

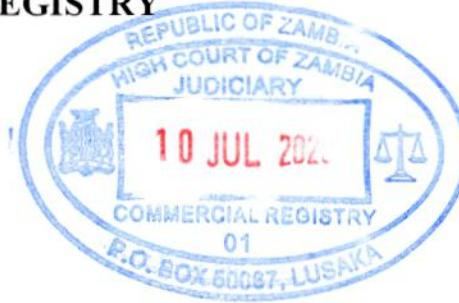
IN THE HIGH COURT FOR ZAMBIA

2017/HPC/0483

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)



**BETWEEN:**

ZAMBEZI INVESTMENTS LTD

1<sup>ST</sup> PLAINTIFF

BRIMAGOBA INVESTMENTS LIMITED

2<sup>ND</sup> PLAINTIFF

SOUTH HILL FARMING LIMITED

3<sup>RD</sup> PLAINTIFF

**AND**

ASSOCIATED TOBACCO COMPANY

DEFENDANT

LIMITED

*Before the Hon Madam Mrs. Justice Irene Zeko Mbewe in Open Court*

*Appearances*

*For the Plaintiffs : Mr. W M Kabimba SC of Messrs WM Kabimba and Co*

*For the Defendant : Mr. Pindani of Messrs Musaile, Pindani & Chonta*

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## JUDGMENT

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**Cases referred to:**

1. *British Movietonews Limited v London and District Cinemas [1952] AC 166*

2. *The Sea Angel* [2007] 2 Lloyds Rep 571
3. *Poultry Farms Limited v Nutri Feeds Zambia Limited* SCZ Judgment No 3 of 2016
4. *Khalid Mohammed v Attorney-General* [1982] ZR 49 S.C
5. *Attorney-General v D G Mpundu* [1984] ZR 6
6. *Ngulube v Malipenga* SCZ Judgment No 3 of 2015
7. *Eastwalsh Homes Limited v Anatal Development Limited* [1993] 12 OR 675 C.A

**Legislation referred to and other works:**

1. *Sales of Goods Act, 1893*
2. *Tobacco Act, Cap 237 of the laws of Zambia*
3. *Roy Goode 'Commercial Law' 3<sup>rd</sup> Edition*

This matter appeared to be straightforward. It refers to a contract entered into between the parties herein. It is the familiar story of a party failing to perform and the other taking action against the defaulter. By the time the defence was filed into Court it took a sharp turn with the Defendant pleading frustration of the contract.

The Plaintiffs action was commenced by way of writ of summons dated 15<sup>th</sup> November 2017 and accompanied by a statement of claim. In its amended writ of summons dated 5<sup>th</sup> February 2018, the Plaintiffs seek the following reliefs:

1. *Breach of contract.*
2. *Payment of the sum of US\$579,620.30, US\$580,153.19 and US\$256,379.21 due and payable to the 1<sup>st</sup> Plaintiff, 2<sup>nd</sup> Plaintiff and 3<sup>rd</sup> Plaintiff respectively under the Deed of Arrangement.*

3. *Payment of the sum of US\$196,348.85, US\$100,620,00 and US\$92,915.29 being costs incurred and paid to Tombwe Limited for the processing of the green tobacco by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively.*
4. *Interest on the sum due under 1, 2 and 3 above at the Bank of Zambia lending rate.*
5. *Any other relief the court may deem fit and just.*
6. *Costs.*

The claim as set out in the statement of claim is that in December 2015, the Plaintiffs sold tobacco to the Defendant from the Tobacco Board of Zambia auction floor valued at US\$1,419,671.90 for the 1<sup>st</sup> Plaintiff, US\$1,014,323.80 for the 2<sup>nd</sup> Plaintiff and US\$657,213.00 for the 3<sup>rd</sup> Plaintiff and the Defendant took possession. The Defendant was to pay at the close of the auction sale period but failed to do so.

By a written Deed of Arrangement (hereinafter referred to as “the Deed”) dated 26<sup>th</sup> February 2016 executed by the parties herein it was agreed that the Defendant would sell the tobacco it purchased from the Plaintiffs and pay them accordingly. It was a further term that the title in the tobacco would remain with the Plaintiffs until it was sold.

From February 2016 until May 2017 the Defendant failed to find a buyer and subsequently in May 2017 the Plaintiffs through their own effort found a buyer of the tobacco which they allege was sold at a loss against the values agreed with the Defendant at the tobacco auction floor in December 2015.

The Plaintiffs further incurred costs for processing and packaging the tobacco which costs had escalated on the market since December 2015. The Plaintiffs averred that the Defendant refused to negotiate regarding the Plaintiff's loss of earning as prescribed in the Deed. It is on that basis the Plaintiff claims as set out in the writ of summons.

## **Defence**

In the defence filed into Court on 9<sup>th</sup> February 2018, the Defendant contended that the Plaintiffs initially sold certain quantities of tobacco to the Defendant at the Tobacco Association of Zambia (TAZ) auction floors. According to the Defendant, this initial contract was reversed by mutual agreement of the parties and at all times the Plaintiff retained ownership of the tobacco in the custody of the Defendant.

It is pleaded that the 2014 crop sold by the Plaintiffs to the Defendant was rejected by the Chinese market on the premise it was contaminated and had an aroma. Consequently, a shipment of tobacco was returned by the Chinese Tobacco International Inc (hereinafter referred to as "CTI") back to Zambia and marooned in South Africa resulting in the Defendant incurring significant costs. The Defendant was subsequently banned from exporting any further tobacco to China thereby negatively affecting its future business prospects.

The Defendant pleaded the defence of frustration which consequently resulted in a lack of financial capacity to pay the Plaintiff for the tobacco sold at the TAZ auction floor. It then informed the Plaintiffs of these developments and the parties agreed to reverse the earlier transaction through the Deed which was executed by all the parties.

The Deed set out terms and conditions which included both the Plaintiff and Defendant finding buyers for the tobacco. It was left open ended as to the time frame within which the sale would be done by either party. It was an agreed term that the financial results would accrue for the account of the Plaintiffs. The Defendant admitted that the Plaintiffs incurred packaging and processing fees which had escalated since December 2015.

