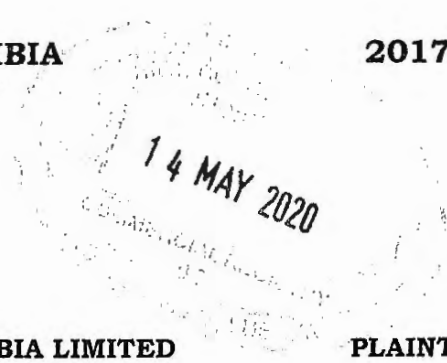


IN THE HIGH COURT FOR ZAMBIA  
AT THE PRINCIPAL REGISTRY  
HOLDEN AT LUSAKA  
(Commercial Jurisdiction)

2017/HPC/0017



BETWEEN:

VARUN FOOD AND BEVERAGES ZAMBIA LIMITED

PLAINTIFF

AND

SCONEER INVESTMENTS LIMITED

DEFENDANT

*Before Lady Justice B.G. Shonga this 14<sup>th</sup> day of May, 2020*

*For the Plaintiff, Mr. S. Kaonga, Mesdames Theotis, Mataka & Sampa Legal Practitioners*

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## JUDGMENT

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Cases Referred to:

1. *Wimpey's case* ([1953] 1 All ER 583
2. *Jarvis v Moy, Davies, Smith, Vandervell & Co* ([1936] 1 KB 399 at p 405.
3. *re Wait* [1927] 1 Ch 606

Legislation and Other Material Referred to:

1. Order LIII, rule 12 of the High Court Rules, Chapter 27, Vol. 3 of the *Laws of Zambia*.
2. *Sale of Goods Act, 1893, section 28*.
3. *Sale of Goods Act, 1893, section 27*.
4. *Sale of Goods Act, 1893, section 49(1)*.

5. *The Sale of Goods, 2nd ed., Oxford University Press, Oxford, para. 3.01.*
6. *Sale of Goods Act, 1893, section 17(1) and (2).*
7. *Sale of Goods Act, 1893, section 18.*
8. *Sale of Goods Act, 1893 Act, section 62.*
9. *The Oxford Dictionary of Law, Jonathan Law, 8<sup>th</sup> Edition, Oxford University Press, 2015.*
10. *Sale of Goods Act, 1893 Act, section 16*
11. *Sale of Goods Act, 1893 Act, section 16, R, 5*

## **1.0 THE CLAIMS**

In this action, the plaintiff claims payment of the price of goods allegedly sold and delivered to the defendant in the sum of Eighty-Two Thousand Nine Hundred and Forty-One Kwacha and Forty-Four Ngwee (K82, 941.44), being the balance of moneys alleged to be due by the defendant.

The claim arises from a written agreement, which the defendant admits was entered between the plaintiff and the defendant, for the plaintiff to supply various products including creambell brands, carbonated drinks, and bottled water to the defendant.

The defence, briefly summarized, is that the amount claimed is inaccurate because the plaintiff did not offset, from the balance due to the plaintiff, moneys that the plaintiff owed the defendant. Further, that the amount claimed is inflated due to

the addition of the credit value of K20,000 in respect of a container that the plaintiff provided to the defendant for storage, which container was subsequently collected by the plaintiff.

The defendant counterclaims: (i) a refund of K20,000.00 being moneys allegedly due by the plaintiff for the deposit paid by the defendant in respect of the container and (ii) a refund of K1,500 in respect of money paid on behalf of the plaintiff for illegal dumping.

## **2.0 THE HEARING**

### *2.1 Preliminary*

When the matter came up for trial, the defendant was not in attendance. This was despite a notice of hearing having been issued on 10<sup>th</sup> September, 2019.

Counsel for the plaintiff did inform the Court that he had received an email from counsel for the defendant notifying him that a Notice to Adjourn had been filed into Court by the defendant. Attached to the email was a notice of hearing from the Court in Ndola, dated 4<sup>th</sup> October, 2019 reflecting that counsel would be before Judge M. Zulu in Ndola on that date.

In considering whether to adjourn, I observed that the Notice of Hearing in this cause was issued before the one issued out of Ndola. Secondly, I noted that the Judge herein enjoyed seniority and thirdly, I observed that the defendant did not apply to vary the hearing date in accordance with **Order LIII, rule 12 of the High Court Rules, Chapter 27, Vol. 3 of the Laws of Zambia. Rule 12** makes it mandatory for a party seeking to vary the hearing date to make an application, by notice, at least ten days before the date of the hearing. Considering the circumstances, particularly that both notices of hearing gave the defendant ample time to apply to vary the hearing date, I proceeded to conduct the trial in the defendant's absence.

