IN THE HIGH COURT FOR ZAMBIA **2016/HKC/0012**

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Commercial Division)

BETWEEN:

NEW BARON & LEVEQUE EAST (NBLE) **1st PLAINTIFF**

BOMAR MINING COMPANY ZAMBIA LIMITED **2nd PLAINTIFF**

AND

DORAMART INVESTMENTS LIMITED **DEFENDANT**

RESPONDENT

Before Lady Justice B.G. Shonga this 11th day of May, 2020

For the Plaintiffs, G. M Kalandanya, Messrs. GM Legal Practitioners

For the Defendants, Mr. N. Simwanza, Messrs Noel Simwanza Legal Practitioners

---

JUDGMENT

Cases Referred to:

1. ***Varley v Whipp [1900] 1 QB 513.***

2. ***Jaffco Ltd V Northern Motors Limited (1971) Z.R. 75 (C.A.).***

Legislation and Other Material Referred To:

1. ***Sale of Goods Act, 1893, section 28***
2. ***Sale of Goods Act, 1893, section 14 (1).***
3. ***New Choice English Dictionary, Geddes & Grosett, 2016, Scotland.***

1.0 THE CLAIM

The 1st plaintiff is a registered foreign company having its registered office in Belgium. Sometime in 2015 it required a drill rig for use in Zambia. The 2nd plaintiff is a company registered in Zambia, having its registered office in Kitwe. It was appointed by the 1st plaintiff as its agent for the purpose of inspecting and purchasing the drill rig. The defendant is a company incorporated in Zambia and has its registered office in Kitwe.

By writ of summons dated 9th September, 2015, the plaintiffs instituted proceedings against the defendant, claiming that the defendant was liable to pay the plaintiff all additional costs of parts and services secured by the plaintiffs to make the drill rig that the defendant had delivered fully rebuilt and operational.

Alternatively, the plaintiffs claimed for payment of the full purchase price of ZMW 1,700, 000 advanced to the defendant for the rig plus costs incurred by the plaintiffs in attempting to fix the drill rig.

Additionally, the plaintiff claimed payment of USD 155, 883.33 for loss of revenue; damages for breach of contract; damages for inconvenience caused to the plaintiff; damages for loss of reputation with the 1st plaintiff's principal client Mopani Copper Mines Plc; and any other relief, interest and costs.

The defendant refuted the claim and alleged that the plaintiffs failed to pay the full purchase price of the refurbished drill rig. Resultantly, the defendant raised a counterclaim for payment of K33, 000, being currency exchange losses arising from the alleged late payment of the purchase price.

2.0 THE INTERFACE BETWEEN LAW AND FACTS

It is not in dispute that on or about 28th July, 2015, the defendant, as seller, agreed to sell a drill rig to the plaintiffs, as buyers, for the total fixed price of K1,700, 000. It is also

common cause that prior to this, a sum of K60, 000 was paid by the plaintiffs to the defendant not only to reserve the rig, but to serve as a deposit on the agreed purchase price. Thus, the parties were of one mind as regards the balance being K1,640,000 as at 29th July, 2015.

I take pause to observe that the agreement between the parties involved the transfer of the property in specific goods by a seller to a buyer for a money consideration. As such, I opine that the transaction fell squarely within the ambit of the administration of the ***Sale of Goods Act, 1893***. I will therefore apply the said Act in determining this mater.

Returning to the case at hand each party called one witness. Eugene Bartas, a Site Manager for the 2nd plaintiff gave evidence on behalf of the plaintiffs as Pw1. Martin Imbula, the Managing director for the defendant gave evidence as Dw1, on behalf of the defendant.