It is averred that the Plaintiffs sold the tobacco without consulting or involving the Defendant and therefore could not place blame on the Defendant for any consequences arising from their action nor could they benefit from their own wrong when they sold the tobacco at a price they preferred.

In conclusion, it was denied that the Plaintiffs are entitled to the reliefs sought.

### **1<sup>st</sup> Plaintiff's evidence**

PW1 was Graham Charles Ray who relied on his witness statement filed into Court on 16<sup>th</sup> April 2018 with similar averments as in the statement of claim.

In cross-examination by Counsel for the Defendants, PW1 admitted that before the 2015 transaction he encountered no problem with the Defendant relating to the sale of tobacco. When queried as to whether he knew where the Defendant sold the supplied tobacco, PW1 stated he had no clue where it was being sold. He admitted that the Defendant's representatives educated him on how the tobacco to be supplied to the Defendant was supposed to be grown.

In terms of the selling price of the tobacco, it was PW1's testimony that according to the different grades of tobacco a matrix was used and on average was US\$3.10

per kilogram of green leaf and that the Defendant would buy different grades. However, PW1 did not have documentation to support the claim in respect of the quantities sold to the Defendant.

In respect to the supply of tobacco in April 2015, it was PW1's testimony that the 1<sup>st</sup> Plaintiff was paid 30%. He testified that the selling season was normally around Easter up to August or September and depended on when TAZ and TBA opened the floors. PW1 stated that on numerous occasions the tobacco was sold as per bookings with TAZ.

As to the payment, PW1 stated it was to be done within 3 days according to TAZ rules. He maintained that for the first transaction the 1<sup>st</sup> Plaintiff was not paid within the stipulated 3 days though they still went ahead and sold the tobacco to the Defendant a second time. PW1 maintained that the 1<sup>st</sup> Plaintiff waived none of its rights under the *Tobacco Act, Cap 237 of the laws of Zambia*.

In respect to the events of November 2015, PW1 admitted that Tim White explained the liquidity problems but did not explain what caused the delay for payments. PW1 denied that the delay as explained by Tim White was caused by the rejection in China of the earlier tobacco sold to the Defendant in 2014 following its export.

He denied having any knowledge of an after-taste aroma detected by the end user in CTI of China and was unaware that the tobacco had been sent back to Zambia and marooned in Durban at the Defendant's cost. He further denied being aware of the black listing of some tobacco merchants from Zambia. When queried on a company called Zambia Leaf Tobacco and whether it had been blacklisted hence its closure in Zambia, PW1 denied knowledge of that.

He agreed that the Tobacco Board of Zambia (TBZ) had disseminated information for the farmers to cure their tobacco to avoid rejection of their product on the market. In respect to what caused the liquidity problems, PW1 stated that ATC had stopped an application done through Exim Bank. He denied any knowledge of the blacklisting of the Defendant by the Chinese buyers and that Tim White proposed the return of the entire tobacco supplied in 2015.

PW1 denied telling Tim White to find other buyers for the tobacco and he rejected the return of the green tobacco supplied, on the basis that it belonged to the Defendant. PW1 admitted the tobacco could be processed to increase its shelf life and that the processing was done at Tombwe Processing Limited which had custody of the said tobacco.

PW1 agreed that a Deed prepared by PW1's lawyers was executed to regulate the relationship between the Plaintiffs and Defendant. PW1 stated that all this was done to protect its money and ensure the Plaintiffs got paid and to protect and enhance the value of the said tobacco.

In respect to ownership of the tobacco, PW1 conceded that under clause 2.1 of the Deed, the proceeds of sale of the tobacco would accrue to the 1<sup>st</sup> Plaintiff. Further, that the Defendant was at liberty to look for buyers of the said tobacco. He denied the assertion that the Defendant became the Plaintiffs agents and confirmed there was no time frame placed for the Defendant to find another buyer.

PW1 further denied that Gordon Chance had found a buyer for the tobacco at the price of US\$4.00. He conceded the tobacco was eventually sold to Ross Tobacco and ACAL at US\$5.70 per kilogram and US\$3.65 respectively. However, PW1 had no supporting documentation to back up this assertion. He conceded he gave

permission for the removal of the tobacco from Tombwe Processing Limited where it was stored.

PW1 further conceded he approached Alliance One to purchase his tobacco and an agronomist Bush Becker checked the tobacco on his farm and found it had some adhesive chemical used to seal the tobacco. PW1 testified he had always used this chemical for his tobacco. PW1 denied the allegation that the chemical used on the tobacco caused the contamination and an after-taste smell.

PW1 denied any knowledge of the meeting held in Chisamba in October 2016 including the findings of Bush Becker relating to the cause of contamination. He however conceded that the TAZ memorandum sent to all farmers advised them not to use the adhesive which PW1 conceded he had used for the past fifteen (15) years.

In terms of clause 1.1 of the Deed, PW1 conceded the tobacco could not be sold without his consent. PW1 further admitted he had no documentation of any invoice to support his claim in Court. Further, he conceded he had no records of the transaction between the 1<sup>st</sup> Plaintiff and the other two buyers.

In re-examination, PW1 clarified that in respect of the transaction with the two companies, they were paid through the FNB export account and monies were distributed to all parties and disbursed by the 1<sup>st</sup> Plaintiff. After the sale of the tobacco, PW1 stated they received approximately US\$575,000.00 and the claim before Court was of a lesser amount. He reiterated that the Defendant had not paid the Plaintiffs due to liquidity problems.



In respect to the Deed, PW1 maintained that the tobacco was sold 4-6 months after signing the Deed and the processing, fumigation and packaging was done by Tim White. As to the processing fees, PW1 conceded it was not a free service.

## **2<sup>nd</sup> Plaintiff's evidence**

**PW2** was Gordon Charles Chance who filed his witness statement on 16<sup>th</sup> April 2018 with similar averments as in the Plaintiffs statement of claim.

