

IN THE SUPREME COURT OF ZAMBIA APPEAL NO. 39/2015
HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

FOOD RESERVE AGENCY

AND

BEN SIMUNYIKA

JAMES NG'AMBI

DERRICK SIULUTA

CHARLES MUTAMBO



APPELLANT

1st RESPONDENT

2nd RESPONDENT

3rd RESPONDENT

4th RESPONDENT

CORAM: Wood, Malila and Mutuna JJS.

on 26th September, 2017 and 12th October, 2017.

For the Appellant: Mr. A. Chewe – Assistant Legal Counsel

*For the Respondent: Mr. T.S. Ngulube – Messrs Tutwa S. Ngulube &
Company*

JUDGMENT

WOOD, JS, delivered the Judgment of the Court.

This is an appeal against a decision of the High Court which held that the appellant should refund the respondents the

equivalent of the price of under-grade maize for 600x 50Kg bags of maize at the current market value together with the sum of K24,862.00 and interest thereon.

For convenience we shall refer to the respondents as the plaintiffs and the appellant as the defendant which is what they were in the court below.

On 30th October, 2011, the plaintiffs offered to purchase under grade maize from the defendant. The defendant accepted the offer by letter dated 5th December, 2011. The acceptance stipulated that the plaintiffs could purchase from the defendant 6,000 x 50Kg bags of maize at K20,680.00 per bag from Kabwe. The letter further stated that the quality and quantity would be final at the point of collection and that the maize should be collected within 30 days of the plaintiff's acceptance. The acceptance was to be valid for seven days.

The defendant prepared a delivery order on 3rd January 2012 in favour of the plaintiffs for the 600 bags of under-grade maize. The plaintiffs paid the defendant the sum of

K12,408,000.00 on 30th December, 2011 and also paid into the defendant's account held with Zambia National Commercial Bank Plc at Lusaka Business Centre Branch a further sum of K24,816,000.00 for the maize on 6th January, 2012. These two amounts came to a total of K37,224,000.00 which was for 1,800 bags of maize. The evidence further shows that the plaintiffs proceeded to Kabwe where they loaded the 600 bags of maize onto a truck and then proceeded to Kasumbalesa border post where the truck was impounded following a complaint of theft made to the Police Service in Kabwe on 7th January, 2012 by the defendant's Provincial Marketing Coordinator. The complaint of theft to the Police arose because the defendant alleged that the plaintiffs did not collect under-grade maize but instead collected good maize. The other reason was that the truck was loaded without a Goods Issued Note.

After the maize was seized, the prosecutor applied before the Chingola Magistrate's court to have the maize stored in the defendant's storage shed at Chambeshi pending the conclusion of investigations. The order dated 9th January, 2012 shows that the

number of bags of maize seized was 300 and not the 600 that were initially collected from Kabwe. On 19th January, 2012, the Police in Kabwe wrote a report stating that they could not prosecute the matter as the evidence was rather weak.

On 29th February, 2012, the plaintiff issued a writ claiming inter alia damages for breach of contract; US\$19,800.00 being the value of 1,800 bags of maize and K15,000.00 for transporting the maize from Kabwe to Chingola. On 10th July, 2012, the defendant conducted a sampling exercise of the maize and issued a Grain Grading Certificate which showed that the sample results were quite close to Grade A grain.

The learned trial judge considered the evidence before him and found that there was no dispute that that the 4th plaintiff was offered 600 x 50Kg bags of under-grade maize. We agree with this finding. He further found as a fact that 600 x 50Kg bags of under-grade maize was purchased by the 4th plaintiff and that authority to load the maize was granted by the defendant. We shall return to this finding of fact later on in our judgment. The learned trial judge found as a fact that at least 300 of the

600 x 50Kg bags of maize were seized by the Police on the instruction of the defendant from Kasumbalesa where the plaintiffs had taken it for sale. The documentary evidence from the Subordinate Court in Chingola clearly shows that this was the position. The other finding of fact made by the learned trial judge related to the further sum of K24,860,000.00 that was paid by the plaintiffs to the defendant for 1,200 bags of maize but was not refunded. In addition, the learned trial judge found as a fact that the seized maize was not returned to the plaintiffs. We have no difficulty in agreeing with these findings of fact too.

After considering the evidence further the learned trial judge came to the conclusion that the defendant was duty bound to restore the seized maize to the plaintiffs. He also found that the sum of K24,816,000.00 that was deposited into the defendants account should be refunded to the plaintiffs as it remained an amount due to the plaintiffs in lieu of the supply of 1,200 x 50 bags of under-grade maize. The learned trial judge then entered judgment in favour of the plaintiffs for a refund of the equivalent of 600 x 50Kg bags of under-grade maize at the market value

prevailing at the time of judgment and also entered judgment in favour of the plaintiff for the sum of K24,816,000.00 together with interest and costs.

The defendant has raised two grounds of appeal. The first ground of appeal is that the court below erred in law and fact when it ordered the defendant to refund the plaintiffs the equivalent of 600 x 50Kg bags of maize at the current market value when the evidence on record clearly shows that the defendant only recovered 300 x 50Kg bags of maize from the plaintiffs' sales agent at Kasumbalesa Border Post. The second ground of appeal is that the court below erred in law and fact when in rendering its judgment it did not adjudicate on the issue of the quality of the 600 x 50Kg bags of maize that the plaintiffs had uplifted from the defendant's depot out of which 300 x 50Kg bags of maize were impounded by the Police on the defendant's instructions.

