>th</sup> April, 2017;
- ii. Damages for loss of profit in the sum of USD832,319.47 as a result of monies owed by the Defendant to the Plaintiff since April, 2017;
- iii. Costs;
- iv. Further or other relief.

According to the Amended Statement of Claim, on 5<sup>th</sup> September, 2014, the Governments of Zambia and Botswana awarded the Defendant a construction contract to build a bridge across the Zambezi River at Kazungula. Between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> March, 2017, the Defendant ordered from the Plaintiff through its director, Jeff Tembo, various materials, equipment and services all valued at USD431,936.46 for use on the said Kazungula Bridge Project.

It is claimed that despite repeated reminders, the Defendant has failed or neglected to discharge its liability by wrongfully associating the orders to Keren Motors Limited, with whom it has a supply contract. It is averred that apart from its director Jeff Tembo who had acted as financial consultant for Keren Motors Limited to secure funds from First National Bank Zambia Limited prior to the said orders, it has no business or any relationship with Keren Motors Limited.

The Statement of Claim further discloses that by letter dated 24<sup>th</sup> July, 2017, to the Defendant, Keren Motors Limited denied liability for the sum claimed by the Plaintiff stating that it had no knowledge or approval of the orders made directly by the Defendant to the

Plaintiff through its director, Jeff Tembo. As a direct consequence of the Defendant's refusal to settle the debt due to the Plaintiff since April, 2017, the Plaintiff has suffered loss of profit in the sum of USD832,319.47 as per attached schedule. Hence, the Plaintiff's claims for payment of the sum of USD431,930.46 plus interest thereon for materials, equipment and services ordered by the Defendant and delivered to its project site between 13<sup>th</sup> September, 2016 and 8<sup>th</sup> April, 2017; damages for loss of profit in the sum of USD832,319.47 as a result of monies owed by the Defendant to the Plaintiff since April, 2017; costs; further or other relief.

The Defendant filed a Memorandum of Appearance and Defence on 23<sup>rd</sup> August, 2017. The Defendant admitted that the Governments of Zambia and Botswana awarded it a construction contract to build a bridge across the Zambezi River at Kazungula and averred that it never ordered any materials, equipment or services from the Plaintiff through Jeff Tembo. It further stated that it corresponded with Jeff Tembo in his capacity as an agent or proxy of Keren Motors Limited, a company it had a contract with for the supply of aggregate and that all materials ordered by Jeff Tembo were for use by Keren Motors Limited in the performance of its contract with the Defendant.

The Defendant denied being indebted to the Plaintiff in any way as alleged and stated that it would show at trial that it had no contractual relationship with the Plaintiff for the supply of any material, equipment and services. Further, that the materials ordered from various suppliers through Jeff Tembo were ordered for Keren Motors Limited for use in the performance of its contract to supply to the Defendant and that it is Keren Motors Limited that is liable to the Plaintiff.

In an Amended Reply filed on 19<sup>th</sup> September, 2017, the Plaintiff stated that at all material times the Defendant was aware and specifically engaged the Plaintiff to supply it with goods. That, in certain instances, the Defendant even submitted proof of payment for goods imported by the Plaintiff at the instance of the Defendant, such as the 150 tonnes of cement bought from Ohorongo Cement in Namibia, whereof the Defendant submitted a payment confirmation effected by the Plaintiff, through First National Bank Zambia Limited.

With respect to the assertion in the Defendant's Defence that Jeff Tembo was an agent or proxy of Keren Motors Limited, the Plaintiff averred that a proposal by the said Jeff Tembo to be appointed as coordinator for Keren Motors Limited over the

Kazungula Bridge Project was expressly and vehemently rejected by the Defendant on 7<sup>th</sup> April, 2017. That, the Defendant is therefore, estopped from holding Jeff Tembo as agent or proxy of Keren Motors Limited, as no consent was granted by the Defendant pursuant to clause 9 of the Supply Agreement for Concrete and Aggregates between Keren Motors Limited and the Defendant, dated 21<sup>st</sup> July, 2015. Further, that the Plaintiff will aver that the Defendant ordered materials from the Plaintiff through Jeff Tembo, pursuant to clause 6 of the Amended Supply Agreement dated 6<sup>th</sup> October, 2015, wherein the Defendant was mandated to operate the concrete batching plant(s) and thus, by implication, procure raw materials directly from independent suppliers in the event that Keren Motors Limited refused or was unable to operate the batching plant(s).

The Plaintiff also averred that at any rate, pursuant to the Supply Agreement between Keren Motors Limited and the Defendant, the former was mandated to supply, while the latter was mandated to buy, concrete and aggregates only. Therefore, the Defendant is precluded from impliedly asserting that it was ordering cement and other materials from Keren Motors Limited through Jeff Tembo in his alleged capacity as proxy for Keren Motors Limited.

The matter came up for trial on 6<sup>th</sup> July, 24<sup>th</sup> and 31<sup>st</sup> August, 2018. The Plaintiff had two witnesses. The first witness was Jeffrey Masauso Tembo (hereinafter referred to as "PW1"). His Witness Statement dated 5<sup>th</sup> December, 2017 was tendered and duly admitted in evidence.

In cross-examination, PW1 testified that he was a director of Orix Holdings Limited (the Plaintiff) and had been since 2008. It was his testimony that he was introduced to Kazungula Project as a consultant. He was an independent consultant as well as Project Coordinator. He agreed that between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> March, 2017 he was both an independent project consultant as well as Orix director and it was during that period that the Defendant made orders for various materials and services through him. According to him, Orix Holdings and Daewoo Engineering never signed an agreement to supply goods because it was not necessary. It was his evidence that the Defendant ordered goods in writing from the Plaintiff just as it did with other suppliers. According to PW1, a written order is an agreement and he fulfilled the agreements. He drew the Court's attention to page 36 of the Plaintiff's Bundle of Documents, particularly an e-mail from Mr. Kyu-Min Kim dated 4<sup>th</sup>

August, 2016 and said that that was the beginning of their correspondence with the Defendant with regard to his involvement in supplying them with materials. He clarified that he was addressing Daewoo Engineering as an independent contractor. However, he admitted that there was no mention of Orix Holdings Limited in the e-mails at page 36.

PW1 admitted in further cross-examination, that at one point he was an independent consultant for iCapital representing First National Bank Zambia Limited (hereinafter referred to as "FNB"). It was his testimony that at the time FNB granted the funding to Keren Motors, there was a concern that Keren Motors may not apply the funds appropriately and there was also a concern by the Defendant that the funds also may not be applied properly and the Defendant put that in writing. His role was to monitor and supervise the work that Keren Motors was performing. He admitted that during that same period there was a supply agreement between Keren Motors and the Defendant. He denied ever being a consultant to assume liabilities on behalf of the Defendant for Keren Motors. He admitted that there was no mention of Orix Holdings or iCapital in the e-mail on page 120 of the Plaintiff's Bundle of Documents. Upon being



cross-examined further, PW1 admitted that one of his two e-mail addresses had iCapital in it. He testified that he still had a relationship with iCapital but his relationship with FNB terminated somewhere between April and May, 2017.

In continued cross-examination, PW1 testified that Orix Holdings supplied the goods it alleges to have supplied to the Defendant. As evidence of this, he referred the Court to page 171 of the Plaintiff's Bundle of Documents, where according to him, there was exhibited one of the products ordered by the Defendant used to treat concrete. He also referred the Court to pages 99-100 of the Bundle of Documents as evidence of another delivery of 36 tonnes of fly ash, a mixture in the production of concrete. He further referred the Court to page 146 for another order and 149 where the Defendant was submitting to the cement manufacturer proof of payment. He referred the Court to pages 150 and 151 showing a bank transfer confirmation. According to PW1, this was further proof that the Defendant was directly in contact with the Plaintiff. PW1 admitted that the delivery note on page 99 was received by a person called Bhakire, a site engineer for Keren Motors. He admitted further, that the delivery note on page 100 was for fly ash which was also received

by Albert Bhakire, the employee of Keren Motors. He admitted that most of the delivery notes, except for one, were received by Keren Motors, as per agreement.

When asked whether the concrete made by Keren Motors was supplied to the Defendant, PW1 said that that was the case according to the contract but not in practice. When asked why the materials meant for the Defendant were not delivered to the Defendant directly instead of Keren Motors, PW1 said that it was because the contract between the Keren Motors and the Defendant was varied in October, 2015 and the varied contract is on pages 18-21 of the Plaintiff's Bundle of Documents. It was his testimony that Orix Holdings was not part of the contract between the Defendant and Keren Motors, but he was aware of the intricacies of the contract between the Defendant and Keren Motors because of his role of consultant. He testified that it was on the basis of paragraph 6 of the amended agreement on pages 19-20 of the Plaintiff's Bundle of Documents that they agreed with the Defendant that they would be supplying materials and paid directly. He agreed that the varied contract was availed to him because he was representing FNB who had appointed him to supervise Keren Motors.

