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

2020/HPC/0111

BETWEEN:

AXIZ (PTY) LTD **PLAINTIFF**

AND

CLOUDTECH ZAMBIA LIMITED **1st DEFENDANT**
RAVIKIRAN VIJAY SALVI **2nd DEFENDANT**

Before Honourable Mr. Justice E. L. Musona on the 29th day of July 2020

For the Plaintiff: *Ms. M. Kapotwe, Theotis Mataka & Sampa Legal Practitioners*
For the Defendant: *Mr. L. Mtonga, Messrs. Philsong and Partners*

R U L I N G

Cases Referred To:

1. *Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General (1994) S.J. 22 (S.C.)*
2. *Miyanda v The High Court (1984) Z.R. 62*
3. *Lysos Impact and Export Ltd v Brands Africa Corporation Ltd and Another(2013/HPC/476) ZMHC*
4. *Steak Ranch Limited v Steak Ranches International BV (2011/HP/0183) [2012] ZMHC 25*
5. *Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi SCZ Appeal No. 222/2013*
6. *Shirlaw v Southern Foundries Ltd [1939] 2 KB 206*
7. *BP Refinery (Western Port) PTY Ltd v Shire of Hastings [1978] ALJR 20*
8. *Guaranty Trust Co. of New York v Hannay & Co. (1914-16) ALL E.R. Rep. 224*
9. *Garthwaite v Garthwaite (1964) 2 ALL E.R. 233*
10. *Fehmarh (1958) 1 WLR 159*

Legislation Referred

1. *The Constitution of Zambia (Amendment) Act No. 2 of 2016*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*

Other Works Referred to:

1. *Black's Law Dictionary 8th Edition*
2. *Halsbury's Laws of England Volume 12, 4th Edition*

The matter herein originates from a dispute regarding an agreement between the Plaintiff and the 1st Defendant in which the Plaintiff appointed the 1st Defendant as reseller of its computer equipment and products. In addition, the agreement incorporated a deed of surety that bound the 2nd Defendant as surety and co-principal debtor together with the 1st Defendant as regards the latter's obligations under the agreement. However, the 1st Defendant failed to discharge its obligation to pay the price of the goods supplied to it.

Aggrieved by the Defendants' actions, the Plaintiff, on 21st February, 2020, commenced an action by way of Writ of Summons and Statement of Claim endorsed with the following claims:

(i) *"Payment of the sum of USD 160, 718.78 being sums due and owing to the Plaintiff for the supply of various computer equipment under the reseller application agreement;*
(ii) *Interest on the aforesaid sum at the rate of 10% per annum tempore morae to date of the writ;*

(iii) Interest at the London Inter Bank Offered Rate (LIBOR) from date of the writ to date of payment;
(iv) Costs of and occasioned by this action;
(v) Any other reliefs that the Court deem fit."

On 10th March, 2020 the Defendants filed Summons and the supporting Affidavit for the matter to be dismissed for want of jurisdiction pursuant to Order 11 Rule 1(4) of the High Court Rules. The affidavit was sworn by **Ravikiran Vijay Salvi** who deposed that it was agreed by the parties that the Reseller agreement (exhibit **'RVS1'**) which is subject of the dispute, would be governed by South African Law thereby affecting the Court's jurisdiction to preside over the matter.

On the same day, Counsel for the Defendants filed Skeleton arguments. To augment his case, he relied on the case of **Zambia National Holdings Limited and United National Independence Party (UNIP) v. The Attorney-General (1994) S.J. 22 (S.C.)** in which the Supreme Court stated that:

> **"The term "jurisdiction" should first be understood. In the one sense, it is the authority which a court has to decide matters that are litigated before it; in another sense, it is the authority which a court has to take cognizance of matters presented in a formal way for its decision. The limits of authority of each of the courts in Zambia are stated in the appropriate legislation."**

Counsel also cited Order 11 rule 1(4) of the High Court rules which allows a party served with a writ of summons to enter conditional appearance and apply by way of summons to the Court to set aside the writ for lack of jurisdiction on the part of the Court. Thus, Counsel argued that the Court lacked jurisdiction to hear the suit on the ground that the agreement in dispute is governed by South African Law.

In response, Counsel for the Plaintiff filed an Affidavit in Opposition in which she deposed that according to paragraph 1.1.2.2 of the Reseller Agreement, South African Law was only to apply from time to time as regards performance, delivery, receipt or use of service. Consequently, this did not oust the inherent jurisdiction of the Zambian Court.