In cross examination, he confirmed having sold tobacco to the Defendant for the previous 5 years without any payment difficulties. In mid-April 2015 to July 2015, PW2 admitted having sold tobacco to the Defendant and received a part payment and thereafter payments stopped. It was then that he signed a Deed and clause 3.2 provided for the tobacco to remain the property of the 2<sup>nd</sup> Plaintiff. He understood the Deed to be a contract of sale.

When queried as to whether he had proof of the price the tobacco was sold for by the Plaintiffs, he responded in the negative. When referred to a letter at page 41 of the Defendant's bundle of documents dated 10<sup>th</sup> April 2017, he agreed that the email was sent earlier. PW2 told Court he sold the tobacco at US\$5.70 and the next lot at US\$3.65 was negotiated with other Plaintiffs and Mr. Ross.

PW2 admitted TAZ had addressed all tobacco farmers vide an email to stop using an adhesive in the curing process of tobacco. He maintained he had never used the adhesive in question.

Most of the responses in cross examination mirrored those of PW1 including the lack of knowledge of the blacklisting of the Defendant in the Chinese market due

to the after-taste aroma in the tobacco. He testified he only knew of the Defendant's liquidity problems and not the cause. PW2 denied he had knowledge of the findings made by the agronomist Bruce Becker.

In respect to clause 3.2 of the Deed, PW2 stated the tobacco belonged to him and the arrangement was for the Defendant to find a buyer for the returned tobacco and no time frame was given. He confirmed the tobacco was exported by Ross Tobacco and ACL had export licences and the entire payment was paid to the 1<sup>st</sup> Plaintiff who then distributed monies to the others. However PW2 did not have any evidence or verifying documents to support this assertion.

In re-examination, PW2 confirmed the 1<sup>st</sup> Plaintiff and others were paid pro-rata for what was owed on their respective tobacco. PW2 clarified that at the Mkushi meeting Bruce Becker presented his findings though the report was inconclusive in terms of identifying the exact problems encountered by the tobacco farmers. He reiterated that the tobacco was delivered to Tombwe Processing Limited from the Defendant's warehouse after collection from the respective warehouses.

### **3<sup>rd</sup> Defendant's evidence**

PW3 is Hillary Keith Palmer who filed her witness statement on 16<sup>th</sup> January 2018. PW3 explained she conducted farming business under South Hill Farm the 3<sup>rd</sup> Plaintiff herein.

In cross-examination she maintained that the Defendant did not pay for the tobacco. When questioned on the contamination of the tobacco, she stated she was unaware of the contamination in 2015 of Zambian tobacco. She confirmed being

aware of the memorandum from TAZ to all farmers to stop the use of an adhesive in the curing process of tobacco.

In terms of the new buyer, she reiterated that the tobacco was moved from the Defendant to Tombwe Processing Limited and that the farmers involved agreed to have it processed at Tombwe Processing Limited and the tobacco remained there until a buyer was found.

She told the Court that she consented to the removal of the tobacco from Tombwe Processing Limited to Ross Tobacco as buyers of the tobacco. PW3 conceded she had no invoices issued by herself from the Plaintiffs to the buyers.

After the 3 witnesses who testified on behalf the respective Plaintiffs, the Plaintiffs closed their case.

### **Defendant's evidence**

The Defendant called two witnesses.

**DW1** was Timothy John Barker White who filed his witness statement into Court on 10<sup>th</sup> April 2019 with similar averments as in the defence.

In a nutshell, in cross-examination DW1 stated he was a Director of ATC UK Limited and General Manager of the ATC Group and his role was primarily administrative. He told the Court he was not in a position to know a subsidiary company's day to day operations.

DW1 testified that during 2014 to 2015 the chief executive officer (CEO) of ATC Zambia was Gavin Rolls who left in May 2016 whilst Mr. Banda is the financial

manager. DW1 stated he was concerned with the non-payment of the purchased tobacco from the Plaintiffs and approached Standard Chartered Bank London to resolve the issue by releasing finances, but the Bank suspended any further advances due to the rejection of the tobacco by CTI for the 2014 crop delivered in 2015.

In further cross-examination, when questioned as to which crop was not paid for, he stated that it was not the rejected tobacco. He further explained that at the meeting held with the farmers, the rejection of the tobacco by the Chinese market was responsible for their financial incapability to pay.

DW1 maintained that the original sale and purchase of the tobacco from the Plaintiffs was frustrated through the withdrawal of the trade finance facility with Standard Chartered Bank, London.

In terms of the Deed, DW1 told the Court the arrangement was for the Defendant to market the tobacco in question on behalf of the Plaintiffs. It was DW1's belief that the Deed cancelled the earlier transaction with the Defendant and relied on clause 3.2 of the Deed.

When asked about the parties entering into negotiations relating to the unpaid balance, DW1 stated the balance made reference to tobacco sold on behalf of the Plaintiffs and where it did not achieve the desired price to mitigate the costs, there was room to discuss the outstanding balance.

When referred to the schedule in the Deed, DW1 maintained it reflected the value of the green tobacco at the time of signing the Deed which was in the sum of US\$1,419,671.90.

When referred to clause 2.1 of the Deed, DW1 stated the proceeds of any sale would be for the benefit of the Plaintiffs. In terms of the costs, DW1 referred to clause 1.1 of the Deed where costs related to the sale would be deducted from the sales proceeds and the net proceeds would be for the account of the Plaintiffs. He conceded that the Defendant did not achieve the sale and therefore under the circumstances clause 1.1 and 2.1 of the Deed were irrelevant.

He admitted Tombwe Processing Limited had issued an invoice to the Defendant for US\$336,170.84 relating to the processing of tobacco. DW1 maintained that the Defendant never defaulted as it found a buyer but was unable to transact due to the Plaintiffs actions.

In re-examination, DW1 clarified that Standard Chartered Bank provided finance for the non-Chinese styled tobacco which benefitted the 1<sup>st</sup> and 3<sup>rd</sup> Plaintiffs. He explained that for years the tobacco grown by the Plaintiffs was primarily for the Chinese market accounting for roughly 70% of the exports. DW1 further clarified that the 2014 crop was the one rejected, though it was rejected in 2015 when deliveries were made. He explained that the rejection of the tobacco was interconnected to the supply of Chinese style tobacco following the contamination issue.