PW1 stated in further cross-examination that FNB granted a facility of USD200,000.00 to Orix Holdings knowing very well that Mr. Jeff Tembo (PW1) who is director of Orix Holdings was well appraised with the Kazungula Bridge Project, so there was nothing wrong with FNB granting the facility. It was his evidence that he did not see anything wrong with being an independent consultant and at the same time supplying materials. When put to him that he had failed to show any written contract between Orix Holdings and the Defendant for supply of any materials apart from the orders which he had referred to, PW1 stated that to the contrary, his understanding was that if a party orders materials and another party performs the contract, then in effect the parties are in a contract. He said he negotiated the contract in his capacity as director of Orix Holdings Limited and Orix performed the contract in full disclosure to the Defendant. It was his further evidence that according to clause 7.1 of the Supply Agreement exhibited at page 12 of the Plaintiff's Bundle of Documents, Keren Motors was supposed to receive supplies. He admitted that Orix Holdings Limited was not a party to this Supply Agreement but was an independent supplier.

In further cross-examination, PW1 agreed that he played a dual role with regard to the Kazungula Project; that he was the supplier to both the Defendant and Keren Motors. When referred to the last paragraph of the letter at page 188 of the Plaintiff's Bundle of Documents, being a letter from Keren Motors to Daewoo Engineering dated 9<sup>th</sup> March, 2017, reference "Request for Direct Payments to Concrete Materials Supply", PW1 said that the nominated supply chain agent indicated therein was Orix Holdings, the Plaintiff herein. PW1 was then referred to paragraph 4 of the Amended Statement of Claim where it was averred that the Plaintiff had no business or any relationship with Keren Motors apart from its director Jeff Tembo who acted as financial consultant for Keren Motors. It was PW1's testimony that in his statement he had not stated that there was no relationship with Keren Motors but had clearly stated that there was a relationship of supply; that they supplied both the Defendant and Keren Motors. He said that he wanted to make it clear that he was not consulting on behalf of Keren Motors, but that his role as financial consultant was for FNB in relation to the client, Keren Motors.

With regard to the Notice of Appointment exhibited on page 192 of the Plaintiff's Bundle of Documents, PW1 said that in the said document Keren Motors attempted to appoint him as Project Coordinator but the Defendant rejected the appointment. It was PW1's testimony that the contract between Keren Motors and the Defendant required Keren Motors to seek approval from the Defendant before the appointment could be effected but this appointment was rejected by the Defendant. When asked whether he specifically introduced himself as a director of Orix Holdings to the Defendant, PW1 said he did in various meetings they had with the Defendant. He further testified that the evidence in chief of the Defendant acknowledged that he was a director for the Plaintiff. He repeated that there was no precise agreement but it was his belief that the circumstances of the interaction formed a contract. He identified the document on page 199 of the Plaintiff's Bundle of Documents as an e-mail from Robinly Rodriguez to Nelson Porfirio in which the Defendant ordered 60 tonnes of cement from Ohorongo Cement and attached Swift messages as confirmation of payment.

In re-examination PW1 testified that the amended contract between Keren Motors and Daewoo Engineering was a successor to

the original agreement and did specifically state that the material provision as regards the obligations of Keren Motors remained unchanged, except those which had been specifically amended in the amended agreement. Such provisions included receiving materials at the project site and billing for the production coming out of the plant because at that point, the contract was not terminated, so Keren Motors still had to bill for the quantities that were coming out and for that purpose, Keren Motors needed to know the quantities received and what concrete it was producing in order to bill. He said that the reasons why the Defendant changed the original agreement was because Keren Motors was failing to perform its obligations.

In further re-examination PW1 stated, with regard to his testimony that some materials were received by Mr. Bhakire who was an employee of Keren Motors instead of the Defendant, that the fact that the Defendant was operating the batching plant did not mean that Keren Motors had to move away from the site. It was his contention that the amendment to the contract was just a technical amendment of the project and Keren Motors was required to continue performing its obligations per the original contract, such as receiving materials at the batching plant site because it was still the

responsibility of Keren Motors to bill the Defendant for the materials received and the concrete produced. He further stated that the reason why the Defendant was ordering the materials itself instead of Keren Motors was because, according to the Defendant, Keren Motors had failed. Therefore, he disagreed with the allegation that he was representing Keren Motors, a company that failed to procure the materials. On being asked to clarify why the e-mails were showing Jeff Tembo and iCapital but had no mention of Orix Holdings, PW1 said that when they started dealing with the Kazungula Bridge Project, the e-mail address he was using was JeffreyTembo@gmail.com and also the one for iCapital. He said that those were the e-mail addresses which they originally used as independent project supervisors and maintained them as suppliers. PW1 further clarified that the Defendant's project site had two sets of employees, those belonging to the Defendant and those belonging to Keren Motors, and sometimes materials would be received on weekends or public holidays and any person designated to the plant would receive those materials and that is why Mr. Lee, whom he knew personally, received the said goods.

The Plaintiff's second witness was Berhane Kibrom the Managing Director of Keren Motors (hereinafter referred to as "PW2"), who stated that the contents of his Witness Statement, which was tendered and admitted in evidence, was a true reflection of what transpired. It was his evidence that Jeff Tembo was appointed by FNB to assist as Project Financial Controller. According to PW2, Keren Motors borrowed money from FNB, so the Bank was interested in seeing the project succeed. When asked whether he consented to that arrangement, PW2 said that he didn't have to consent as the Bank made the appointment and he was there to see that Keren Motors was doing the right thing regarding the contract, not the project. He further stated that he introduced Jeff Tembo in 2016 as an independent financial consultant as well as a business man.

PW2 was referred to paragraph 9 of this Witness Statement and confirmed that the contents thereof were correct. The said paragraph read as follow:

*"Sometime in the month of April, 2016, at a meeting held at the Defendant's offices in Kasane, Botswana, I introduced Jeff Tembo to the Defendant's project and planning managers. In particular, I stated the fact that Jeff Tembo was an independent financial consultant, who*



*also financed supply chain activities through his private company, the Plaintiff.”*

PW2 said that Jeff Tembo was never appointed by Keren Motors and he was certain about that fact. He was then referred to the document at page 192 of the Plaintiff's Bundle of Documents and identified the signature thereon as his and the subject as "Notice of Appointment." It was his evidence that the said letter was rejected by Daewoo Engineering. PW2 was then referred to paragraph 13 of his Witness Statement where he stated that Keren Motors never appointed Jeff Tembo as its agent or proxy in the procuring of the materials. When asked as to which of the two contradictory statements the Court should go by, PW2 said that the Court should go for both statements at page 192 and paragraph 13 of his Witness Statement.

When referred to page 191 of the Plaintiff's Bundle of Documents, PW2 admitted that there was a statement on that page where Jeff Tembo was saying he had full authority from Keren Motors to make the communication. He agreed that the communication was between Jeff Tembo and Dong Chang Kim of the Defendant company. He further agreed that Jeff Tembo had authority from Keren Motors

regarding the payment but that did not mean he had authority from Orix Holdings (the Plaintiff) which was an independent company. He said that Orix Holdings was nominated as a supplier by Keren Motors and he gave a list of companies from where they could buy the product. It was his evidence that he could not produce the said list. He also did not know why the Plaintiff only attempted to invoice the Defendant after the contract between Keren Motors and the Defendant had been terminated. He did not know whether the Plaintiff had invoiced the Defendant during the subsistence of Keren Motors' contract.

It was PW2's evidence in continued cross-examination that there was no written contract between the Plaintiff and the Defendant and that he introduced Jeff Tembo to the project as a supplier and independent consultant. Further, that Jeff Tembo was appointed by FNB to oversee the project in relation to the performance of Keren Motors because Keren Motors borrowed money from the Bank to buy machinery. That, Jeff Tembo also arranged finances to supply requirements in his own capacity as Orix Holdings. According to PW2, many meetings were held at the Defendant's offices at Kazungula. He agreed that one of the meetings could be the one

referred to in the e-mail on page 25 of the Plaintiff's Bundle of Documents. He also stated that the meeting mentioned on page 28 could also be one of the meetings held at Kazungula. He admitted that reference was made to Keren Motors in that meeting and not Orix Holdings Limited. He testified that Mr. Jeff Tembo attended that meeting as FNB independent consultant and not as Orix Holdings Limited consultant.

In further cross-examination PW2 testified that there were many meetings, sometimes twice a week and sometimes, once per month between Keren Motors, Daewoo Engineering and Jeff Tembo representing FNB. He could not specifically say when Jeff Tembo converted from representing FNB to representing Orix Holdings; save to say that he was representing both FNB and Orix Holdings. Further, that Keren Motors was supplying concrete to Daewoo Engineering while Orix Holdings supplied ash chemicals and cement to the same company. He said it was not true that Jeff was appointed because Keren Motors failed to perform. He said Keren Motors delivered to the satisfaction of Daewoo Engineering. He confirmed that the contract they had was exclusively to supply concrete for the

Kazungula Bridge. Further, that Orix Holdings was not part of the contract for the construction of the Kazungula Bridge.