Given that the defendant was not in attendance, its counterclaim was dismissed for want of prosecution, albeit with liberty to commence a fresh action. The dismissal was founded not only on the defendant's absence, but upon considering that the counterclaim had not been prosecuted three years after it was filed. This, to me, constituted an inordinate delay in the commercial court. My decision to expressly articulate the defendant's (plaintiff in terms of the counterclaim) right to commence a fresh action is rooted in the principle that a dismissal for want of prosecution is not a final determination on the merits. The principle was succinctly explained by Morris LJ in *Wimpey's case* ([1953] 1 All ER 583<sup>1</sup>) where he stated:

*“When an action has been dismissed for want of prosecution, the defendant has not been “sued to judgment” at all. There has been no finding on the merits. There has been no judgment that the defendant is not liable. It is only an interlocutory order—a matter of procedure—which does not affect substantive rights.”*

Thus, the defendant is not put out of his right to adjudicate its claim. I now turn to consider the plaintiff’s claim.

## *2.1 Interface between the Law and the Facts*

Since the pleadings reveal that defendant does not dispute the existence of contract, the principal question for consideration is whether the plaintiff demonstrated that it supplied goods to the defendant and the defendant failed to pay for the goods in accordance with the contract.

My first observation is that the agreement between the parties involved the transfer of the property in specific goods by the plaintiff, a seller, to the defendant, a buyer for a money consideration. As such, I consider that the transaction falls squarely within the ambit of the administration of the ***Sale of Goods Act, 1893***. I will therefore apply the said Act in determining this matter.

Under ***section 28 of the 1893 Act***, unless otherwise agreed, delivery of the goods and payment of the price are concurrent

conditions. This means that the buyer is required to be ready and willing to pay the price to the seller at the time that the seller gives the buyer possession of the goods except where the parties have agreed otherwise.

In this case, the plaintiff's case rests on the testimony of its sole witness, Om Prakesh, Pw1. According to Pw1's witness statement, which was admitted into evidence, it was agreed that the plaintiff would, upon an order made by the defendant, invoice and supply the defendant the goods ordered. In turn, the defendant was to pay the invoiced amount upon delivery.

Additionally, Pw1's evidence was that it was a term of the agreement that failure by the defendant to pay invoiced amounts within five days from delivery exposed the defendant to suspension of supply. The evidence of Pw1 is unchallenged. Consequently, I accept Pw1's testimony that it was a condition of the contract that the defendant would pay invoiced amounts upon delivery of the goods and at best, the condition carried a 5-day moratorium.

Even if I were to disregard Pw1's testimony, absent proof of any agreement to the contrary, the defendant would have been obligated to pay on delivery in accordance with section 28 of the 1893 Sale of Goods Act.

Next, I considered what would constitute a breach of contract. In this regard, counsel for the plaintiff drew my attention to the dicta of Greer LJ in *Jarvis v Moy, Davies, Smith, Vandervell & Co* ([1936] 1 KB 399 at p 405.<sup>2</sup>, where he stated:

*“Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract.”*

My attention was also drawn to **section 27 of the Sale of Goods Act, 1893** which reads:

*“It is the duty of the seller to deliver the goods, and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.*

I accept that section 27 of the 1893 Act places a duty on the defendant to accept and pay for goods in accordance with the terms of the contract. Because I have determined that it was a term of the contract for payment to be made upon delivery, it is with ease that I hold that the defendant’s duty was to pay the plaintiff upon taking delivery of the goods.

My finding births the question whether the defendant failed to honour its obligation by failing to pay upon delivery. According to the evidence presented by Pw1, during the period 1<sup>st</sup> January, 2015 to 29<sup>th</sup> August, 2016 the parties had various transactions for the supply of specific products. Further, that the defendant

accepted delivery of some of the products without making the necessary payments despite the plaintiff having issued invoices to the defendant. Pw1 referred to the defendant's statement of account with the plaintiff exhibited on page 1 of the plaintiff's bundle of document. The statement was received into evidence. The balance that is reflected on the statement as outstanding as at 29<sup>th</sup> August, 2016 stood at K82, 951.44.

It was Pw1's testimony that despite several demands and requests by the plaintiff, the defendant refused or neglected to settle the amounts due.

Given that PW1's testimony was unchallenged, I accept it. Consequently, I find that the defendant accepted delivery of invoiced goods from the plaintiff without concurrently paying for them. It follows, therefore, that the defendant failed to honour its obligation to pay upon delivery according to the contract. As a result, I am satisfied that the defendant breached the contract it entered with the plaintiff.

### **3.0 REMEDIES**

**Section 49 of the 1893 Sale of Goods Act** entitles the seller to maintain an action for the price of the goods where: (i) the property in the goods has passed to the buyer and payment is not made in accordance with the contract; and (ii) the price is



payable 'on a day certain' irrespective of delivery although property has not passed and the goods have not been appropriated to the contract.

