

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

2015/HP/2352

BETWEEN:

**FAST FORWARD INTERNATIONAL
(Z) LIMITED**

PLAINTIFF

AND

**JOSEPH MULAISHO T/A NJANGE
ENTERPRISES**

DEFENDANT



Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mrs. K.M. Chileshe, Sikwakana Mweemba & Partners.

The Defendant: In Person.

J U D G M E N T

The Plaintiff took out a writ of summons and statement of claim dated December 9, 2015, and the reliefs sought are as follows:

- (i) payment of the sum of USD 9, 220.00;**
- (ii) interest on the above sum at the current Bank Lending Rate;**
- (iii) costs and incidental to this suit; and**
- (iv) Any further or alternative relief that the Court may deem fit.**

The Defendant filed his defence and the same was amended on November 24, 2017. The Plaintiff's counter-claim is reproduced herebelow:

- (i) immediate shipment of the goods to Ndola Zambia, the final destination of the goods as per agreement;**

- (ii) in the alternative a refund of US\$39, 233.00 the total cost price of the goods less freight charges of USD 9,220.00;**
- (iii) damages for loss of business;**
- (iv) special damages of USD \$500.00 spent on transport and food and accommodation on my follow-up trip to and from the United Republic of Tanzania following the consignment;**
- (v) interest on all sums found due at current bank lending rates;**
- (vi) costs of and incidental to this action;**
- (vii) any further relief that the court may deem fit and just.**

The Plaintiff's only witness was Ms. Edith Bulanda, the Commercial Manager in the employ of the Plaintiff Company. She said the dispute between the parties arose from non-payment of ocean freight by the Defendant for port to port shipment of the Defendant's goods from Dubai to Dar es-Salaam. She added that part of the money the Plaintiff used to buy his goods was a loan from the Plaintiff. She said the agreed charges for freight for port to port delivery was USD 2,500.0. She explained that apart from freight charges, standing at USD 2, 500.00, the Defendant borrowed the sum of USD 6, 720.00 from the Plaintiff to enable him purchase more goods to take advantage of the remaining space in the container. According to her, the total debt owed by the Defendant to the Plaintiff was USD 9, 220.00 thus (USD 2, 500 + 6, 720 = USD 9, 220.00).

She said when the container was delivered to the Port in Dar es-Salaam in September 2014, the Defendant was notified. She added that it was the Defendant's responsibility to clear and take

possession of the goods. She added that the goods were supposed to be cleared within 14 days from the date the ship docked, failure to which the Defendant was liable to pay port charges. She said the goods were not cleared within that period as a result of which they were later auctioned in 2017. On the one hand she said the goods were auctioned by the Plaintiff's Office in Dar es-Salaam, and on the other hand she said the same were auctioned by the Tanzania Ports Authority (TPA) to recover port charges.

She dispelled the Defendant's allegation that the agreement was a house to house shipment. By "house to house" she meant delivery of goods from the port in Dubai to the Defendant's final destination in Ndola. She said if this was case, freight would have been more than USD 8, 000.00.

In his defence, the Defendant testified and called no witnesses. He stated that in 2014, he bought goods from Dubai worth USD 39, 000.00, at the material time equivalent to K470, 000.00. He said among the goods that he bought were motor vehicle spares parts and brand new tyres. He said he signed shipping instructions for the shipment of his goods by the Plaintiff from Dubai to Ndola. He said the nature of the shipment was house to house delivery. And the freight thereof was USD 6, 500.00.

He admitted that he borrowed some money from the Plaintiff to purchase more goods because he had remained with some space in the container to accommodate more goods. He, however, stated that the money he borrowed from the Plaintiff was USD 2, 500.00.

According to him, he was assured by the Plaintiff that goods were going to reach Dar es-Salaam within 20 days, but the goods only reached Dar es-Salaam after 45 days.

He said when he was advised that goods had arrived at the Port, he got in touch with the Plaintiff's Manager to find out when the goods would be delivered to Ndola. He said he was advised that he was required to pay freight charges within 14 days, and his reply was that there was no way he could pay freight when the goods had not yet been delivered to Ndola. He said the total freight for delivery of the goods to Ndola was USD 9, 220.00.

He said he travelled to Dar es-Salaam, but did not state when. He said the Plaintiff's Manager in Dar es-Salaam advised him that his goods were auctioned, but was not told how much was realized from the auction. He said just from the auctioning of tyres, he expected a yield of not less than K200, 000.00. According to him, since the goods were not delivered to him, he put up a counter-claim of USD 39, 233.00 which should be less USD 9, 220.00 freight charges.

Both parties filed their written submissions. The Plaintiff's Counsel, Mrs. Mulenga argued that it was clear from the evidence adduced as to the debts owed by the Defendant, thus USD 6,720.00 cash advance and freight in sum of USD 2, 500.00. It was contended that the shipment was port to port and that when the cargo arrived at the port in Dar es-Salaam, the Consignee (Defendant) was supposed to make arrangements for the transportation of the cargo from the port in Dar es-Salaam to his final destination in Ndola. She further noted that the goods

remained at the port in Dar es-Salaam from 2014 to 2017 and that the whole time the goods remained at the port, they accrued port charges.

It was further contended that the auction was conducted by the Tanzania Ports Authority, and that it was misconceived for the Defendant to pursue the Plaintiff.

And as regards the counter claim, it was argued that the same was bound to fail because the shipment was not "house to house" but "port to port". And that the Plaintiff discharged its obligation when the goods were delivered to Dar es-Salaam and that the Defendant was duly notified about the goods in Dar es-Salaam.