PW2 testified in continued cross-examination that FNB directly engaged Jeff Tembo for the purpose of overseeing the project, not the Defendant as indicated in paragraph 12 of his Witness Statement. However, he did not see any contradiction between his testimony under cross-examination and his statement in paragraph 12 of his Witness Statement. PW2 was referred to paragraph 11 of his Witness Statement where he said that at no point in time did the Defendant query or object to the involvement of Jeff Tembo in the Project as a financial consultant or supplier of materials to the Defendant. PW2 said that the Defendant did not have a problem with Jeff being on board as a representative of the FNB to oversee Keren's performance; that in fact the Defendant was pleased to have a third person. However, the Defendant rejected the appointment of Jeff Tembo by Keren Motors to be coordinator.

In re-examination PW2 stated that once Jeff's appointment was rejected, the appointment was withdrawn. It was his testimony that after the letter on page 192 was written, Daewoo rejected Jeff, so he did not work for Keren Motors. With respect to the correspondence

at pages 190-191 of the Plaintiff's Bundle of Documents, PW2 said that there was a lot of communication going on in the relationship of supply and confirming that Jeff Tembo could supply. It was never meant for payment and Jeff Tembo was not authorised to contract debts. That, the relationship was specifically a relationship to supply cement, chemicals and other things. Further, that there were many suppliers and one of them was Orix Holdings. PW2 said that he gave instructions to the Defendant to agree with the supplier and make direct payments from Keren Motors' account. When asked why he instructed Daewoo Engineering to supply materials on his account, PW2 said that they could either pay from their account, which was not possible because they had cashflow problems, or Orix Holdings could be paid directly from Keren Motors' account. That, it was in view of the above considerations that Keren Motors instructed Daewoo Engineering to pay all the suppliers supplying Keren Motors from Keren Motors' account.

PW2 further clarified that in order to make concrete they needed certain products, two of which were cement and ash; others were aggregate, sand and water. In this particular case, they were buying ash, chemicals and cement. It was his testimony that the contract

between Keren Motors and Daewoo Engineering was mutually amended. Making a clarification on the alleged failure by Keren Motors which precipitated the appointment of Jeff Tembo, PW2 stated that the failure alluded to was with regard to not meeting the specification. He said for that they had a meeting to amend the contract to that effect and to suggest that Daewoo manages the plant and provides additional expertise in addition to Keren Motors staff.

This marked the end of re-examination and the close of the Plaintiff's case.

The Defendant called one witness for its case, namely, Alvin Sindowe, the Defendant's Senior Contracts Engineer (hereinafter referred to as "DW1"). His Witness Statement dated 9<sup>th</sup> December, 2017, was tendered and duly admitted in evidence.

In cross-examination, DW1 stood by his evidence in the Witness Statement that there was no contract whether oral or written between Orix Holdings and Daewoo Engineering. He restated that as alleged in paragraph 2 of the Defence, the Defendant never ordered any material or services from the Plaintiff. He identified the document on page 1 of the Defendant's Bundle of Documents as a Supply Agreement for Concrete and Aggregate between Daewoo Engineering

and Keren Motors. He agreed that cement is not included under goods and works in the Agreement.

DW1 testified further, that he was aware that after execution of the contract, problems arose between Daewoo Engineering and Keren Motors. He also testified that he was aware that Daewoo Engineering wrote a warning letter to Keren Motors with a list of concerns. The said letter is exhibited on pages 22-23 of the Plaintiff's Bundle of Documents. That, the concerns included lack of cement. It was his evidence that the concerns persisted after Daewoo Engineering had highlighted them to Keren Motors. According to DW1, he was aware that this forced the parties to execute an amended contract which is exhibited on page 24 of the Defendant's Bundle of Documents. He further testified that the Buyer according to the amended agreement, was Daewoo Engineering and the Supplier was Keren Motors. He admitted that in clauses 6 and 7 of the amended contract, the parties were agreeing to the consequences to arise should Keren Motors default. He also agreed that if the parties did not execute the amended contract, Daewoo Engineering would have breached the original contract.

In further cross-examination, DW1 was referred to page 37 of the Plaintiff's Bundle of Documents. He said that the subject of the e-mail was a request for cement and fly ash. That, the e-mail was from Kyu-Min Kim of Daewoo Engineering to Jeff Tembo. He agreed that in the e-mail the Defendant was giving direct instructions to Mr. Tembo. He testified that Kyu-Min Kim was at that time the Planning Manager for the Defendant. He stated that the subject of the e-mail at page 40 of the Plaintiff's Bundle of Documents was procurement of cement. The mail was from Jeff Tembo to DW1. He admitted that the e-mail at the bottom of page 40 was from himself to Jeff Tembo where he wrote to the Plaintiff as a matter of urgency to find out the status on the procurement of the cement and fly ash. DW1 was also referred to page 52 of the Plaintiff's Bundle of Documents and said that the same was an e-mail entitled 'request for cement and fly ash', from Jeff Tembo to Sang-Jin Park, a Senior Cost Engineer with the Defendant. That, the other e-mail on the same page was from Mr. Sang-Jin Park to Mr. Jeff Tembo and the subject was also 'request for cement and fly ash'. He agreed that under this correspondence, Mr. Sang-Jin Park was directing the Plaintiff not to hesitate to pay and to order the cement.



these instructions. He further identified the e-mails on pages 145 and 176 as being from Lwelenja Ferdinand to Jeff Tembo and the subject: 'Supply of Ohorongo cement'. Lwelenja Ferdinand was the Material Engineer for the Defendant. He admitted that this again was another clear set of instructions for supply of cement. It was DW1's further testimony that on page 146 at the top was an e-mail from Jeff Tembo to Charles Malambo wherein the former was requesting the latter to expedite the transfer of USD26,580 to Ohorongo Cement. He identified the e-mail on page 182 as being from Sungwook Kim to Jeff Tembo and agreed that it was another set of instructions relating to the supply of admixture. Sungwook Kim was Construction Manager at the Defendant company. He admitted that according to the e-mail on page 109, the payment was being made directly to Ohorongo Cement and not Keren Motors. He also admitted that Ohorongo Cement was not party to the contract which was signed between Keren Motors and Daewoo Construction. He agreed that the aforesaid notwithstanding, Daewoo Engineering was paying directly to Ohorongo and not Orix Holdings and that was why this case was in Court.

When referred to page 198, DW1 testified that according to the instructions on that page, Daewoo Engineering was telling Ohorongongo Cement that even if they supplied them with cement or any materials, they should not put the invoice in the name of Daewoo Engineering but in Keren Motors' name. That, even if Keren Motors was not the one that supplied the materials, the invoice should still be in the name of Keren Motors so as to speed up the payment process.

DW1 identified the document on page 111 as a proof of payment, with the applicant being Daewoo Engineering and the beneficiary, Drillmate Zambia Limited. It was his evidence that Drillmate was a nominated drill contractor for Keren Motors. He admitted that Daewoo was paying Drillmate directly according to the document. He also identified the document on page 112 as another proof of payment. The applicant was Daewoo Engineering and the beneficiary, Simba Drilling, another of Keren Motors' subcontractors. He admitted that this was another of Keren Motor's subcontractors being paid directly by Daewoo Engineering. He conceded that Daewoo elected to pay the subcontractor but refused to pay the Plaintiff.