She further averred that the Zambian Courts were competent to try the matter as the 1st Defendant is a company incorporated under the Companies Act, Chapter 388 of the Laws of Zambia and has its registered address in Lusaka, Zambia. Further, she deposed that the 2nd Defendant is a Zambian resident.

In addition to the affidavit in opposition, Counsel for the Plaintiff filed Skeleton arguments on 8th July, 2020 in which she relied on the case of **Miyanda v The High Court (1984) Z.R. 62** to define the term 'Jurisdiction' as defined above. She argued that the Reseller agreement was specific as regards the aspects of the agreement that were to be governed by South African Law namely; performance, delivery, receipt or use of services. Thus, it did not apply to non-payment upon delivery of goods.

Counsel contended that according to the case of **Lysos Impact and Export Ltd v Brands Africa Corporation Ltd and Another(2013/HPC/476) ZMHC** for a Court to have the requisite jurisdiction, the matter in question must be within the scope of the matters that can be determined by such Court in accordance with the appropriate legislation. Thus, she argued that the reseller agreement did not oust the unlimited and original jurisdiction conferred on the Zambian Courts **Article 134(a) of the Constitution of Zambia (Amendment) Act No. 2 of 2016** and **Sections 4 and 5 of the High Court Act**.

Further, Counsel urged the Court to consider the principles of *forum conveniens* and *forum non conveniens* as defined at page 680 and 681 of **Black's Law Dictionary 8th Edition** and considered in the case of **Steak Ranch Limited v Steak Ranches International BV (2011/HP/0183) [2012] ZMHC 25** wherein the Court stated as follows:

> **"My findings in the preceding paragraph are fortified by the fact that domestic courts as I have stated earlier are presumed to have jurisdiction unless the contrary is proved. I would venture to state that, therein lies the rationale behind the provisions of Article 94 (now under Article 134(a) of the Constitution which vests original jurisdiction to this Court in all matters..."**
>
> **"*forum conveniens*; the court in which an action is most appropriately brought, considering the best interests and convenience of the parties and witnesses...**
>
> ***forum non conveniens*; the doctrine that an appropriate forum-even though competent under the law- may divest itself of jurisdiction if for the litigants and witnesses, it appears that the action should proceed in another forum in which the action might also have been properly brought in the first place- also termed forum conveniens.**
>
> **It is clear from the above definitions that as the terms suggest, a matter should be determined in the Court where it is most convenient for the parties to it. Further the presumption is that the Court in which the action is commenced has jurisdiction unless the party challenging jurisdiction can prove otherwise. In doing so he must demonstrate that the forum in which an action has been commenced is not convenient and that an alternative convenient forum exists."**

Counsel concluded by reiterating the contents of the Plaintiff's affidavit in which she averred that this Court was the appropriate Court to try the case because the 1st Defendant was a Zambian company having its registered office in Zambia and that the 2nd Defendant is resident in Zambia as well.

Having considered the Defendants' application and all the documents filed into Court, I find that the sole issue arising for determination is whether the case before me should be determined in Zambia on the basis of convenience despite the fact that the agreement in issue is governed by South African Law.

To begin with, according to the principles of the law of contract, a person who signs a contract is bound by it unless the contrary is proved. I am therefore guided by the case of **Kalusha Bwalya v Chadore Properties and Ian Chamunora Nyalugwe Haruperi SCZ Appeal No. 222/2013** wherein the Court held that:

> **"The general rule is that a person is bound by the terms of any instrument which he signed even though he did not read it or understand its contents."**

My understanding of the case above is that as a general rule, a party is bound by an agreement which he freely and voluntarily executes even if he did not read it or understand its contents.

Therefore, in applying the law to the present case, I find that the reseller agreement between the parties was clear and unambiguous. The parties agreed that the applicable law to govern the agreement is South African Law.