At the meeting of November 2015, DW1 clarified that at the material time the contamination issue was unclear and that two of the Plaintiffs acknowledged use of the curing adhesive on the tobacco.

DW1 denied that the Defendant acted fraudulently in its failure to make payment to the Plaintiffs and attributed it to frustration of the transaction. The contract was

further frustrated as it denied the Defendant future markets in China for the tobacco following the contamination issue.

DW1 explained the Defendant's role under the Deed was for it to find customers and any price variations would be negotiated if the Plaintiff sold the tobacco through their own methods without the involvement of the Defendant. Further, DW1 clarified that the value of the green tobacco would have been dependent on the price matrix provided to all tobacco growers.

DW1 further clarified that following a visit to China, the end users had detected an off-taste aroma and as far as the Defendant understood, it was a pre-curing production problem.

In terms of frustration of the contract DW1 reiterated it was caused by the contamination issue. As to the relevance of clause 1.1 and 2.1 of the Deed, DW1 stated that the Plaintiffs had found alternative buyers through their own efforts and therefore those clauses became inapplicable. He interpreted clause 3.2 of the Deed to mean that the original sales agreement between the parties was annulled as the tobacco in question remained the property of the Plaintiff.

In respect to clause 1.7 of the Deed on the price differential, DW1 clarified that the Defendant could not pay for the costs as it did not participate in the transaction. He further alluded to the fact that it was the Plaintiffs that had negotiated with Tombwe Processing Limited for a credit arrangement.

In terms of the Defendant having found a buyer, DW1 stated that a buyer was located in August 2017 but the sale did not materialise.

**DW2** was Gary Robin Parker the marketing director of the Defendant Company. He filed his witness statement into Court on 18<sup>th</sup> August 2018.

DW2 stated there were around 70 grades of tobacco and that the Defendant failed to pay the Plaintiffs for the tobacco delivered. He admitted that a Deed was executed on 26<sup>th</sup> February 2016 between the Plaintiffs and Defendant. He attributed the failure to pay the Plaintiffs was as a result of the withdrawal of the line of credit from the Bank following the rejection of the tobacco delivered to CTI from the 2014 crop. He reiterated it was the 2014 tobacco that was rejected and the 2015 crop had nothing to do with the rejection. He then clarified that the 2014 crop was rejected in 2015. In respect to the 2015 crop, DW2 averred it was not contaminated.

DW2 stated that after the 2014 crop was brought back, it remained in their possession until early 2016 after the Deed was executed. He told the Court a prospective buyer was found for around 170-180 tonnes at US\$4.00 per kilogram and that the buyer was only prepared to purchase one grade ZMFL10F out of the three grades.

DW2 told the Court he later learnt the tobacco had been sold by the Plaintiffs in September 2017. He maintained the Defendant had no dealings with Tombwe Processing Limited over the tobacco. He told the Court the invoice from Tombwe Processing Limited was addressed to the Defendant who never paid for it as the tobacco was rejected.

In re-examination, DW2 clarified the 2015 tobacco was not paid for as the Defendant never obtained any credit facilities due to the rejection by CTI of the tobacco in 2014. He clarified they were only made aware of the rejection of the

2014 crop in October 2015 meaning there was a gap between the start of purchasing of the Plaintiffs' tobacco on the auction floors to October when it was purchased by CTI. He reiterated the 2014 crop had an off taste and was rejected and that 70%-80% of it came from the Plaintiffs.

He clarified the 2015 crop was in the Defendant's warehouse and was destined for the Chinese market. Following the rejection and blacklisting by the Chinese market, the Defendants were unable to make further supplies to CTI. DW2 maintained that the contamination findings came in 2018 and maintained that the 2014 to 2015 crop was contaminated.

On the sale of the returned tobacco by the Plaintiffs, DW2 clarified that he came to learn of it in August 2017 when Scandinavian Tobacco Company came to Zambia to draw samples and inspect the said tobacco and Mr. Chance confirmed the sale to another buyer.

DW2 told the Court that after the Deed was executed and the tobacco returned to the Plaintiffs, the Defendant was acting as their agents to market the said tobacco. In respect to the invoice from Tombwe Processing Limited, one was addressed to the Defendants which was switched and re-invoiced to the 1<sup>st</sup> Plaintiff with a tax invoice to them appearing at page 3 of the Plaintiff's supplementary bundle of documents.

DW2 reiterated there was any proof of payment by the Plaintiffs to Tombwe Processing Limited as there was no receipt issued to that effect.

After the two witnesses, the Defendant closed its case. At the close of the trial the parties filed written submissions. In determining the issues I have taken due benefit



of the submissions by the respective Counsel. I shall make reference as I deem necessary in the course of this Judgment.

### **Analysis and determination**

I have considered the evidentiary hearing, pleadings and written submissions of the parties herein. In my view, the issues that emanate for determination are as follows:

1. Whether the original contract between the Plaintiffs and Defendant was superseded by the Deed of Arrangement.
2. Whether the defence of frustration is available to the Defendant.
3. Whether the Defendant was an agent of the Plaintiffs under the Deed of Arrangement.
4. Whether the Plaintiffs are entitled to the reliefs claimed.

From my assessment of the pleadings, evidentiary hearing, it is common cause that the Plaintiffs supplied tobacco to the Defendant in 2014 and 2015. The tobacco was exported to China Tobacco International by the Defendant and shipped back to Zambia. At the material time of supply, the Defendant did not pay the whole amount for the tobacco as agreed at the auction floor. Consequently, a Deed of Arrangement was executed by the parties on 26<sup>th</sup> February 2016. It was a term of the Deed that ownership of the tobacco vested in the Plaintiffs until the tobacco was sold.

Beyond this are contentious issues relating to the parties understanding of the terms and conditions of the Deed including whether the 2014 crop was contaminated resulting in the frustration of the original contract as alleged by the

Defendant. Before I deal with the substantive issues, I need to address peripheral issues as to whether or not the original contract had been annulled following the execution of the Deed by the parties herein.