DW1 was referred to paragraph 2 of his Witness Statement which stated as follows:

*“Daewoo E &C’s association with one of the directors of Orix Holdings Ltd Mr. Jeff Tembo has been through:*

- 1. When he was representing the First National Bank with regards to the financial transactions between Keren Motors Ltd and First National Bank.*
- 2. When Keren Motor appointed Mr. Jeff Tembo as project coordinator for Keren Motors Ltd.”*

DW1 was then referred to page 12, paragraph 9 of the Plaintiff’s Bundle of Documents which read as follows:

*“The Supplier shall not assign or sublet the Agreement in whole or in any part thereof without prior written consent of the Buyer.”*

It was his testimony that there was no need for consent of the Buyer, the Defendant, in view of the fact that Jeff Tembo was representing FNB with regards to the financial transactions between Keren Motors Limited and FNB. DW1 also stated that there was also no need for consent when Keren Motors appointed Mr. Jeff Tembo as Project Coordinator for Keren Motors. DW1 was then referred to page 196 of the Plaintiff’s Bundle of Documents and identified the e-mail there as being from Dong Chan Kim, the Project Coordinator for the Defendant who wrote the following to Jeff Tembo:

*“I appreciate your suggestion to remind (sic) of the Agreement regarding your appointment as Project Coordinator for Keren Motors, which I rejected today. You may not need our approval because you are not anyone recognised in our Agreement – actually Keren Motors shall need our approval on this matter under clause 9 [Assignment] saying “The Supplier shall not assign or sublet the Agreement in whole or in any part thereof **without prior written consent of the Buyer**” (Emphasis added).*

DW1 reiterated that despite what was written in the e-mail, he still stood by his testimony that there was no need for consent for Keren Motors to appoint Mr. Jeff Tembo as a Project Coordinator. He denied that his statement contradicted that of Dong Chan Kim. DW1 was referred to paragraph 2 of the Defence which read as follows:

*“...the Defendant shall at trial aver and show that: -*

- i. It never ordered any material, equipment or services from the Plaintiff through Jeff Tembo.*
- ii. It corresponded with Jeff Tembo in his capacity as an agent or proxy of Keren Motors Limited, a company it has a contract with for the supply of aggregate and that all materials ordered by Jeff Tembo were for use by Keren Motors Limited in the performance of its contract with the Defendant.”*

DW1 testified that Jeff Tembo was not part of the agreement with Daewoo Engineering and Keren Motors. He agreed that there was need for consent for Jeff Tembo to be appointed agent or proxy for

Keren Motors. He admitted that no consent was given in this case but he still insisted on saying that Jeff Tembo was an agent or proxy for Keren Motors. In further Cross-examination DW1 stated that Keren Motors had its own employees at Kazungula Bridge site, who included Abel Lupambo, Joseph Ngosa and Yusuf Tsege, who were present at the site most of the time. He agreed that despite the presence of these employees most of the time, the Defendant dealt with Jeff Tembo. When asked if Jeff Tembo represented himself as an agent of Keren Motors, DW1 said he was not sure.

DW1 was referred to page 190 of the Plaintiff's Bundle of Documents and said that the e-mail on that page was from Don Chan Kim to Jeff Tembo and the subject was 'Direct payments on Keren Motors materials for concrete production'. He admitted that in the mail Jeff Tembo was saying that he was not part of the contract with Keren Motors. He said that Jeff Tembo signed the mail as Project Finance Supervisor. DW1 was referred to page 188 of the Plaintiff's Bundle of Documents and identified the subject of the document on that page as 'Request for direct payments for concrete materials supply'. DW1 said that after reading the paragraph at the bottom of

page 188, it was his view that the Defendant was not aware that he was dealing with the Plaintiff, even in light of the said letter.

When referred to page 69 of the same bundle, DW1 said that the document on the said page was a delivery note showing Orix Holdings (Pty) Limited, the Plaintiff herein. The delivery note is dated 11<sup>th</sup> October, 2016. He further identified delivery notes also showing Orix Holdings (Pty) on pages 144 and 185. He said that all the materials shown on the delivery notes were delivered to the Defendant. When DW1 was referred to page 149 of the Plaintiff's Bundle of Documents, he said that the author of the e-mail on that page was Robinly Rodriguez, a Senior Material Officer at Daewoo Engineering. He admitted that the electronic transfer that was forwarded to Mr. Nelson as per page 149 was the one exhibited on page 150 and the applicant thereon was Orix Holdings Limited; the contact name was Jeffrey Tembo. However, DW1 still maintained his position that the Defendant did not know that it was dealing with Orix Holdings, the Plaintiff herein. He agreed that the various orders placed by Jeff Tembo were executed and the materials supplied. He also said that he believed that the Defendant benefited from the said materials and that there were payments with respect to the works that were done.

In re-examination DW1 was referred to page 25 of the Defendant's Bundle of Documents and said that the Amendment Agreement was between Daewoo Engineering, the Defendant herein and Keren Motors. When referred to page 37 of the Plaintiff's Bundle of Documents, DW1 said that the person referred to in that document was Jeff Tembo, who was the Financial Adviser to Keren Motors. He said that the e-mail on page 30 of the same bundle was addressed to Mr. Jeff Tembo, in short, it was written to Keren Motors. With regard to the e-mail on page 52 of the Plaintiff's Bundle of Documents, DW1 said that it was generated by Mr. Jeff Tembo, a representative of Keren Motors, and not the Plaintiff. With regard to the e-mail on page 70, DW1 said that in this case the Defendant was writing to Mr. Tembo and Mr. Kibrom, representing the fact that the e-mail was written to Keren Motors. He also said that whenever the Defendant was given instructions by Keren Motors, that's when the instructions would be carried out. With respect to the e-mail at page 120 of the Plaintiff's Bundle of Documents, from Ferdinand Lwelenja of Daewoo Engineering to Jeff Tembo asking the latter to supply 90 tonnes of Ohorongo cement, DW1 said that there is no mention of the Plaintiff in that e-mail; that the person mentioned is Jeff Tembo, and rightly

so, because he was representing Keren Motors. When referred to page 146 of the Plaintiff's Bundle of Documents, DW1 said that again the instructions went to Jeff Tembo. That, the position was that no instructions were given to the Plaintiff to order any materials. It was his testimony that the instructions were given to Mr. Jeff Tembo and rightly so, because he was a representative of Keren Motors and not the Plaintiff. He also stated that the Defendant was not paying the Plaintiff because the Plaintiff never supplied anything warranting payment. It was his evidence that although Simba Drilling was not party to the contract, the Defendant paid it because it had done some specific work and there were instructions from Keren Motors to pay the company. With regard to the document at page 188 of the Plaintiff's Bundle of Documents, from Keren Motors to the Defendant requesting for direct payments for concrete materials supply, DW1 said that the letter was a summary of what was happening between the Defendant and Keren Motors and had nothing to do with the Plaintiff. That, Keren Motors was requesting Daewoo Engineering to pay the suppliers Orix Holdings. However, this was rejected because there was nothing that the Plaintiff had supplied to the Defendant and further, on page 189 there is a crossing out, meaning that the



payment was never done because the Plaintiff never supplied anything to the Defendant.

DW1 testified that at page 144 of the Plaintiff's Bundle of Documents was a classic example of a delivery note from Sika Botswana to Orix Holdings, for the attention of Mr. Jeff Tembo, who was a representative of Keren Motors. That, when the materials landed, they were cleared by Mr. Bhakire, who was a Keren Motors employee. He also said that at page 185 was another delivery note and the parties were Orix Holdings, Jeff Tembo and Keren Motors. That, the Defendant was not in the picture. With respect to the e-mail at page 149, DW1 said that the e-mail was not instructing the Plaintiff to pay for any cement. When referred to page 150 where there is an application to purchase currency, DW1 said that the applicant was Orix Holdings Limited and the beneficiary was Ohorongo Cement.

This marked the end of re-examination and the close of the Defendant's case.

Counsel on both sides filed submissions in support of each party's case, and the same are summarised as hereunder.

It is the Plaintiff's argument that the Defendant's refusal to settle the amount owed to the Plaintiff in the face of all the correspondence and documentation which clearly shows that it indeed directly ordered material and services from Jeff Tembo, and was supplied with such materials and services by the Plaintiff, is an attempt to hide behind the fact that there was no written contract between the parties to this action. The Plaintiff contends that even though there was no written contract between the Plaintiff and the Defendant, there was in place an implied contract; an implied contract being one founded by law on the assumed intention of the parties. That, in this case such contract can be inferred from the correspondence between the parties. For example, in the e-mail from the Defendant to Jeff Tembo dated 10<sup>th</sup> January, 2017, exhibited on page 120 of the Plaintiff's Bundle of Document, there was an order for cement couched in the following terms:

*"Kindly arrange and supply us 3 bulk cement loads (90 tons) of Ohorongo cement (52.2N) by 14 January, 2017."*

It was further submitted that on the same date, as can be seen at page 21 of the Plaintiff's Bundle of Documents, Jeff Tembo replied as follows:

*"Noted with thanks, we will proceed to make the order and payment right away – fly ash already ordered."*

In support of the submission that in the absence of an express contract, a contract can be inferred from the circumstances of the case, the case of *D. P. Services Limited v. Municipality of Kabwe*<sup>1</sup>, was cited. It was stated in that case that it was arguable whether or not there was subsisting an express contract, but that assuming that there was no express contract, the only inference that could reasonably be drawn from the circumstances of the case was that there must have been, at any rate, an implied contract to pay for services to be rendered. The appellant rendered its services in the way of business, not as an office or friendship and both parties must have assumed throughout the relevant period that the services were ultimately to be paid for as the circumstances of the case clearly showed that the work was not to be done gratuitously. It was argued that similarly, in *casu*, the exchange of e-mails between the Plaintiff and the Defendant constituted an offer and acceptance. That, there was a clear intention by the Plaintiff and Defendant to create an enforceable agreement. Further, as guided by the Supreme Court in the case of *Base Chemicals and Another v. Zambia Air Force and Another*<sup>2</sup>, in analysing a business relationship in a given case, the court has to take an objective approach of whether or not the parties'