In his submissions the Defendant was very talkative and argumentative, and some matters raised were extraneous, for which I will waste no time to repeat irrelevant submissions. Suffice to state that, he contended that the shipping instruction were "house to house" thus from Dubai to Dar es-Salaam and up to the final destination in Ndola, Zambia. It was submitted that freight was agreed at USD 6, 000.00 and not USD 2, 500.00. It was reiterated that the Plaintiff failed to deliver the cargo to Ndola.

I have carefully considered the evidence adduced and the arguments thereof. I am satisfied that around September 2014, the Plaintiff and the Defendant entered into a verbal agreement whereby the Plaintiff as a forwarding agent agreed to ship the Defendant's goods comprising of assorted car spare parts from Dubai, and the agreed port of delivery was Dar es-Salaam.

And in order to maximize the full use of the container, the Defendant got a loan from the Plaintiff, which loan he used to

purchase more goods. Further, it is not in dispute that the said goods were delivered to the Port of Dar es-Salaam, however, what is in dispute is whether the Plaintiff's obligation in terms of transportation of goods ended at the Port of Dar es-Salaam or was to be extended to delivery of the goods to final destination in Ndola as alleged by the Defendant.

There is no specific written agreement that was adduced speaking as to the responsibility of the Plaintiff in terms of shipment of the goods whether it was "port to port" or "house to house". Clearly, the obligation thereof is to be ascertained from the testimonies of the witnesses who gave conflicting evidence and the Bill of Lading will be helpful. The Plaintiff alleged it was "port to port" and the Defendant alleged it was "house to house." Having heard and seen the witnesses and having looked at the Bill of Lading which was for Ocean Transport, I am inclined to believe the Plaintiff's witness that the shipping arrangement was port to port delivery. Even the value of freight pegged at USD 2,500.00 reasonably speaks to the fact that the arrangement was a port to port delivery otherwise, it makes no business sense that the Plaintiff would have agreed to transport the goods via house to house at an unrealistic value of USD 2,500.00.

There is also independent evidence at page 2 of the Plaintiff's Bundle of Documents that ocean freight was pegged at USD 2,500.00, which freight did not whatsoever include land freight to transport goods from Dar es-Salaam to Ndola, Zambia.

And since the nature of the shipment was port to port, when the goods reached Dar es-Salaam, the Plaintiff's obligation was

discharged. Thereafter, it was the Defendant's obligation to ensure that his goods were cleared within time, and directly meet the cost of transporting his goods to his final destination.

From the foregoing, it is also believable that the amount that was advanced to the Defendant as a loan was USD 6, 720.00, and not USD 2, 500.00 as alleged by the Defendant. Apart from the testimony of the Plaintiff's witness, there was an invoice produced at page 2 of the Plaintiff's Bundle of Documents that shows that the amount lent to the Defendant was USD 6, 720.00. I reasonably believe that the Defendant interchanged the figures that is to say that he borrowed USD 2, 500.00 and that USD 6, 720.00 or there about for freight was an attempt albeit failed to justify his false narrative that delivery was port to house or house to house when in fact not.

It is, therefore, clear that the Defendant was indebted to the Plaintiff in the sums of USD 2, 500.00 for unpaid ocean freight and USD 6, 720.00 as a loan, bringing the total to USD 9, 220.00.

Turning to the counter-claim, the Defendant raised a counter-claim in the sum of USD 39, 233.00. The Defendant alleged that the counter-claim was anchored on the basis that the Plaintiff failed to deliver the said goods to him worth USD 39, 233.00 in Ndola. Based on the Defendant's testimony and the documentary evidence in form of receipts produced in his Bundle of Documents, I find it probable that the goods shipped by the Plaintiff to the Port of Dar-es-Salaam were worth USD 39, 233.00. It is clear that the goods were auctioned. However, it is not true that the goods were

auctioned before the port clearance grace period of 14 days expired. The goods were auctioned after more than two years.

The auctioning of the goods was not by fault of the Plaintiff, the goods had overstayed at the port and had accrued port charges due to the Defendant's failure to timely clear the goods and take full possession of the goods. By his past dealings with the Plaintiff and his experience in the business, the Defendant was privy to the consequences of not collecting goods within the grace period provided by the port, and the consequence was that the goods were amenable for auction either by the Port Authority or the forwarder. And since the failure to collect was due to the Defendant's inordinate delay resulting in the said auction, the Defendant's counter-claim cannot succeed against the Plaintiff.

Furthermore, it was not the Plaintiff's obligation to deliver the goods to Ndola. As such a claim for an order to compel the Plaintiff's to deliver non-existence goods is unattainable. In the same vein, the claim for a refund of USD 39,233.00 is untenable. Perhaps the only issue that the Defendant ought to have pragmatically pursued was for an order to compel the Plaintiff to account for the proceeds of sale from the auction, but since it was not pleaded and applied for, it is untenable.

As regards the claim for loss of business and the sum of USD 500.00 for alleged expenses incurred by the Defendant to travel to Dar es-Salaam, the reasons advanced for dismissing the claims for refund of USD 39, 233.00; these claims are equally untenable. For the avoidance of doubt, there was no obligation on the Plaintiff to deliver goods from Dar es-Salaam to Ndola. The

inordinate delay and failure to collect the goods from the port was not that of the Plaintiff, but that of the Defendant.

All in all, the Plaintiff's claim succeeds, the claim of USD 9, 220.00 is allowed and shall carry interest at 4 per cent per annum from the date of the writ of summons to the date of final payment. The counter-claim is dismissed.

Costs for the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

DATED THIS 1ST DAY OF SEPTEMBER 2020.

A handwritten signature in dark ink, consisting of several overlapping loops and a long horizontal stroke, positioned above a dotted line.

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THE HON. MR. JUSTICE CHARLES ZULU