I have understood section 49 to make the transfer of the property in the goods a mandatory occurrence for the seller to succeed in an action for the price. My understanding is supported by the observation made by Bridge M.G, in his text, ***The Sale of Goods, 2nd ed., Oxford University Press, Oxford, para. 3.01.*** As Bridge observes, the passing of property in goods:

*"...affects contractual rights and duties. It is the fulcrum on which depends issues as diverse as the seller's entitlement to sue for the price ..."*

What remains to be considered, therefore, is whether the property in the goods passed to the defendant.

According to **Section 17(1) of the 1893 Act**, the paramount criterion for ascertaining when the property passes is the intention of the parties. In determining the intention of the parties, one is called, by **section 17 (2) of the Act**, to consider the terms of the contract, the conduct of the parties and the circumstances of the case.

Absent any explicit terms in the contract or perceptible conduct to assist in identifying the intention of the parties, **section 18 of the Act** contains five rules for the purpose of ascertaining their

intention. The Rules apply unless a contrary intention can be discerned from the terms of the contract, the conduct of the parties, and the circumstances of the case. Different rules apply depending on the nature of the goods. That is, depending on whether the goods are specific or unascertained; existing or future; or are delivered to the buyer on approval or "on sale or return" or other similar terms.

**Section 62 of the Sale of Goods Act, 1893 Act** defines the term "specific goods" as:

*'goods identified and agreed upon at the time the contract of sale is made'*

Pw1's evidence was that the goods were to be supplied after the contract was made, upon the defendant making an order, which would in turn stimulate the issuance of an invoice and delivery by the plaintiff. From this testimony, it is clear that the goods in question were not identified and agreed upon at the time the contract was made but they were to be identified after the defendant placed an order. Consequently, I conclude that the goods in this case were not specific goods.

Since the goods were not specific, I considered whether they were unascertained. My analysis of the 1893 Act revealed that the term "unascertained goods" is not defined in the legislation. However, **The Oxford Dictionary of Law, Jonathan Law,**

**8<sup>th</sup> Edition, Oxford University Press, 2015** defines “unascertained goods” as:

*“Goods that are not specifically identified at the time a contract of sale is made.”*

Upon considering the above definition, and upon accepting that the goods for which the price is claimed were not specifically identified at the time the contract was being made, I indubitably resolve that the goods were unascertained. The passing of the property in unascertained goods is addressed by **section 16 of the 1893 Act**, which reads as follows:

*“Where there is a contract for the sale of unascertained goods no property in the goods is transferred to the buyer unless and until the goods are ascertained.”*

The significance of **section 16** is that it prevents the passing of property in unascertained goods until the goods are ascertained. In the leading English case on ascertainment, **re Wait [1927] 1 Ch 606<sup>3</sup>**, per Atkin LJ at 630, it was held that:

*“goods are ascertained when they are ‘identified in accordance with the agreement after the contract is made’*

The evidence before Court is that the contract entailed that once an order was made by the defendant, the plaintiff would issue an invoice and delivery would be made based on the invoice. I

have perused the plaintiff's bundle of documents and sighted several invoices issued on different dates, each indicating the particular goods ordered and their attendant prices. Thus, it is clear to me that the process of identification commenced at the point of invoicing. Since the goods were delivered, it can be assumed that at some point after invoicing but before delivery, the goods were set aside for delivery. Such setting aside served to physically allocate the goods to the contract. That being the case, I am satisfied that ascertainment occurred at the point of invoicing and setting aside.

Turning back to determining intention, I have observed that there is a dearth of evidence to demonstrate the intention of the parties with respect to passing of property. As such, I do not perceive any intention that would serve to dissuade me from applying an applicable Rule. The relevant Rule in this case is **Rule 5(1)**, which reads:

*'Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods then passes to the buyer; and the assent may be express or implied, and may be given either before or after the appropriation is made.'*

Rule 5 (2) provides:

*“Where, in pursuance of the contract, the seller delivers the goods to the buyer ... and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract”*

In this case, the goods were unconditionally appropriated to the contract when the plaintiff delivered them to the defendant. There is no evidence before me that suggests that the plaintiff reserved its right of disposal. I therefore find that no such reservation was made. In addition, I opine that by accepting delivery, the defendant assented to the appropriation. Resultantly, in applying Rule 5, I am of the settled mind that the property in the goods passed at appropriation, specifically at delivery.

#### **4.0 DETERMINATION**

In light of the foregoing, I hold that the plaintiff has demonstrated that it is entitled, under **section 49 (1) of the Sale of Goods Act, 1893**, to payment of the outstanding price

I therefore enter judgment in favour of the plaintiff in the sum of Eighty-Two Thousand Nine Hundred and Forty-One Kwacha and Forty-Four Ngwee (K82, 941.44) owed by the defendant, together with simple interest at the average short-term bank

deposit rate from date of writ to date of judgment, thereafter at 9% per annum until date of final settlement.

I also award the plaintiff costs of and incidental to this action. Costs are to be taxed if the parties fail to reach agreement.

Dated this 14<sup>th</sup> Day of May, 2020



**B.G. SHONGA., J**

**HIGH COURT**