*“The Supplier shall not assign or sublet the Agreement in whole or in any part thereof without prior written consent of the Buyer.”*

It was submitted that it was not possible by the contract and at law, for Keren Motors to delegate its contractual burden in the performance of the Supply Agreement to a third party without the agreement of the Defendant and that the Plaintiff was strengthened in that regard by the case of *Tolhurst v. Associated Portland Cement Manufacturers Limited*<sup>3</sup>. It was contended that had Keren Motors proffered Jeff Tembo as an agent or proxy, the Defendant would have objected to the appointment in view of the provisions of clause 9 of the Supply Agreement but there was no such objection because Jeff Tembo was introduced from the outset as an independent project supervisor whose role was to monitor Keren Motors' performance for the financing arranged through FNB. Further, that Jeff Tembo's involvement via the Plaintiff through the supply of materials and services was a distinct and separate undertaking that came out of an understanding with the Defendant as evidenced in the e-mail exchanges of 3<sup>rd</sup> and 4<sup>th</sup> August, 2016, found on pages 35 and 36 of the Plaintiff's Bundle of Document, which according to the Plaintiff, do not in any way suggest that Jeff Tembo was an agent or proxy of

Keren Motors. Further, that there is no evidence of any fiduciary relationship with Keren Motors. It was also submitted that Jeff Tembo never possessed actual authority by express appointment as Keren Motors' employee, financial advisor or agent, nor were the conditions of apparent authority fulfilled. Further, that Jeff Tembo (PW1) neither had actual authority nor did he have apparent authority or ostensible authority, as no such representation was made by Keren Motors. That, PW1 is on record disassociating himself from the contract between the Defendant and Keren Motors and most importantly, PW1 did not consent to be in a position to be an agent of Keren Motors, which is a critical factor in agency formation. It was submitted that Keren Motors never made any representation to the Defendant either expressly or by conduct that PW1 had a position of authority to bind it with the Defendant. That, PW1 was employed as an independent project supervisor by FNB. Further, that the claim that PW1 was Keren Motors' financial advisor is not supported by any evidence nor is there any explanation of how the agency would have arisen, for the Defendant to make direct orders to a financial advisor who was not party to the supply agreement.

In further support of the Plaintiff's case, it was submitted that the Plaintiff was an undisclosed principal. It was argued that it was not in dispute that PW1 was a director in the Plaintiff company and therefore, at the very least, held actual authority when binding the Plaintiff in a contract with the Defendant. It was contended that the evidence before this Court is to the effect that PW1 never performed or provided any consideration for the materials and services delivered to the Defendant, the same being done by the Plaintiff. Guidance in this regard was sought from Chitty on Contracts-Specific Contracts, 28<sup>th</sup> Edition, Volume 2 at page 30, paragraph 32-55 where it states as follows:

*"The general rule is that a principal is bound and entitled to the benefit of the contract his agent made on his behalf within the scope of such agent's actual authority. This is so whether the agent at the time of acting named or identified his principal, or merely indicated that he was acting for a principal but did not identify him"*

It was submitted that for the doctrine of undisclosed principal all that is required is to establish that the agent had authority from his principal in the contract that he seeks to be enforced. That, in the case before this Court, PW1 was the Plaintiff's director and he testified that he acted on behalf of the Plaintiff when creating the

contract with the Defendant. The Plaintiff also invited this Court to take note that the Defendant had not shown any reasons as to why it would not have wanted the Plaintiff to supply it with materials. It was submitted that the Plaintiff would place reliance on the English case of *The Novasen SA v. Alimenta SA*<sup>4</sup>, where the Court held that the Defendant was the undisclosed principal to a company called Sogescol and was a party to the contract with the Plaintiff. Novasen's appeal in the appeals court was subsequently dismissed on the basis that Alimenta, the Defendant, had established the existence of circumstances that established that Sogescol was acting as its undisclosed agent and it relied on the legal relationship between Alimenta and Sogescol for its decision. It was submitted that in light of the above, PW1 was in this case the director of the Plaintiff and therefore, had actual authority to contract on its behalf. Further, that this Court should find that the Defendant has not proved that it would not have contracted with the Plaintiff as PW1's principal in order to qualify for the exception to the general rule on undisclosed principals.

With regard to consideration, it was submitted that it was consideration that marked the connection between PW1's principal,

the Plaintiff, and the third party, the Defendant. Further, that all the materials directly ordered by the Defendant were as a result of the amendment to the Supply Agreement at clause 1 (6) (page 20 of the Plaintiff's Bundle of Documents) that allowed the Defendant to directly contract with third-party suppliers. That, the evidence on record points to the fact that it is not in dispute that the Plaintiff supplied the materials and services herein at the instance of the Defendant. Further, that the consideration was from the Plaintiff and not PW1 and it is trite law that in contracts, the party that provides the consideration can sue and be sued in damages. It was submitted that Keren Motors was not a party to this consideration. That in keeping with the principle in the case of *Dunlop Pneumatic Tyre Company v. Selfridge Limited*<sup>5</sup>, which stated that only a party to a contract can claim upon it, it is the Defendant that is liable on the contract between the Defendant and the Plaintiff as it consumed the materials and services arising from the Plaintiff's consideration. Keren Motors never made the orders, never provided the consideration and never consumed the materials and services arising from the Plaintiff's consideration.



It was also submitted that in the case of *Smith 4 Snipes Hall Farm v. River Douglas Catchment Board*<sup>6</sup>, Lord Denning stated as follows:

*“The principle that no one can sue upon a contract to which he is not a party has never been able entirely to supplant the principle that a man who makes a deliberate promise which is intended to be binding, that is to say, under seal or for good consideration, must keep his promise; and the court will hold him to it, not only at the suit of the party who gave the consideration, but also at the suit of one who was not a party to the contract, provided that it was made for his benefit and that he has a sufficient interest to entitle him to enforce it.”*

It was argued that it is upon the above principle, implicit if not express, that Lord Mansfield (in the case of *MacDowell v Fraser*<sup>7</sup>), held that an undisclosed principal is entitled to sue on a contract made by his agent for his benefit even though nothing was said about agency in the contract. That, PW1 testified that he negotiated the supply of materials and services in his capacity as director of the Plaintiff and the Plaintiff performed the contract by paying for the materials from its FNB credit facility and delivering the same to the Defendant's site.

With regard to the Defendant's contention that it had privity of contract with Keren Motors and therefore, the Plaintiff is not part of

it, it was submitted that a collateral contract is one of the exceptions to the general rule of privity of contract as a contract between two parties may be accompanied by such a contract between one of them and a third person relating to the same subject matter. The definition of collateral contract in Black's Law Dictionary, 2<sup>nd</sup> Edition was quoted as follows:

*“A written or oral agreement associated as a second, or side contract made between the original parties, or between a third party and an original party. This typically occurs before or at the same time the first or main contract is made. This collateral contract is independent and separate from the primary contract. A collateral contract is often done because (1) its terms conflict with those of the main contract; (2) its rules of evidence supersede its incorporation in the main contract; (3) the main contract is wrongly drawn; or (4) there is a difference in the contracting parties, needing to involve a third party.*

*It may also be used to avoid overstepping the privity of the main contract. A collateral contract is active along with the main contract and it may override or replace one or more of the main contract's provisions, if triggered.”*

It was further submitted on behalf of the Plaintiff that the notion of collateral contract was summarised in a leading statement made by Lord Moulton in *Heilbut Symons and Company v. Buckleton*<sup>8</sup>, as follows:

*“There may be a contract the consideration for which is the making of some other contract. ‘If you will make such and such a contract, I will give you one hundred pounds’, is in every sense of the word a complete legal contract. It is collateral to the main contract, but each has an independent existence, and they do not differ in respect to their possessing to the full character and status of a contract.”*

It was contended that the original parties to the supply agreement, that is, the Defendant and Keren Motors, on an objective view of the circumstances, intended that there exist collateral contracts in the matter of supply of materials and services to the project to exist alongside the main supply agreement earlier entered on 21 July, 2015. That, the collateral contract between the Plaintiff and the Defendant contained all the elements of a contract and was consistent with the main contract. Each time Keren Motors failed to perform, as per amendment to the supply agreement, collateral contracts were being entered into. That, the Plaintiff was fortified in its submission that there was in existence a collateral contract between the Plaintiff and the Defendant by the case of *Shanklin Pier v. Detel Products*<sup>9</sup>.

It was further submitted that both the pricing and quantities schedule at page 104 of the Plaintiff's Bundle of Documents,

including the computation of claims at page 219, have not been contested by the Defendant, and at any rate, PW1 was given the go ahead to determine the price by the Defendant as per the e-mail correspondence of 4<sup>th</sup> August, 2016 exhibited at page 36 of the Plaintiff's Bundle of Documents.