The evidence of both Pw1 and Dw1 revealed that the nature and description of the goods sold was a rig which the defendant was in the process of rebuilding at his workshop when the plaintiffs first had sight of it. According to Dw1, the defendant agreed to modify the rig that he was rebuilding from long-haul to development. According to Pw1, the plaintiffs sought a refurbished rig. The Purchase Order, which was tendered into evidence by the plaintiffs, Purchase Order No.15/08/982 dated 29th July, 2015 contains a heading *"Description,"* which reads as follows: *"As described in tax invoice 1353, dated 28th July, 2015."* It also contains a heading *"Item,"* which reads as follows: *"Refurbished single boom drill rig."* The tax invoice was also admitted into evidence. The description captured therein reads as follows:

> *"Sale of Boomer equipped with cop 1838 me coverage area up to 31m2 Hydraulic boom BUT 29 heavy duty boom with double tripod suspension for accurate hydraulic parallel holding in all directions"*

During cross-examination, Dw1 accepted that the agreement was governed by the Purchase Order. That being the case, I find that the subject matter of the agreement was a fully refurbished

boomer equipped with cop 1838 me coverage area up to 31m2 Hydraulic boom BUT 29 heavy duty boom with double tripod suspension for accurate hydraulic parallel holding in all directions.

Neither party adduced any documentary evidence that could assist the Court to determine how the parties defined the term refurbish. I therefore relied on the definition ascribed in the ***New Choice English Dictionary, Geddes & Grosett, 2016, Scotland,*** being:

> *"to renovate or re-equip."*

Given that the rig was being rebuilt and renovated, I find that the subject matter of the agreement to sell was not a brand-new rig, but a renovated one.

The next item for consideration relates to the delivery terms. Pw1 testified that the parties originally agreed to a delivery date of 30th July, 2015. He stressed that the plaintiffs informed the defendant that the rig was required for contractual obligations to Mopani Mine at the end of July, 2015. He explained that the

defendant requested for time to complete rebuilding of the drill, and an extension was granted to 6th August, 2015.

I observed that Pw1's evidence was inconsistent with the letter dated 24th August, 2015 from the plaintiffs to the defendant, exhibited in their bundle of documents. In that letter, the plaintiffs recapped that the agreement between the parties was that delivery would take place upon payment of the purchase price. Additionally, from the letter of intent issued by the 2nd plaintiff to the defendant, also exhibited in the plaintiffs bundles, I did descry that the plaintiffs not requested the defendant to reserve the rig until 21st August, 2015 but undertook to pay the purchase price prior to 21st August, 2015. The two letters strongly suggest that the delivery date was not fixed for July, but that delivery was connected to payment of the full purchase price prior to 21st August, 2015.

On the other hand, Dw1's his evidence was that the 2nd plaintiff was informed that the Rig would only be available for delivery 15 to 20 days after receipt of the full purchase price. When he

was cross-examined, Dw1 accepted that full payment was received about 11 days after 30th July, 2015, around 10th August, 2015.

If, on the one hand, I was to accept the defendant's testimony that delivery was to take place between 15 to 20 days of payment, delivery would have been due within 15 to 20 days from 10th August, 2015, particularly between 25th to 30th August, 2015. If, on the other hand, I was to accept that delivery was due upon payment of the purchase price, delivery would have been due on 10th August, 2015. The parties are clearly at odds with respect to the agreed delivery date. The documentary evidence before Court on this point is obscure as neither the letter of intent nor the Purchase Order governing the agreement addresses the issue of delivery. My conclusion, therefore, is that the parties did not agree the date of delivery.

In the terms of ***section 28 of the Sale of Goods Act, 1893***, unless otherwise agreed, payment and delivery of the goods are concurrent conditions. In other words, in the absence of any

agreement to the contrary, the seller must give possession of the goods to the buyer upon receipt of the price. Since full payment was made on or about 10th August, 2015, delivery was due on the same date. During cross-examination, Dw1 admitted that delivery was made sometime at the end of August, after 25th August, 2015. Since delivery was made at the end of August, 2015, well after 10th August, 2015, I find that the defendant breached its obligation to deliver upon receipt of funds.

Regarding the conditions and warranties that applied to the contract, the plaintiffs submitted that the sale was one by description and that there was, therefore, an implied condition that the goods required to correspond with the description. I do not accept that argument because according to Channell J in the case of ***Varley v Whipp [1900] 1 QB 513***[1]***:***

> *'The term 'sale of goods by description' must apply to all cases where the purchaser has not seen the goods, but is relying on the description alone.*

Consequently, it is my understanding that a sale is by description where the purchaser is buying on a mere description, having never seen the goods. That was not the case in the matter before me. The plaintiffs sighted the goods and inspected them before issuing the purchase order.