### **Annulment of original contract**

In paragraph 2 of the defence, the Defendant averred that the initial purchase of the tobacco was reversed by mutual agreement and the Plaintiffs retained ownership of the tobacco. Conversely in cross examination, PW1 and PW2 testified that the parties agreed to execute a Deed to regulate and govern their contractual relationship for the purpose of protecting their interest and the value of the packed tobacco. Counsel for the Plaintiffs further submitted that the Defendant having failed to pay for the tobacco purchased from the Plaintiffs, the parties executed a Deed. Evidently the parties are at opposing ends as to their understanding of the Deed.

Counsel for the Defendant made heavy capital of clause 3.2 of the Deed which states as follows:

*“3.2 The Green Tobacco or its packed equivalent shall remain the property of ZRC until such time as it is sold to a buyer.”*

Clause 3.2 is what is termed as a retention clause where the Plaintiff as seller retains ownership of the packed/green tobacco until it is sold and payment is received from the buyer and only then does ownership pass to the buyer. These types of clauses are used to provide the unpaid seller with security in the event of the buyer's insolvency or receiving order.

In my view once the tobacco was sold off by the Plaintiffs the title passed directly to the buyer and not through the Defendant. The fact that there was a retention clause did not in any way annul the Deed as alleged by the Defendant and this will become apparent in the course of this Judgment.

I will go further and cite the relevant parts of the Deed as follows:

**BACKGROUND**

- 0.1 *WHEREAS ZRC has sold stocks of green tobacco to ATC through the Tobacco Association of Zambia in the quantity set out in the schedule to this Deed (the “Green Tobacco”)*
- 0.2 *WHEREAS ATC has to date not made any payment for the Green Tobacco since December, 2015.*
- 0.3 *WHEREAS ATC has agreed to cooperate with ZRC on the onward state of the related Packed Tobacco.*
- 0.4 *WHEREAS ZRC through their advocates WM Kabimba and Company have agreed to accept this arrangement upon the following terms and conditions.*

The Court’s duty is to interpret what the clauses mean in order to determine what the parties had agreed to. In my considered view, the intention of the Deed as set out in the recitals was to govern the re-sell and importantly payment of the subject tobacco. It set out the *modus operandi* of the transaction.

I agree with Counsel for the Plaintiffs' submissions that the Deed arose after the failure of the Defendant to pay for the tobacco sold at the auction floor. I opine that the Deed was birthed from the Defendant's failure to pay for the supplied tobacco. I find that the Deed is a stand-alone document with stipulated rights and obligations of the parties hereto and governed by the law of contract and not the earlier arrangements under the *Tobacco Act, Cap 237 of the laws of Zambia* as argued by Counsel for the Plaintiffs.

### **Agency**

Counsel for the Defendant further argued that the Deed created an agency relationship between the parties as stated in a letter addressed to the Plaintiffs' from the Defendant dated 12<sup>th</sup> October 2017 (page 44 Defendant's bundle of documents). It reads as follows:

*" We advise on behalf of our Client that the essence of the Deeds of Arrangement was inter alia for our Client to offer Agency Services on best endeavours efforts by finding market for the green tobacco or packed equivalent tobacco and once prospective buyers are found, consult your Clients and upon their consent proceed with the sale. There was no time frame for this exercise. Your Clients too were at liberty to find prospective buyers. Your clients retained the ownership of the tobacco (Clause 3.3)"*

Conversely, Counsel for the Plaintiffs argued the Defendant's position on the creation of an agency was untenable as that was not the intention of the parties.

The learned authors of *Halsbury's Laws of England, 4<sup>th</sup> Edition (re-issue) Volume 1(1)* at paragraph 1 define the terms agent in the following terms:

*“..... in law the word ‘agency’ is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called the agent has authority to act on behalf of another, called the principal and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the circumstances of the relationship between the alleged principal and agent.”*

The same authors describe the creation of an agency relationship at paragraph 19 as follows:

*“The relation of agency is created by the express or implied agreement of principal and agent, or ratification by the principal of the agent’s act done on his behalf. Express agency is created where the principal or some person authorised by him, expressly appoints the agent whether by deed by writing under hand or orally. Implied agency arises from the conduct of the situation of the parties.”*

The question whether or not the Defendant was an agent of the Plaintiffs depends on the facts herein. In the present case, I have to look at the contractual relationship as governed by the Deed. Even though clause 1.3 of the Deed states an agency commission, the correct inference to draw is that it was in reference to an agency commission contemplated in a situation where the Defendant engaged a third party to find a buyer for the tobacco hence agency commission would come

into play. A further reading of clause 1.4 states that every action taken by the Defendant required the consent and approval of the Plaintiffs.

Do these cited clauses bring the Defendant into the ambit of an agency relationship with the Plaintiffs? From the express provisions of the Deed, I think not. If the parties had indeed intended an agency relationship, it would have been made clear in the Deed and this is not apparent. Overall, I find no agency relationship between the parties and I shall proceed on that basis.

### **Breach of contract**

The Plaintiffs claim is for damages for breach of contract arising from the quantities of tobacco sold to the Defendant which was payable after the close of the auction sale period but remained unpaid leading to the execution of the Deed. In the statement of claim, paragraphs 10, 11 and 12 states that the Plaintiffs through their own efforts found a buyer and sold at a loss and also incurred costs for processing and packaging of the tobacco which had since escalated.

In his witness statement, PW1 alleged the breach emanated from the tobacco sold on the auction floor as the Plaintiffs ended up selling the tobacco at a loss and the Defendant admitted there were processing and packaging costs and this view was shared by both PW2 and PW3.

According to the Plaintiffs, the Defendant has refused to negotiate in respect of the Plaintiff's loss of earnings as envisaged under clause 1.7 of the Deed which stipulates that:

*“1.7 Enter into negotiations with ZRC/BMA/SHF for the balance of any payments due and owing to BMA after the sale of the packed stocks.”*

The Defendant vehemently denied it is in breach of contract on the basis that the contract was frustrated arising from the alleged contamination of the tobacco, hence the Defendant was discharged from their initial obligations. This was denied by the Plaintiffs.