With respect to the Plaintiff's claim for breach for contract, it was submitted that since there was a legally binding collateral contract between the Defendant and the Plaintiff, the Plaintiff is entitled to a claim for breach of contract and damages. That, the claim for breach of contract has been uncontested, save for the defence that the Defendant ordered the said materials and services from PW1 because he was Keren Motors' agent or proxy, which defence must fail as argued earlier. Further, that it was PW1's testimony in his Witness Statement at paragraph 53 that the Plaintiff did provide the materials and services to the Defendant and according to PW2, to the best of his knowledge, the Plaintiff's supplies, delivery notes and claims thereof are those of the Plaintiff on account of orders that were duly made by the Defendant.

The Plaintiff also urged this Court to award it damages amounting to USD832,319.47 for loss of business suffered at the

instance of the Defendant for its contumelious act of withholding the Plaintiff's dues since April, 2017. It was contended that, as a result of the Defendant's act of unjustifiably withholding the Plaintiff's money in respect of materials and services supplied to it, the Plaintiff has incurred loss of business. Therefore, it is only just and fair that this Court orders that the Plaintiff recovers damages from the Defendant for loss of business, and thus be put in the position it would have been had the Defendant not illegally withheld its dues. The Plaintiff also prayed for costs.

The Defendant also filed Skeleton Arguments and submissions in support of its case. It was the Defendant's contention that there were no direct orders for materials and services from the Defendant to the Plaintiff. That, the materials ordered through Jeff Tembo who was introduced to the Defendant as a Project Coordinator, were for use by Keren Motors in its performance of the contract with the Defendant. As such, no contract existed between the Defendant and the Plaintiff. The Defendant cited the case of *Lee Cooper Limited v. C.H. Jeakins and Sons Limited*<sup>10</sup>, where it was established that in subcontracts, the subcontracted owed a contractual duty to the party who had engaged him.

It was further submitted that it is evident that the Plaintiff's claim has no merit as there was no contract between the Defendant and the Plaintiff, while a contractual obligation existed between Keren Motors and the Plaintiff. That, this is why the Plaintiff did not question that Jeff Tembo was representing Keren Motors, a company with whom they had a contract. Further, that it was never mentioned at any point to the Plaintiff that the order being made was a direct order from the Defendant.

According to the Defendant, Jeff Tembo was engaged by Keren Motors Limited, a company that subcontracted the Plaintiff in the supply of materials. It is the Defendant's contention that there was in existence an agency relationship between Jeff Tembo and Keren Motors Limited and therefore, the Plaintiff misdirected itself as it failed to bring an action against Keren Motors with whom, it had a contract. That, the fact that the appointment was not in writing or that the terms principal and agent were not used expressly does not negate the agency between Jeff Tembo and Keren Motors Limited who are not party to these proceedings.

It was submitted that the contract for the supply of the materials was between Keren Motors Limited and the Defendant and as such,

the Defendant did not at any point source the materials on its own accord. Hence, the communication between Jeff Tembo and the Defendant cannot be said to be proof that the Defendant ordered materials directly. That, the communication was merely falling within the conformity of the terms of the contract as Jeff was representing Keren Motors Limited. It was argued that as the maxim “equity will not suffer a wrong to be without a remedy”, the Plaintiff can go ahead and sue Jeff Tembo as per the case of *Cavmont Merchant Bank Limited v. Amaka Agricultural Development Company Limited*<sup>11</sup>, where it was stated that where an agent is a contracting party, he will be held personally liable even if he names his principal.

It was submitted that it is clear from the Plaintiff’s final submissions and the evidence adduced in Court that there was never a contract between the Plaintiff and the Defendant in this case. That, it follows that since there was never any contract between the Plaintiff and the Defendant, no rights accrued between the parties. Further, that the purported dealings between the Plaintiff and the Defendant was because the Plaintiff was representing FNB to supervise Keren Motors which had failed to perform under the contract. That,

therefore, it is not true that the Plaintiff dealt with the Defendant as Orix Holdings Limited.

It was argued that on page 25 of the Plaintiff's Bundle of Documents, it is clearly indicated that Jeff Tembo (PW1) was engaged as independent Project Supervisor to monitor Keren Motors' performance and usage of working capital facilities as iCapital Limited and not as Orix Holdings Limited. That, even the purported direct orders being referred to in the Plaintiff's final submissions were done between Jeff Tembo and the Defendant as Jeff Tembo was working for iCapital Limited representing FNB and not as a representative of Orix Holdings Limited.

Citing Chitty on Contracts-Specific Contracts, 28<sup>th</sup> Edition, Volume 2 at page 30, the Defendant submitted that the general rule is that a principal is bound and entitled to the benefit of the contract his agent made on his behalf within the scope of such agent's actual authority. That, this is so, whether the agent at the time of acting names or identifies his principal, or merely indicated that he was acting for a principal but did not identify him. That, in this case, the principal on whose instructions Jeff Tembo acted was either FNB or Keren Motors and neither of them have brought a claim against the



Defendant as regards the contract entered into between Keren Motors and the Defendant. It therefore, follows that the Plaintiff in this case is a third party who accrued no single right under the contract. The case of *Novasen SA v. Alimenta SA* (supra) was distinguished from the case before this Court arguing that Jeff Tembo never at any point introduced the Plaintiff as his principal and so cannot be seen to benefit from the *Novasen v. Alimenta* case cited above. It was submitted that Keren Motors attempted to introduce the Plaintiff as shown on page 188 of the Plaintiff's Bundle of Documents but the Defendant was not willing to deal with the Plaintiff and the unwillingness is exhibited on page 189 of the Plaintiff's Bundle of Documents by the cancellation of the acceptance and acknowledgment of instructions by the Defendant. It was argued that the case of *Dunlop Pneumatic Tyre Company v. Selfridge*, (supra) where the court held that Dunlop could not claim for damages in the circumstances of the case as the court found that firstly, only a party to a contract can claim upon it and secondly, that Dunlop had not given any consideration to Selfridge and therefore, there could be no binding contract between the parties, was on point. That in *casu*, the above position applies and therefore, the Plaintiff is not entitled to

claim under the contract. It was contended that it is the Defendant's position that it had privity of contract with Keren Motors and therefore, the Plaintiff cannot claim from it as it is not party to it. That, the Plaintiff had lamentably failed to prove that it was and had been a party to any contract with the Defendant. That, therefore, the Plaintiff's claim is not tenable at law and should be dismissed with costs to the Defendant.

The undisputed facts of this case are that on 5<sup>th</sup> September, 2014, the Governments of Zambia and Botswana awarded the Defendant a construction contract to build a bridge across the Zambezi River at Kazungula. On 21<sup>st</sup> July, 2015, the Defendant entered into a Supply Agreement with Keren Motors Limited to supply them with concrete and aggregate. The said agreement was amended on 6<sup>th</sup> October, 2015. On or about 5<sup>th</sup> April, 2016, Keren Motors introduced Jeff Tembo, a financial consultant as well as director in the Plaintiff company, to the Defendant as an independent project supervisor. Jeff Tembo's role was to facilitate financing requirements for the Kazungula Project as well as to monitor Keren Motors' performance for the financing arranged through FNB.

The disputed facts are as hereunder. According to the Plaintiff, between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> March, 2017, the Defendant ordered from the Plaintiff through its director, Jeff Tembo, various materials, equipment and services all valued at USD431,936.46 for use on the Kazungula Bridge Project. The Defendant was aware and specifically engaged the Plaintiff to supply it with goods. Further, despite repeated reminders, the Defendant has failed or neglected to discharge its liability by wrongfully associating the orders to Keren Motors Limited, with whom it has a supply contract.

The Defendant, on the other hand, has denied having ordered any materials, equipment or services from the Plaintiff through Jeff Tembo. It has claimed that it corresponded with Jeff Tembo in his capacity as agent or proxy of Keren Motors Limited, a company it has a contract with for the supply of aggregate. Further, that all materials ordered by Jeff Tembo were for use by Keren Motors Limited in the performance of its contract with the Defendant. The Defendant further claims that it had no contractual relationship with the Plaintiff for the supply of any material, equipment and services.

From the above facts, the issues for determination, in my view, are the following:

- i. Whether or not there was a contractual relationship between the Plaintiff and the Defendant;
- ii. Whether or not the Plaintiff was an undisclosed principal;
- iii. Whether or not an agency relationship existed between Jeff Tembo and Keren Motors;
- iv. Whether or not the Plaintiff supplied materials, equipment and services to the Defendant between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> April, 2017;
- v. Whether or not the Defendant is liable for the Plaintiff's claims herein.

Whether or not there was a contractual relationship between the Plaintiff and the Defendant

From the evidence before this Court, it is common cause that there was no written contract between the Plaintiff and the Defendant. That being the case, the question to be asked is whether or not the fact that there was no written contract between the Plaintiff and the Defendant meant that there was no contractual relationship at all between them. To answer this question, it is imperative to begin by understanding what constitutes a contract.