However, I am alive to ***section 14 (1) of the Sale of Goods Act, 1893*** which provides that where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply, whether as manufacturer or not, there is an implied condition that the goods shall be reasonably fit for such purpose.

In this case, the testimonies of both Pw1 and Dw1 was that representatives of the plaintiffs visited the defendant's workshop and sighted a rig which the defendant was rebuilding and in which they expressed an interest. Dw1 further testified

that he was requested to modify or refurbish the rig from long-haul to developmental for use by the plaintiffs at Mopani Mines.

When he was cross-examined, Dw1 confirmed that he informed the plaintiffs that the defendant was able to refurbish the rig as requested. During re-examination, Dw1 illuminated that the defendant was in the business of working on rigs and that the rig that was sold to the plaintiffs was not the first rig that the defendant had worked on. In the light of Dw1's testimony, I accept that the rig sold was of a nature which the defendant supplied in the course of its business.

I also acknowledge that the defendant was made aware that the plaintiffs required the refurbished rig to undertake development works and that they relied on the defendant's skill in refurbishing rigs. Further, the letter dated 24th August 2015, admitted into evidence through Pw1, reveals that prior to taking delivery, the plaintiffs inspected the drill rig at the defendant's premises and found that it was not in full working order. The letter identified a defect with the pump and requested the

plaintiff to replace it prior to delivery. The fact that the plaintiffs anticipated that the defendant could successfully repair the defects before delivery, coupled with Dw1's confirmation that the defendant was in the business of rig modification, to me, suggests that the plaintiffs relied on the defendant's skill and judgment to enter and proceed with the transaction. That being the case, I am satisfied that there is an implied term, pursuant to ***section 14 (1) of the 1893 Sale of Goods Act***, that the rig was to be reasonably fit for purpose. This births the question whether the evidence before Court demonstrated that the rig was fit for purpose within the meaning of **section 14 (1) of the Sale of Goods Act, 1893.**

The evidence which Pw1 gave was that the day after the plaintiffs took delivery, they noticed that the rig was neither fully refurbished nor operational because, amongst other things, it had a multitude of oil leaks, the four wheel drive on the drill rig was not operational, the tramming motor was damaged, and it had a defective drifter.

During cross-examination Pw1 maintained that the plaintiffs were not able to undertake any underground digging in the first month and in the second month the rig drilled two (2) meters.

According to Pw1, no tests were carried out to certify operability at the time the rig was collected from the defendant's workshop. This was because the defendant was unable to facilitate testing due to a shortage of electrical cable at the workshop.

Dw1, on the other hand, testified that the plaintiffs negotiated to purchase the drill rig after the 2nd plaintiff's technician, Gary, certified the tramming and drilling function as fully operational. Further, that that the rig was inspected, tested, and approved according to the test reports from Pecks hydraulics.

When asked whether the full machine was tested, Dw1 acceded that it was not. He clarified that it was only the hydrostatic pump and tramming department of the machine that were tested through mobile testing methods. When it was put to him that the Pex Hydraulic Reports exhibited in the defendant's

bundle of documents revealed that the tests were conducted on 15th September, 2019, after the plaintiffs took delivery, Dw1 maintained that there was an error on the part of Pex Hydraulics Zambia Limited.

I have considered the testimony of both Pw1 and Dw1. Firstly, Dw1 admitted that the machine was not fully tested. Secondly, since Pex Hydraulics were not called to verify or refute that they erred, I reject the testimony that the dates specified in the Test Reports were inaccurate. I accept the records as evidence that mobile tests were carried out in September, 2015, at least two weeks after the plaintiffs had taken delivery. I therefore find that the rig was not tested or certified as operational prior to delivery.

As to fitness, the testimony that the machine was unable to drill in the first month or that the main hydraulic pumps were defective was met with Dw1's testimony that a refurbished rig could not be expected to operate at the same levels as a new rig. It is not disputed that a brand-new rig and a refurbished rig may have different outputs. However, a zero output in the first

month demonstrates a failed output. Consequently, I find that the rig was not fit for the purpose of drilling at the time of delivery.