What is in dispute is whether the Court can extrapolate that the clause in question includes 'non-payment upon delivery' by considering the *ejusdem generis* rule. According to **Halsbury's Laws of England Volume 12, 4th Edition at paras 1460 and 1461**:

> **"The function of the court is to ascertain what the parties meant by the words which they have used; to declare the meaning of what is written in the instrument not of what was intended to have been written; and to give effect to the intention as expressed. The object is to discover the real intention of the parties and the intention must be gathered from the written instrument read in light of such extrinsic evidence as is admissible for the purpose of construction. It is not permissible to guess at the intention of the parties and substitute the presumed for the expressed intention."**

The test which is often used by the Courts in implying a term into a contract is the 'officious bystander' test, whose origin lies from the statement of Lord Mackinnon L.J in **Shirlaw v Southern Foundries Ltd [1939] 2 KB 206** at p.207:

> **"Prima facie that which in any contract is left to be implied and need not be express is something so obvious that it goes without saying; so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress him with a common, 'Oh, of course'."**

In **BP Refinery (Western Port) PTY Ltd v Shire of Hastings [1978] ALJR 20**, Lord Simon laid down the requirements for terms implied in fact as follows (at p.26):

> **"For a term to be implied, the following conditions (which may overlap) must be satisfied:**
>
> **(i) It must be reasonable and equitable;**
>
> **(ii) It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it;**
>
> **(iii) It must be so obvious that 'it goes without saying';**
>
> **(iv) It must be capable of close expression;**
>
> **(v) It must not contradict any express term of the contract."**

This test, in my view, applies to the current case. It is unreasonable and inequitable to conclude that the agreement would provide for delivery but not consider non-payment of goods upon delivery even though this goes to the root of performance of the agreement.

This is based on an interpretation of the clause in line with the *ejusdem generis* rule, which is to the effect, that general words that follow specific words in a list must be construed as referring only to the types of things identified by the specific words. In accordance with the rules of construction of statutes which can be adopted for purposes of interpreting the clause in question, anything not specifically referred to in the section but which is shown to fall

within the spirit and intendment of the said section would have to be governed by the *ejusdem generis* rule.

Although the issue in question is non-payment for goods that were delivered, the clause in question provides that South African Law would be applicable *inter alia* to performance and delivery which go to the root of the agreement. Thus, the argument that the Reseller agreement was specific as regards the aspects of the agreement that were to be governed by South African Law namely; performance, delivery, receipt or use of services and did not apply to non-payment upon delivery of goods falls off.

Regarding the definition of jurisdiction, I agree with Counsel that the High Court is the creation of statute, and its jurisdiction is statutory. I am fortified by the case of **Zambia National Holdings Limited and National Independece Party (UNIP) v The Attorney General and Others (1994) SCZ 22** wherein the Court in considering the opinion Pickford, L.J. in **Guaranty Trust Co. of New York v Hannay & Co. (1914-16) ALL E.R. Rep. 224 at page 35** and Diplock, L.J., in **Garthwaite v Garthwaite (1964) 2 ALL E.R. 233 at pages 241 to 242** stated as follows;

"The expression "jurisdiction" of a court may be used in two different senses, a strict sense and a wider sense. In its narrow and strict sense, the "jurisdiction" of a validly constituted court connotes the limits which are imposed on its power to hear and determine issues between persons seeking to avail themselves of its process by reference (i) to the subject-matter of the issue, or (ii) to the persons between whom the issue is joined, or (iii) to the kind of relief sought, or any combination of these factors. In its wider sense it embraces also the settled practice of the court as to the way in which it will exercise its power to hear and determine issue which fall within its "jurisdiction" (in the strict sense), or as to the circumstances in which it will grant a particular kind or relief which it has "jurisdiction" (in the strict sense) to grant, including its settled practice to refuse to exercise such powers or to grant such relief in particular circumstances."

I associate and respectfully adopt the foregoing as I have no reason to disagree. On the issue of convenience, Counsel for the Plaintiff seems to concede that the Court lacks jurisdiction when she urges the Court to consider the matter on a 'convenience' basis when she cited the case of **Fehmarh (1958) 1 WLR 159** as well as raised the principle of *forum non conveniens.*

The case *in casu* differs from the aforementioned case in that it does not involve perishable goods. Secondly, the principle of *forum non conveniens* cannot be applied in this case as it entails that a Court that has jurisdiction strips itself of this jurisdiction for the convenience of the parties or witnesses so that the matter can be entertained by another court or forum that is dressed with the same

jurisdiction save for the fact that the matter was not brought before it first. The principle cannot be said to apply to the converse; that a Court that lacks jurisdiction can assume jurisdiction for the convenience of the litigants and witnesses.

The fact that the agreement expressly stated that it would be governed by South African law, precludes this Court and Zambian Courts from trying the suit. Accordingly, I grant the Defendants' application and dismiss the Plaintiff's action for lack of jurisdiction. Costs are for the Defendants to be taxed in default of agreement.

Dated this day of 29th July, 2020

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Hon. Mr. Justice E. L. Musona
HIGH COURT JUDGE

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