A contract is a legally binding agreement between two or more parties in which an exchange of value is made. A contract can be express or implied. An express contract is one whose terms the parties have explicitly set out, while an implied contract as defined by Black's Law Dictionary, 10<sup>th</sup> Edition is one:

*“that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances – Also termed contract implied in fact; inferred contract.”*

The evidence before this Court is that between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> March, 2017, PW1 was both an independent project consultant as well as director at Orix Holdings Limited (the Plaintiff herein) and his role was to facilitate financing requirements for the project as well as to monitor Keren Motors' performance for the financing arranged through FNB. It was during this time that the Defendant made orders for various materials and services through him. According to PW1, it was not necessary for the Plaintiff and the Defendant to sign a contract as the latter ordered goods in writing just as it did with other suppliers. As evidence of this, PW1 pointed to various orders of cement made by the Plaintiff through himself for the Defendant exhibited at pages 171, 99, 100, 146 and 149,

amongst others, of the Plaintiff's Bundle of Documents. According to PW1, the orders showed that the Defendant was in direct contact with the Plaintiff. PW1 also pointed to the bank transfer exhibited at page 150 of the Plaintiff's Bundle of Documents indicating the applicant's name as Orix Holdings and the beneficiary as Ohorongo Cement and the e-mail on page 151 from Robinly Rodriguez, the Senior Material Officer at the Defendant company to Nelson Porfirio at Ohorongo Cement attaching an EFT Receipt for the payment of cement and asking him to arrange the immediate loading and dispatch of the cement. It was PW1's testimony that this was further evidence that the Defendant was in direct contact with the Plaintiff. Further, that the materials meant for the Defendant were not delivered directly to the Defendant but to Keren Motors because of a variation in the Supply Agreement in October, 2015, as evidenced by pages 18 – 21 of the Plaintiff's Bundle of Documents.

DW1 on the other hand, testified that the orders mentioned above were made by Jeff Tembo, a representative of Keren Motors. That, the Defendant carried out instructions when the same were given by Keren Motors. Further, that even the instructions on page 90 of the Plaintiff's Bundle of Documents for the supply of 90 tonnes

of Ohorongo cement were addressed to Jeff Tembo and there's no mention of the Plaintiff. It was DW1's further evidence that no instructions were given to the Plaintiff to order materials but the same were given to Jeff Tembo, and rightly so, because he was a representative of Keren Motors. According to DW1, the Plaintiff was not paid because it did not supply anything warranting payment; that even the delivery notes on pages 144 and 185 of the Plaintiff's Bundle of Documents were for the attention of Jeff Tembo and the Defendant is not in the picture.

Having stated the above, it is notable that in cross-examination DW1 admitted that the various orders placed by Jeff Tembo were executed and the materials supplied to the Defendant. It was his further testimony that he believed that the Defendant benefited from the said materials.

The Plaintiff has submitted that the absence of a written contract between the Plaintiff and the Defendant is not in dispute, but that there was in place an implied contract which can be inferred from the correspondence between the parties. For example, in the e-mail from the Defendant to Jeff Tembo dated 10<sup>th</sup> January, 2017, exhibited on

page 120 of the Plaintiff's Bundle of Document, there was an order for cement couched in the following terms:

*"Kindly arrange and supply us 3 bulk cement loads (90 tons) of Ohorongu cement (52.2N) by 14 January, 2017."*

On the same date, as can be seen at page 21 of the Plaintiff's Bundle of Documents, Jeff Tembo replied as follows:

*"Noted with thanks, we will proceed to make the order and payment right away – fly ash already ordered."*

The learned authors of Halsbury's Laws of England, Vol. 22, 5<sup>th</sup> Edition, on the subject 'Contract', state as follows under paragraph 233:

*"Agreement is usually reached by the process of offer and acceptance and, where this is so, the law requires that there be an offer on ascertainable terms, which receives an unqualified acceptance from the person to whom it is made. In the nineteenth century, the popular theory was that there could be no contract without the meeting of minds of the parties, consensus ad idem. The strict consensus theory has, however, been modified... and it is now settled that, where one party (A) expresses an apparent intention (objective intention) which does not express what he actually means in his own mind (subjective intention), an apparent meeting of the minds of the parties may suffice for a binding contract. Where A has so conducted himself that a reasonable person would believe that he is unambiguously*



*assenting to the terms as proposed by the other party B, A is precluded from setting up his real intention and is bound by the contract as if he had intended to agree to B's terms. This is certainly the case where B believes that A's statement expresses A's intention; but B cannot accept A's apparent offer where B knows that that does not accord with A's subjective intention."*

After considering the evidence before this Court and the law applicable, I am of the view that while there was no written contract between the Plaintiff and the Defendant, the existence of such a contract can be inferred from the facts of this case. Black's Law Dictionary has defined an implied-in-fact contract as one that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances. Indeed, the exchange of e-mails between the Plaintiff and the Defendant constituted an offer on ascertainable terms and unqualified acceptance of the same and a clear intention by the Plaintiff and Defendant to create an enforceable agreement can be deduced from the facts. Consideration was provided by the Plaintiff who supplied the goods and services as attested to by the Plaintiff's witnesses and admitted by the Defendant's witness. Under cross-examination, DW1 did admit that the various orders placed by Jeff Tembo were executed and the

materials supplied. It was also his belief that the Defendant benefited from the said materials. Further, to borrow the words of the Supreme Court in the case of *D. P. Services Limited v. Municipality of Kabwe* (supra), in the absence of a written contract, the only inference that could reasonably be drawn from the circumstances of this case is that there must have been, at any rate, an implied contract to pay for services to be rendered. The Plaintiff rendered its services in the way of business, not as an office or friendship and both parties must have assumed throughout the relevant period that the services were ultimately to be paid for as the circumstances of the case clearly showed that the goods and services were not to be done gratuitously.

As correctly submitted by Counsel for the Plaintiff, on an objective view of the circumstances, it is clear that the parties to the original agreement, that is, Keren Motors and Daewoo Engineering, intended that there exist collateral contracts alongside the main supply agreement entered on 21<sup>st</sup> July, 2015. This explains the evidence which is before this Court of sourcing of supplies from other suppliers, including the Plaintiff. It is noteworthy that the implied contract between the Plaintiff and the Defendant was collateral to the supply agreement between Keren Motors and Daewoo Engineering.

The contract fulfilled all the elements of a valid contract and was consistent with the main contract.

Whether or not the Plaintiff was an undisclosed principal

It was submitted on behalf of the Plaintiff that the Plaintiff was Jeff Tembo's undisclosed principal. I am of the view that that was not the position for the reasons that follow.

An undisclosed principal has been defined by Black's Law Dictionary as:

*"A principal whose identity is kept secret by the agent; a principal for whom the other party has no notice that the agent is acting. An undisclosed principal and the agent are both liable on a contract entered into by the agent with the principal's authority."*

(Underlining supplied by the Court for emphasis only)

From the definition of undisclosed principal above, what is clear is that for a principal to be undisclosed, the principal's identity must have been kept secret by the agent and the other party must have had no notice that the agent was acting for the said principal. In the case before this Court, there is evidence that the Defendant was aware of the existence of the Plaintiff and that Jeff Tembo, the agent, was acting for the Plaintiff when he made the orders for the cement and fly ash and provided services to the Defendant. Thus, for

example, in the email from Mr. Jeff Tembo to Mr. Lwelenja of Daewoo Engineering dated 27<sup>th</sup> January, 2017, exhibited at the bottom of page 149 of the Plaintiff's Bundle of Documents, Mr. Tembo was informing Mr. Lwelenja that following their request for cement, they had ordered some from Ohorongo Cement. On the same page, Mr. Robinly C. Rodriguez, Senior Material Officer at Daewoo Engineering wrote an e-mail to Mr. Nelson attaching an EFT Receipt for the payment of the same cement and asking for the immediate loading and dispatch of the cement. On page 150 of the Plaintiff's Bundle of Documents is an application by Orix Holdings Limited, the Plaintiff herein, for an electronic transfer of USD26,580.00 to Ohorongo Cement for the same cement ordered by Orix Holdings through Jeff Tembo. The contact person on the application form for the transfer of the money is indicated as Jeff Tembo. It is therefore, evident that the Defendant was aware that the cement was being ordered and paid for by the Plaintiff and not Jeff Tembo as an individual.

Furthermore, since PW1 was a director in the Plaintiff company, it is not farfetched to conclude that he had actual authority of the Plaintiff to act on its behalf; if not, the authority can be implied from

the circumstances of the case. It follows that the Plaintiff as principal had the right to sue on the contract.