I shall deal with the doctrine of frustration and whether it is available as a defence to the Defendant. Under the said doctrine, a contract may be discharged if after its formation events occur making its performance impossible or illegal. On the authority of *British Movietonews Limited v London and District Cinemas [1952] AC 166 at 185<sup>(1)</sup>* cited by Counsel for the Defendant, the House of Lords rejected the view that a mere unanticipated turn of events was a ground of frustration. Lord Simon observed that:

*“The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate – a wholly abnormal rise or fall in prices, a sudden appreciation of currency, an unexpected obstacle to the execution, or the like. Yet does not in itself affect the bargain which they have made.”*

In determining whether a contract has been frustrated, the relevance of particular factors needs to be assessed and in *The Sea Angel [2007] 2 Lloyds Rep 571<sup>(2)</sup>* it was observed that:

*“Among the factors which have to be considered are the terms of the contract itself, its matrix or context, the parties knowledge, expectations, assumptions*

*and contemplations, in particular as to risk, at the time of contract, at any rate so far as these can be ascribed mutually and objectively, and then the nature of the supervening event, and the parties reasonable and objectively ascertainable calculations as to the possibilities of future performance in the new circumstances.”*

It follows that a Court cannot allow a party to rely on the doctrine of frustration as an excuse for escaping from a bad bargain.

In cross examination, DW1 and DW2 maintained that the tobacco from the Plaintiffs was contaminated leading to CTI rejecting the said tobacco which was returned to Zambia. PW1, PW2 and PW3 all claimed ignorance on the contamination of the 2014 crop of tobacco sold to the Defendant. DW1 told the Court that the Chinese style tobacco from the Plaintiffs accounted for 70% of their export and the contamination was only discovered in 2015 whilst the tobacco was sold in 2014.

Counsel for the Defendant submitted the Plaintiffs were insincere when they stated they were unaware that the tobacco supplied to the Defendant was destined for the Chinese market as in the email from PW1 to DW1 appearing at page 3 and 4 of the Plaintiffs’ bundle of documents, reference was made to the Chinese style tobacco.

The Defendant argued performance of the contract was frustrated by the contamination of the tobacco. In the Defendant’s bundle of documents is an unsigned memo dated 22<sup>nd</sup> June 2015 from Ian Bolwell to CTI Beijing and copied to Adrian Osborne whose content is on the fact-finding mission to China to discuss the taste problem of the tobacco. The report makes inconclusive findings which I cannot rely on (page 3-7 Defendant’s bundle of documents).



In a letter dated 25<sup>th</sup> August 2015 from the Defendant addressed to Standard Chartered Bank, the Defendant strongly disagreed *inter alia* with the findings relating to the off-taste in the smoking aroma of the tobacco (page 14 Defendant's bundle of documents). In cross examination, DW1 clarified that at the material time that was the Defendant's position. The Defendant's Counsel further contended that the Court should take note of the findings in the report on the use of the curing adhesive (pages 1-15 of the Defendant's Supplementary Bundle of Documents). I have read the said report and it states as follows:

*"The off-taste detection is a national problem which will require a robust and effective strategy to ensure it is not repeated.*

*As a result of the dissemination of the information regarding the detection in 2016, Zambian growers were instructed to implement all recommended practices to prevent contamination of tobaccos."*

From the cited excerpts one of the issues identified was contamination of the Zambian tobacco. However, I find the report is stated in general terms without pinpointing the exact source of the contamination. I find there is no direct evidence to show that the Plaintiffs supplied contaminated tobacco to the Defendant. In my humble view, the Defendant's contention does not represent the state of the evidence on record and the allegation on contamination of the tobacco remains unsubstantiated.

I arrive at the ineluctable conclusion that performance of the contract was still possible. This is evident from the parties' execution of the Deed whose terms are enforceable and binding as the respective parties' obligations were still subsisting under the Deed. If the frustrating event had discharged the parties from their

respective obligations, it follows that the Defendant would have declined to execute the Deed. I have further examined the authorities cited by Counsel for the Defendant relating to the doctrine of frustration and for the foregoing reasons, it is apparent that the doctrine is not applicable to the facts at hand.

I have also considered the argument by Counsel for the Defendant that the Plaintiffs breached an implied warranty of goods being merchantable pursuant to section 14 (1) of the *Sales of Goods Act, 1893* as to the quality or fitness for any particular purpose. Arising from my earlier finding on insufficient evidence to prove that the tobacco supplied by the Plaintiffs was contaminated, this section of the *Sales of Goods Act, 1893* is not applicable to the facts herein. It follows that the case of *BJ Poultry Farms Limited v Nutri Feeds Zambia Limited SCZ Judgment No 3 of 2016*<sup>(3)</sup> is distinguishable herein as there is no evidence that the tobacco was not merchantable.

Going back to the issue of breach of contract, it is trite law that a failure to perform a contractual promise when performance has fallen due is prima facie a breach. A breach of contract gives rise to a claim for damages. The golden thread that runs through the law of damages is that a claimant should be compensated for the loss sustained. The aim of compensation for breach of contract which results in pecuniary loss is to seek to return the claimant as closely as possible to the position he or she would have been in had the breach not occurred.

According to *McGregor On Damages, 16<sup>th</sup> Edition, Sweet and Maxwell (London) 1997*, in discussing assessment of damages observed that:

*“contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the*

*other party is the market value of the benefit of which he has been deprived through the breach.”*

I am further guided by the Supreme Court when considering the basis of damages in the case of *Attorney-General v D G Mpundu [1984] ZR 6<sup>(4)</sup>* held at page 12 that:

*“The basis of awarding damages is to bring the wronged party as far as money can do to the position he would have been in had the wrongful act not been occasioned by the other party.”*

In the present case, the basis for damages for breach of contract is the unpaid tobacco which is the subject matter of the Deed. It is factual from the record and evidence that from February 2016 to May 2017 the Defendants failed to sell the tobacco and the Plaintiffs proceeded to sell it. In its defence the Defendant through DW2 averred it kept on searching for potential buyers but could not find any with serious interest.