On the question of warranties, when he was cross-examined, Dw1 acknowledged that he gave an express warranty that the drill rig would be fully refurbished and in good working order in the purchase order. My examination of the purchase order carried me to paragraph 4 which provides:

> *"The Vendor warrants that the drill rig is fully refurbished and in good working order. The Vendor shall guarantee that, for a period of 3 (three) months from the date of delivery to the Buyer, the vendor shall (unless caused by operational negligence): -*
>
> a. *Repair the drill rig in the event of a mechanical failure;*
> b. *Replace any parts of the drill rig which may require to be replaced; and*
> c. *Provide any other services to the Buyer or its representatives in relation to the drill rig which may be required, including (but not limited) to technical assistance and repairs, as well as instruction to the individuals who will be utilizing the drill rig."*

I have already determined that the rig was not fit for purpose because it failed to operate in the first month following delivery. It follows therefore that the defendant breached his warranty to

supply a fully refurbished operational rig that was in good working order.

In conclusion, I opine that the plaintiffs have demonstrated that the defendant breached the contract it entered with the plaintiffs by failing to deliver the rig on the delivery date. In addition, the defendant breached its express warranty and the implied condition to supply a fully refurbished rig that was in good working order and fit for purpose. As observed by the Court of Appeal in ***Jaffco Ltd V Northern Motors Limited (1971) Z.R. 75 (C.A.)***[2] warranty defects which a defendant is obligated to rectify are within the sphere of claims for damages for breach of warranty. In the light of the circumstances of this case, I hold that the plaintiffs are entitled to damages for breach of contract and breach of warranty, to be assessed by the Registrar.

On the claim for an order that the defendant pay for all additional costs of parts and services incurred to make the rig operational, I observed that the evidence of Pw1 was that the

defendant purchased the main hydraulic pump and an alternator from Bosh Hydraulics to fit on the rig that was purchased from the defendant. During re-examination, Pw1 clarified that the plaintiffs were having problems with the main hydraulic pumps which were not capable of working for longer than two weeks and which were losing pressure. He explained that the hydraulic pumps and electrical motor was responsible for supplying the pressure to the hydraulic system, which in turn is used to drill the rock.

The testimony of Pw1, to me, demonstrated that the plaintiffs expended money to secure replacement parts from Bosch Hydraulics to operationalize the rig. I therefore hold that the defendant is liable under paragraph 4 (b) of the Purchase Order to refund the plaintiffs for costs incurred to replace the hydraulic pumps and the alternator which required to be replaced on the defective rig.

With respect to the claim for damages for loss of reputation and loss of revenue, the plaintiffs did not lead any evidence to

substantiate those claims. Accordingly, those claims fail and are dismissed.

3.0 THE DEFENDANT'S COUNTER-CLAIM

In its counterclaim, the defendant claims that the plaintiffs are indebted to the defendant in the sum of K33, 000.00 following failure to transfer 189, 274 on the agreed date.

In his testimony, Pw1 referred to the plaintiff's bundle of documents to demonstrate that the parties agreed a fixed exchange rate on 7th August, 2015. I have examined the correspondence. It shows that on 7th August Dw1 received correspondence in which a representative of the plaintiffs scribed as follows:

> *"The price of the machine is ZMW 1,700, 00. A holding deposit of ZMW 60, 000 was paid. The balance due is ZMW 1, 640, 000. Taking your exchange rate of 1: K8.6647 we arrive at an amount of Euro. 189,273.72. Please acknowledge receipt of this"*

By return email of even date, Dw1 responded *"Thank you"*.

My analysis of the correspondence is that Dw1 not only acknowledged the correspondence but its contents as well. If

that be the case, the exchange rate of the balance payable was fixed by the parties on 7th August, 2015 at 1: K8.6647. My analysis is supported by Dw1's evidence, who during cross-examined, Dw1 accepted that full payment was received around 10th August, 2015.

In view of the foregoing, I find that the defendant's counter claim lacks merit and I dismiss.

Costs of this action are awarded in the plaintiffs favour, to be taxed in default of Agreement.

Dated this 11th Day of May, 2020

B.G. SHONGA

HIGH COURT