

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

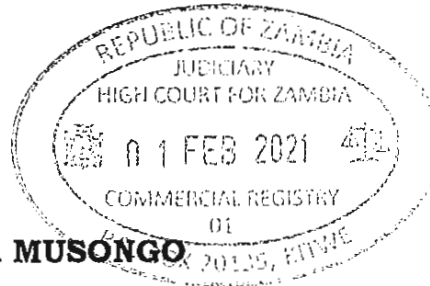
2020/HKC/020

BETWEEN:

ABRAHAM ZULU

AND

INNOCENT MUSAMBA MUSONGO



PLAINTIFF

DEFENDANT

Before: Justice Abha N. Patel, S.C. this 9th day of December, 2020

For the Plaintiff: Mr. J. Sinkala

of Messrs Freddie & Co.

For the Defendant: No Appearance

JUDGMENT

Cases Referred to:

1. *Printing and Numerical Registering Company v Simpson* (1875) L.R 19 E.Q 462
2. *Colgate Palmolive (Z) Inc v Able Shemu Chuka & Ors* Appeal No. 181 of 2005 (unreported)
3. *Tijem Enterprises Limited v Children International Zambia Limited* (2010/HPC/0121)
4. *Post Newspapers and others vs CBU Council and Others* (Appeal No. 84 of 1997)
5. *Access Bank (Zambia) Limited vs Group five/ZCON Business Park Joint Venture* (SCZ/8/52/2014) 2016
6. *Friday Mwamba v Sylvester Nthenge & 2 Ors* SCZ No. 5 of 2013
7. *John W.K. Clayton v Hybrid Poultry Farm Limited* (2006) Z.R. at 70
8. *Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa SJ* No. 21 of 2017

9. *Natural Valley Limited vs Brick and Tile Manufacturing Limited and The Attorney General* SJ No. 32 of 2018
10. *Mhango v Ngulube* (1983) Z. R. at 61

Legislations and Other Material Referred To:

1. *High Court Rules Chapter 27 of the Laws of Zambia.*
2. *Michael Furmston, Cheshire, Fifoot & Furmstons Law of Contract* (16th edition)

1. Introduction and Background

1.1 The Plaintiff commenced this action on 20th March 2020 by way of Writ of Summons and Statement of Claim seeking the following claims:

- (i) An Order for Specific performance of the contract for delivery of a 15 ton Isuzu Truck and a 5-ton Forklift;
- (ii) An Order of attachment and or sale of the Isuzu Rigid Truck Registration Number FK 98 HP GP;
- (iii) An Order for the refund of the sums of USD40,000.00 and USD 4,243 paid to the defendant by the Plaintiff under the contracts for the delivery of a 15 ton Isuzu Truck and a 5 ton Forklift respectively;
- (iv) Damages for breach of contract;
- (v) Interest on the amounts pursuant to section 4 of the Law Reform (Miscellaneous Provisions) Act, Chapter 74 of the Laws of Zambia and thereafter pursuant to section 2 of the Judgments Act Cap 81 of the Laws of Zambia.
- (vi) Further or other relief;

(vii) Costs of and incidental to this action.

1.2 The Statement of Claim had the following operative paragraphs:

"5. On the said 22nd day of December 2018 the Defendant and the Plaintiff also entered into another contract where it was agreed that the Defendant delivers a 5-ton forklift to the Plaintiff within 90 days from the date of the Agreement and the Plaintiff paid the sum of USD 4,243.00 to the defendant as the purchase price for the forklift.

6. Upon the expiry of the 30 days and 90 days respectively, the Plaintiff demanded for the delivery of the truck and the Forklift but the defendant did not deliver as per the agreement and as at the time of commencing this action the said 15 ton Isuzu Truck and the 5 -ton forklift have not been delivered.

7. The Plaintiff has on several occasions demanded for the delivery of the said 15 ton Isuzu truck and the 5 ton forklift but the defendant has been constantly promising to deliver the same and as at the date of this suit, the said items have not been delivered despite being paid for in full.

8. The Defendant has willfully failed and refused to deliver the said 15 Ton Isuzu Truck and the 5-ton forklift."

1.3 It is the Plaintiffs contention that by reason of the matters stated the Plaintiff has lost the benefit of the said contracts; has been put to considerable trouble, inconvenience and expense and has suffered loss and damage.

2. **Facts**

- 2.1 The Defendant not having filed an appearance, the Plaintiff sought leave to serve process by substituted or electronic service which leave was granted by the Court on 8th July 2020.
- 2.2 An Affidavit of Service was filed on 3 September 2020 confirming that the Process was served by substituted service by publication in the Zambia Daily Mail on 13 July 2020 and exhibit 'BM1' was duly attached to the said Affidavit of Service.
- 2.3 There being no appearance for the Defendant, and the Plaintiff seeking declaratory reliefs, the Court declined to grant Judgment in Default and proceed to enter directions on 26th October 2020 and appointed the 9th day of December 2020 at 09:00 hours for the Trial.
- 2.4 The Plaintiff filed its Affidavit of Service on 6th November 2020 confirming service of a copy of the Order for Directions on the Defendant by electronic mail and by whatsapp service.

3. The Evidence of the Plaintiff

- 3.1 The Plaintiff relied on his Witness Statement and Bundles of Documents and Pleadings filed into Court on 25th November 2020 and 18th November 2020 respectively and confirmed that

sometime in December 2018, he had been approached by the Defendant to sell an Isuzu rigid Truck Registration Number FK 98 HP GP. The Plaintiff testified that he did not like that truck but that he entered into an agreement with the defendant for the sale to him of a similar 15 ton Isuzu truck within 30 days from the date of the agreement at a cost of USD Forty Thousand (USD40,000.00) which he paid to the Defendant on 22 December 2018.