After an analysis of the terms of the Deed, the clear intention was for the tobacco to be sold for the account of the Plaintiffs. In my view it did not matter whether the Plaintiffs or Defendant sold the stock. This is even acknowledged by the Defendant in paragraph 6 of the defence that either party was at liberty to find buyers. It is therefore untenable for Counsel for the Defendant to argue that the Defendant is absolved from any liability on the basis of the Plaintiffs having sold the tobacco without consulting the Defendant thereby discharging it from performance.

Counsel for the Plaintiffs relied on section 48 of the *Sales of Goods Act 1893* for breach of contract and the remedies of a seller. It reads as follows:

*“48 (1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.*

*(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract.”*

In interpreting section 48 of the *Sales of Goods Act 1893*, Counsel for the Plaintiff cited the learned author *Roy Goode ‘Commercial Law’ 3<sup>rd</sup> Edition* where it confers on an unpaid seller the right to resell where goods are of a perishable nature, and where the unpaid seller gives notice to the buyer of his intention to resell and the buyer does not within a reasonable time pay or tender the price. This principle underpins the Plaintiffs claim as to whether the Defendant breached the contract and whether the Plaintiffs are entitled to the price of the tobacco as contemplated in section 48 of the *Sales of Goods Act, 1893*.

From the evidence on record, I find that the Defendant breached the contract and I am fortified in my finding by the recitals which contextualize the background to the Deed as follows:

*“0.1 WHEREAS ZRC has sold stocks of green tobacco to ATC through the Tobacco Association of Zambia in the quantity set out in the schedule to this Deed (the green tobacco)*

*0.2 WHEREAS ATC has to date not made any payment for the Green tobacco since December 2015*

*0.3 WHEREAS ATC has agreed to cooperate with ZRC on the onward sale of the related packed tobacco.”*

However, I cannot rely on section 48 *Sales of Goods Act 1893* where a seller can claim for the price of the goods sold simply because no evidence has been adduced as to the value of the resold tobacco.

It is not in dispute that the tobacco was not paid for and this was confirmed by PW1, PW2 and PW3 who testified that they had not been paid for the tobacco supplied to the Defendant. It is my finding that the Plaintiffs have established the wrong done by the Defendant by its failure to pay for the subject tobacco.

However, the matter does not end there as the difficulty I have with the Plaintiffs claim for damages for breach of contract is that it has not led any evidence to show what loss has been suffered arising from the breach. With this shortcoming, I can only award nominal damages which by nature are awarded where a legal default is established without proof of the loss actually suffered.

In an old English case *The Mediana [1900]AC 113 at 116<sup>(5)</sup>* of persuasive value, Lord Halsbury L.C aptly described nominal damages as follows:

*“nominal damages is a technical phrase which means that you have negative anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you*

*no right to real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed.”*

Nominal damages were discussed by the Supreme Court in the case of *Barclays Bank Zambia Plc v Patricia Leah Chatta Chipeta Selected Judgment No 16 of 2017*<sup>(6)</sup> where the Court observed that where there has been an infraction of the Plaintiff's legal rights it entitles them to nominal damages. I am further guided by the Supreme Court in the case of *Ngulube v Malipenga SCZ Judgment No 3 of 2015*<sup>(7)</sup> where it referred to the decision in *Eastwalsh Homes Limited v Anatal Development Limited [1993] 12 OR 675 C.A*<sup>(8)</sup> that Courts should be reluctant to award damages for speculative claims and in my view this is one such instance.

Having rejected the defence of frustration and finding that the Defendant defaulted in payment, I find in favour of the Plaintiffs and award nominal damages to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff in the sum of US\$2000 each, and US\$1000 to the 3<sup>rd</sup> Defendant for breach of contract with interest at the short term deposit rate from date of writ of summons to date of Judgment and thereafter at the average commercial lending rate for dollar denominated loans until full payment. Plaintiffs with interest at the short term deposit rate from date of writ to date of Judgment and thereafter at the average commercial lending rate for dollar denominated loans until full payment.

**Payment of the sum of US\$579,620.30, US\$580,153.19 and US\$256,379.21**

The Plaintiffs claim payment of the sum of US\$579,620.30, US\$580,153.19 and US\$256,379.21 due and payable to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively under the Deed dated 26<sup>th</sup> February 2016 where it was a term of the Deed that the Defendant would sell the tobacco it purchased from the Plaintiffs and pay for it.

The contention between the parties is whether by evidence the Plaintiffs have clearly established that the claimed sums are due and owing from the Defendant. It is a recognized principle of law in Zambian jurisprudence that each party bears the burden of proving the facts relied on to support a claim or defence as espoused in the case of *Khalid Mohammed v Attorney-General* [1982] ZR 49 <sup>(9)</sup>.

In support of the claim, PW1 explained that monies were paid through the 1<sup>st</sup> Plaintiff who had an account that could be used for external transactions. In cross examination PW2 testified that one lot of tobacco was sold at US\$5.70 and the next lot was at US\$3.65 and that the values were negotiated by the Plaintiffs. However, PW2 did not produce any documentary evidence showing the values the tobacco was sold for nor any bank transfer documentation supporting the payments. Similarly, PW3 had no invoices to show the values the buyers paid for the subject tobacco.

Of relevance is clause 1.2 of the Deed where the Defendant was to supply copies of related sales invoices to the Plaintiffs in the event of a sale. It states as follows:

*“1.0 ATC covenants with ZRC that ATC shall –*

*1.2 Supply copies of related sales invoice(s) to ZRC*

In my considered view, this implies that the Plaintiffs had a corresponding duty to have related sales invoices for purposes of assisting the parties negotiate on any outstanding balances, if any.

In his witness statement DW1 at paragraph 13 averred that the Plaintiffs’ expectation for achieving similar prices for these grades needed to be lowered. According to DW1 this was in light of the high price for the Chinese market of US\$9.00 and if

marketed to other buyers this was not an attainable price. This evidence was not challenged by the Plaintiffs.