Whether or not an agency relationship existed between Jeff Tembo and Keren Motors

It was the Defendant's submission that Jeff Tembo was an agent or proxy of Keren Motors and the Defendant corresponded with him in that capacity. Further, that Keren Motors assigned or delegated the performance of its contractual obligation to procure certain materials and services to Jeff Tembo. In rebuttal, the Plaintiff submitted that it was not possible by the contract or law for Keren Motors to do that without the consent of the Defendant in view of the provisions of clause 9 of the Contract Agreement between the Defendant and Keren Motors. That clause did not allow Keren Motors to assign or sublet the agreement in whole or in any part thereof without prior written consent of the Defendant. DW1 conceded in cross-examination that there was need for consent for Jeff Tembo to be appointed agent or proxy for Keren Motors. He admitted that no consent was given in this case.

As rightly submitted by the Plaintiff, the Defendant has not placed before this Court any evidence of a fiduciary relationship

between Keren Motors and Jeff Tembo. There is no evidence to show that Jeff Tembo undertook to perform any of Keren Motors' duties under the contract with the Defendant on its behalf or that he had the power or authority to perform such duties on behalf of Keren Motors. Further, there is no evidence of a manifest representation by Keren Motors that Jeff Tembo had been delegated the sort of authority that the Defendant actually relied upon to its detriment. PW2 testified that he introduced Jeff Tembo in 2016 as an independent financial consultant as well as a business man. That, Jeff Tembo was never appointed by Keren Motors, and he was certain about that fact. It is also on record that Jeff Tembo was a director in the Plaintiff company. The evidence on record is also to the effect that Keren Motors' appointment of Jeff Tembo as project coordinator to oversee all matters relating to the supply agreement with respect to the Kazungula Bridge Project was rejected by the Defendant. The above, as well as the fact that Keren Motors could not assign the agreement without prior written consent of the Defendant, which consent, from the evidence before Court, was not granted, only leads to the inescapable conclusion that Jeff Tembo was not an agent of

Keren Motors. In view of the above, the Defendant is estopped from holding Jeff Tembo as an agent or proxy of Keren Motors.

Whether or not the Plaintiff supplied materials, equipment and services to the Defendant between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> April, 2017.

Evidence was adduced by the Plaintiff to the effect that the Plaintiff supplied fly ash and cement to the Defendant which was used on the Kazungula Bridge Project. For example, at page 37 of the Plaintiff's Bundle of Documents lies an e-mail from Daewoo Engineering to Jeff Tembo wherein the former wrote to find out as a matter of urgency the status on the procurement of cement and fly ash. On page 52 of the Bundle is an e-mail from Sang-Jin Park of Daewoo Engineering to Jeff Tembo requesting for fly ash and cement. DW1 admitted in cross-examination that Sang-Jin Park in this correspondence was directing the Plaintiff not to hesitate to pay and to order the cement. On page 64 is an e-mail from Kyu-Min Kim of Daewoo Engineering to Jeff Tembo ordering additional Ohorongo Cement. On pages 120 and 142 are more instructions to Jeff Tembo from Ferdinand Lwelenja of Daewoo Engineering requesting for cement. Similar requests can be found on pages 146, 149 and 176 of

the Plaintiff's Bundle of Documents. On page 145 is an e-mail from Jeff Tembo to Ferdinand Lwelenja informing him that an order for fly ash and cement was placed with Ohorongo Cement. The foregoing are some of the orders for fly ash and cement placed by Jeff Tembo which, according to the evidence of DW1, were executed and the materials supplied. DW1 also testified in further cross-examination, that he believed that the Defendant benefited from the materials ordered and payments with respect to the works were made. It has been argued on behalf of the Defendant that the instructions for the supply of fly ash and cement were directed to Jeff Tembo and there is no mention of the Plaintiff. The evidence before this Court shows that even though the said orders were directed to Jeff Tembo (PW1), he did not provide the consideration for the materials and services delivered to the Defendant, as that came from the Plaintiff. It is thus, evident that the Plaintiff was Jeff Tembo's principal and Jeff Tembo had the authority of his principal in the orders he made on the principal's behalf. Further, the Plaintiff supplied materials, equipment and services to the Defendant between 13<sup>th</sup> August, 2016 and 8<sup>th</sup> April, 2017.



Whether or not the Defendant is liable for the Plaintiff's claims herein.

To refresh the memory, the Plaintiff's claims are for the sum of USD431,930.46 for materials, equipment and services ordered by the Defendant and delivered to its project site between 13<sup>th</sup> September, 2016 and 8<sup>th</sup> April, 2017; damages for loss of profit in the sum of USD832,39.47 as a result of monies owed by the Defendant to the Plaintiff since April, 2017; costs; further or other relief.

Earlier, I made a finding that there was an implied contract between the Plaintiff and the Defendant. In my view, from the evidence before this Court the Defendant is clearly in breach of the contract between the Plaintiff and itself by defaulting in payment for the materials, equipment and services supplied by the Plaintiff. As correctly submitted by the Plaintiff, the Plaintiff's claim for breach of contract is for payment of a straight debt for the sum of USD431,930.46 for various materials, equipment and services it supplied to the Defendant. This claim has been proved on a balance of probabilities and the Plaintiff is entitled to recover the same.

As for the claim for damages in the sum of USD832,319.47 against the Defendant for loss of business allegedly suffered by the Plaintiff at the instance of the Defendant due to its contumelious act

of withholding the Plaintiff's dues since April, 2017, this is a claim for special damages and the law requires that the same be specifically claimed and proved. The Plaintiff has claimed that by withholding the sum of USD431,930.46 since April, 2017, which sum would have typically been turned over on a monthly basis, the Plaintiff was not able to do so and therefore, suffered loss of profit. Further, that the Plaintiff was disadvantaged for a business opportunity at Kazungula Bridge Project because of the Defendant's act of withholding its dues. The Plaintiff has further submitted that the Defendant's action of withholding the claimed funds has severely disadvantaged it in that its credit facility with FNB which was expected to run until 31<sup>st</sup> October, 2017 with an expectation that the facility would be renewed to run until 31<sup>st</sup> October, 2018, was affected because the Plaintiff was unable to conduct this business and render its account active as a consequence of the Defendant withholding its due funds.

According to the Plaintiff, other consequences of the Defendant's act of withholding the Plaintiff's funds were that FNB commenced proceedings against it for default and foreclosure which means, the company will be blacklisted at the Credit Reference Bureau and will not be able to access credit for the next ten years;

a sanction that will extend to the Plaintiff's directors. The Plaintiff contends that as a result of the Defendant unjustifiably withholding the Plaintiff's money in respect of materials, equipment and services supplied to it, the Plaintiff has incurred loss of business as demonstrated and it is only just and fair for this Court to order that the Plaintiff recovers damages from the Defendant for loss of business and thus, be put in the position it would have been had the Defendant not illegally withheld its dues.

In the case of *Paul Roland Harrison v. The Attorney General*<sup>12</sup>, the Supreme Court held that special damages must be specifically pleaded in the Writ of Summons and Statement of Claim. While the Plaintiff has pleaded for special damages in the sum of USD832,319.47 against the Defendant for loss of business, it has not specifically pleaded as special damages the other alleged loss, namely, inability to conduct business and keep its account with FNB active as a consequence of the withholding of the funds by the Defendant, thereby severely disadvantaging it with respect to its credit facility with FNB. It has further not pleaded as special damages the commencement of legal proceedings against it by FNB for default and foreclosure and likelihood of being blacklisted at the

Credit Reference Bureau and not being able to access credit for the next ten years; a sanction the Plaintiff claims will extend to the Plaintiff's directors. These alleged damages were only brought up in the Plaintiff's submissions. Further, with respect to the claim that the Plaintiff will be blacklisted on the Credit Reference Bureau and will not be able to access credit for the next ten years, as the matter stands, this claim is merely speculative and I cannot award special damages on a speculative claim. Consequently, the prayer for special damages for these particular claims has failed.

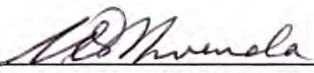
In *Andrew Tony Mutale v. Crushed Stone Sales Limited*<sup>13</sup>, the Supreme Court held that there is need for satisfactory proof to be provided before special damages can be awarded by the Court. In this case, apart from attaching the schedule showing alleged loss of trading opportunity/lost profit to the Amended Statement of Claim, the Plaintiff has not provided any evidence, such as quotations and invoices to support what is listed in the schedule. In my view, a schedule on its own is not satisfactory proof of loss of business opportunity or profit. For the above reasons, I am constrained from awarding special damages. The claim is therefore, dismissed.

In sum, judgment is entered for the Plaintiff for USD431,930.46 for materials, equipment and service ordered by the Defendant and delivered to its project site. The said sum shall attract interest at the average of ruling United States Dollars lending rate of three commercial banks from the date of the Writ of Summons till date of payment.

I also award costs to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

**Delivered at Lusaka this 27<sup>th</sup> day of May, 2020.**

  
**W. S. MWENDA (DR.)**  
**HIGH COURT JUDGE**