In arguing the first ground of appeal, the defendant has relied on the evidence in the record of appeal. The defendant has argued that the learned trial judge did not take into account the

fact that out of 600 x 50Kg bags of maize, only 300 x 50Kg of the said maize had in fact been restored into the custody of the defendant.

Mr. Ngulube in his wide ranging arguments on behalf of the plaintiffs argued that the defendant's claim that the plaintiffs had collected good grade maize instead of under-grade maize was unsubstantiated. Further, he argued that the evidence that 600 bags of maize were impounded was not challenged. The main argument which can be gleaned from the plaintiffs' heads of argument is that 600 bags of maize were impounded in Kasumbalesa and therefore the defendant is liable for 600 bags of maize and not only the 300 bags which were stored in the defendant's warehouse pursuant to the Subordinate Court order. The subsidiary argument by the plaintiffs is that they bought under-grade maize and not good white grade maize and that the police report exonerated them from having stolen, cleared and released any good grade white maize from the defendant's custody.

We have considered the record of appeal, the heads of argument and the oral submissions made in court when this appeal was argued. The issue as we see it in the first ground of appeal is whether the evidence supports the learned trial judge's conclusion that the defendant should refund the equivalent of 600 x 50Kg bags of white maize at the current market price. A distinction needs to be drawn between reporting a criminal offence to the police and liability for the consequences of making that report. Admittedly the defendant set in train the process which led to the seizure of the 600 bags of maize by the police. The defendant's role as a complainant ended at reporting the matter to the police and it had no role whatsoever in the shortage which arose when the bags of maize were seized and an order made that 300 bags of maize be stored in the defendant's warehouse. We therefore agree with the defendant that the learned trial judge reached his decision in ordering a refund of the equivalent of 600 bags of maize without taking into account the evidence which clearly showed that only 300 x 50Kg bags of maize had been seized by the Police. The seizure order refers to 300 x 50Kg bags

of maize and not 600 x 50Kg of maize. There is merit in this ground of appeal and we allow it.

The second ground also has merit as the learned trial judge did not address the issue of the quality of the maize which was cardinal to the defendant's defence. The closest the learned trial judge came to addressing the issue of the quality of the maize was when he held that what was in contention was the quality of the maize and then did not address it in his judgment. The learned trial judge should have addressed the documentary evidence in the form of the Grain Grading Certificate and also the evidence of Rayford Phiri (DW1) who testified that although the documents showed that what was being sold was under-grade maize, the impounded maize was good grade maize as shown by the Grain Grading Certificate. The learned judge did not consider the significance of the absence of the Goods Issued Note in relation to the whole transaction. In reexamination DW1 stated that the quality and quantity only became final after the collection of the Goods Issued Note. We are of the view that quality and control being final at the point of collection was subject to the defendant

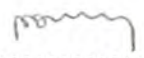
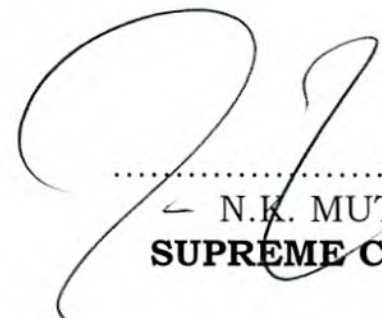
issuing a Goods Issued Note. In this case no Goods Issued Note was issued. We however do not agree with the argument by the defendant that the sum of K24,816.00 (not K24,862.00) should be revised taking into account the value of the 300 x 50Kg bags of maize that the plaintiffs' agent remained with at Kasumbalesa Border Post. This is because the K12,408.00 was for 600 bags out of which 300 were impounded which means that the plaintiffs are entitled to half of this sum since there was no counterclaim for the good grade maize that was taken by the plaintiffs.

We note that the plaintiff was claiming in US Dollars and also made a claim for transport. There was no basis for doing so as this was a Kwacha transaction and there is no documentary evidence of any forward contracts which may have been entered into. There was no documentary evidence in support of the special damages of K15,000.00 claimed for transport. We accordingly set aside the portion of the judgment of the court below relating to the refund of the equivalent of 600 x 50Kg bags of maize and in its place order that the defendant returns the 300 x 50Kg bags of under-grade maize to the respondents. In the

event that the maize has been sold or destroyed, the appellant shall pay the respondents the sum of K6,204.00 representing 300 x 50kg of under-grade maize together with interest. Interest is payable at the short term deposit rate from the date of the writ to the date of the judgment and thereafter at the average lending rate as determined by Bank of Zambia up to date of payment. The payment of the sum of K24,816.00 has been overtaken by events because at the hearing of this appeal we were informed by counsel for the defendant that the defendant had in fact paid the plaintiffs the sum of K37,71.73 on 25th March, 2015 in compliance with the High Court judgment. The plaintiffs shall have their costs in the court below. The parties shall bear their respective costs relating to this appeal.



A.M.WOOD

SUPREME COURT JUDGE
M. MALILA, SC**SUPREME COURT JUDGE**
N.K. MUTUNA**SUPREME COURT JUDGE**