Counsel for the Defendant submitted that the Plaintiffs had not substantiated their claims as to how much the packed tobacco was sold for and what the net sales would be after taking into account the Tombwe Processing Limited processing fees. Counsel for the Plaintiffs submitted that the values of the tobacco were stated in the respective schedules to the Deed. Much as the schedules attached to the Deed show the values of the tobacco, the critical information missing is the value of the sold tobacco.

I agree with Counsel for the Defendant that the Plaintiffs have not discharged this burden of proving what the tobacco was sold for. It is incumbent upon litigants to adduce evidence that will assist the Court in arriving at a just decision. I need not belabor the matter any further as the Plaintiffs have themselves to blame.

For the foregoing reasons, it is my finding that there is no evidence to substantiate how the sum of US\$579,620.30, US\$580,153.19 and US\$256,379.21 arose. To order the payment of these sums of monies is in my view an affront to justice. In this respect the claim fails.

**Payment of the sum of US\$196,348.85, US\$100,620.00 and US\$92,915.29**

The Plaintiffs claim for the sum of US\$196,348.85, US\$100,620.00 and US\$92,915.29 being costs incurred and paid to Tombwe Processing Limited for the processing of the green tobacco by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs.



Again I revert to the Deed which forms the basis of the contractual relationship between the parties herein. Clause 1.3 of the Deed states the Defendant's covenant with the Plaintiffs as follows:

*“Guarantee payments to ZRC's nominated bank account upon receipt of any Nett sale proceeds received by ATC from the end buyer following a sale i.e. Nett sale is defined as being Proceeds received from end buyer less costs such as Tombwe Processing Ltd charges, in addition to freight costs to point of sale and agent commissions.*

The Defendant was obligated to supply copies of related sale, guarantee payment to the Plaintiff's nominated bank account upon receipt of any net sale proceeds received by the Defendant from the end buyer following a sale. It goes further to state that the net sale is proceeds received from an end buyer less costs such as Tombwe Processing Limited charges in addition to freight costs to point of sale and agent.

In paragraph 11 of the Plaintiffs' statement of claim it averred that the Plaintiffs incurred costs for processing and packaging of the tobacco which costs had escalated on the market since December 2015. Counsel for the Defendant argued that paragraph 9 of the defence was in no way an admission that the Defendant was liable to pay the Plaintiffs for incurred costs for processing and packaging of the tobacco which costs escalated on the market since December 2015.

To shed more light as to who was responsible for the costs at Tombwe Processing Limited, clause 1.4 of the Deed is instructive and states that the Defendant was to:

*“Be responsible for the care and supervision of the related packed tobacco stocks stored at Tombwe Processing Limited warehouse and or the Defendant’s warehouse.”*

In my view, this envisaged care and supervision of the packed tobacco stock connotes a cost element. In respect to Counsel for the Defendant’s argument that any agreed sale was for the account of the Plaintiffs, this did not mean that the Plaintiffs were responsible for the charges as that would fly in the face of clauses 1.3 and 1.4 of the Deed. In any case it was immaterial which party made the sale as the processing fees already accrued from the time the tobacco was taken to Tombwe Processing Limited warehouses up to the time the tobacco was sold. Therefore, Counsel for the Defendant argument that the Defendant is not liable to pay the charges incurred at Tombwe Processing Limited on account of the Plaintiffs finding a buyer on its own accord, is unrealistic and untenable.

Counsel for the Defendant further argued that the financial results incurred from any agreed sale was for the account of the Plaintiff and that whether there was a profit or loss, it was for the account of the Plaintiff. This position was admitted by the Plaintiffs. I quickly dispose of this argument as clause 2.1 of the Deed is clear that the financial results incurred from any agreed sale are for the account of the Plaintiffs and that is the whole essence of the Deed.

The parties have exhibited two invoices. The first one is addressed to the Defendant dated 12<sup>th</sup> January 2016 for the period 29<sup>th</sup> December 2015 to 11<sup>th</sup> January 2016 Invoice No TP2015/ATC/08 with a sum of US\$336,107.84 (page 1 Plaintiff’s supplementary bundle of documents). The second one is a tax invoice No 06372 dated 8<sup>th</sup> January 2017 addressed to the 1<sup>st</sup> Plaintiffs of US\$389,885.09 with a

narrative of processing fees (page 2 Plaintiffs' supplementary bundle of documents). This gives an aggregate of the sum claimed by the Plaintiffs herein.

It is my finding that the Defendant is responsible for the storage and processing fees and I do not accept the Defendant's assertion that the issuance of an invoice to the Plaintiffs imputed a responsibility for payment.

On the evidence on record, I find the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs have proved their claim against the Defendant for the sum of US\$196,348.85, US\$100,620.00 and US\$92,915.29 respectively being costs incurred and paid to Tombwe Processing Limited for the processing of the green tobacco.

### **Disposal**

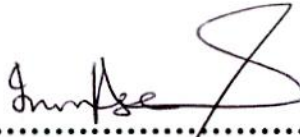
On a balance of probabilities, the Plaintiffs claims partially succeed as follows –

- (1) Nominal damages are awarded to the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiff in the sum of US\$2000 each , and US\$1000 to the 3<sup>rd</sup> Defendant for breach of contract.
- (2) Payment of the sum of US\$579,620.30, US\$580,153.19 and US\$256,379.21 due and payable to the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively under the Deed of Arrangement dated 26<sup>th</sup> February 2016 is without merit and fails.
- (3) Payment of the sum of US\$196,348.85, US\$100,620.00 and US\$92,915.29 being costs incurred and paid to Tombwe Processing Limited for the processing of the green tobacco by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs respectively succeeds.

- (4) Interest under paragraphs (1) and (3) is awarded at the short-term deposit rate as determined by Bank of Zambia from date of the writ to date of Judgment and thereafter at the average commercial lending rate for dollar denominated loans until full payment.
- (5) Each party shall bear its respective costs.

Leave to appeal granted.

Delivered at Lusaka this 10<sup>th</sup> day of July 2020.



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**IRENE ZEKO MBEWE**  
**HIGH COURT JUDGE**