- 3.2 It was also his evidence in chief that the defendant offered to supply him with a 5 ton forklift within 90 days of the agreement and that the Plaintiff paid him a sum of USD Four Thousand Two Hundred and Forty Three on the 22 December 2018.
- 3.3 The Plaintiff said as part of the commitment towards the 2 agreements he had entered into with the defendant, the defendant left with the plaintiff the Isuzu truck registration number FK 98 HP GP and two documents namely an Insurance Form and a Road Transport and Safety Agency document.
- 3.4 The 4 documents being the 2 agreements for the sale of the Truck and forklift and the 2 supporting documents are produced in the Plaintiffs Bundle of Documents marled 1,2,3 and 4 respectively.

3.5 It was the plaintiffs further evidence that ever since the expiry of the 30 and 90 day periods respectively, the Defendant has not been forthcoming and has been evasive and has not fulfilled the terms of the agreements he had entered into with the Plaintiff.

3.6 The Plaintiff was not cross examined and the Plaintiff closed its case. There being no defence filed, the matter was left to the determination of the Court.

4. **The Law**

4.1 The Supreme Court in the case of ***Access Bank (Zambia) Limited vs Group Five/ZCON Business Park Joint Ventures (SCZ/8/52/2014)*** expressed the view that rules of procedure and timelines serve to make the process of adjudication fair, just, certain and even handed. Further in the case of ***John W. Clayton vs Hybrid Poultry Farm Limited***, the Supreme Court held that an action began in the Commercial List is immediately elevated to a class of cases that are governed by fast track rules for disposal of cases.

4.2 It is cardinal that the rules of court and the associated rules of practice devised in the public interest to promote the expeditious dispatch of litigation must be observed.

Consequently, for the proper administration of justice, and in the exercise and discharge of its inherent powers, the Court cannot and will not, entertain applications that fall short of the requirements. See the case of **Post Newspapers and others vs CBU Council and Others** wherein the Supreme Court said:

"While Parties must generally be heard on merits, litigants who sleep on their rights must expect the wheels of justice to turn in their absence for the sake of expedition and finality."

- 4.3 The absence of any evidence explaining or justifying the non-compliance is in the view of the Court, dire when considered in the context of *Order LIII, rule 7 of the High Court Rules*. Further, this Court took guidance from the decision of the Supreme Court in the case of **Natural Valley Limited vs Brick and Tile Manufacturing Limited and The Attorney General** on the procedure it adopted in accordance with *Order 12 rule 8 of the High Court Rules* which provides as follows:

"In all actions not otherwise specifically provided for by the other sub-rules, in case the party served with the writ of summons does not appear within the time limited for appearance upon the filing by the plaintiff of a proper affidavit of service, the action may proceed as if such party has appeared."

- 4.4 *In casu*, the non-compliance related to the absence of a defence and evidence in chief in the form of witness Statements. The non-compliance led into the date of trial.

Given the specific manner relating to trials in the Commercial division, the Defendant invited the peril that befell it.

5. Findings

5.1 In view of the preceding part of this judgment, I find as a fact that the Parties had entered into the two contracts for the sale of the 15 Ton Isuzu Truck and a Forklift and for which the defendant had received payment in full. There being no contest with respect to the Plaintiffs claims, I have no hesitation in accepting that the contracts were executed and payments made in full as evidenced by the Bundles of Documents.

5.2 In the English case of ***Printing and Numerical Registering Company v Simpson***(1875) L.R 19 EQ 462 cited with approval by the Supreme Court of Zambia at page 8 of its Judgment in the case of ***Colgate Palmolive (Z) Inc v Able Shemu Chuka & Ors*** Appeal No. 181 of 2005 (unreported) and in particular the exposition from the English case by Sir George Jessel who said:

" If there is one thing more than another which public policy requires it is that men of full age and competent understanding have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice."

- 5.3 The above principle was echoed by Mutuna J in the case of ***Tijem Enterprises Limited v Children International Zambia Limited*** (2010/HPC/0121)
- 5.4 The more recent decision of ***Friday Mwamba v Sylvester Nthenge & 2 ors*** SCZ No. 5 of 2013 refers, where Mumba Ag DCJ observed as follows:
- "The law of contract regarding contracts entered into voluntarily by legal persons has been honoured since time immemorial."*
- 5.5 The Plaintiff also relied on the judgment of the Supreme Court of Zambia in the case of ***Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa*** which reaffirmed the shibboleth of freedom of contract by quoting the dictum of Sir George Jessel MR in the cited case of ***Printing and Numerical Registering Co. vs Simpson.***

On the claim for damages, the Plaintiff has quoted from the said Judgment in which the Supreme Court went on to say as follows:

"A breach of contract, entitles a party who believes that he or she has been harmed by such break to bring an action for damages for the harm he or she allegedly suffered from the breach. It is important to recollect the principle of the law that where there is a right, there is a remedy. A right would be of little value if there was no remedy available in the event of its infringement. A breach of contract by one party necessarily entails an infringement of a contractual right of the other party. A remedy is given as

a means of vindicating the right, or as pecuniary compensation in lieu of performance. A breach of contract usually, but not always, causes a loss. In either case, there is a right of action against the contract-breaker. In our view ... a cause of action for damages for breach of contract arises even if the actual loss suffered is not immediately obvious."

- 5.6 Accordingly and being mindful of the obligation of the Plaintiff to prove his claims, despite the default of the Defendant, I found the Plaintiff to be credible and consistent and his evidence as to the contracts entered into between the Parties, was supported by the documents in his bundle of documents.

Further, although I am satisfied that the Plaintiff has pleaded its claim for breach of contract against the Defendant, I note that no evidence or material was placed before the Court to substantiate the claim for damages. I am guided by the clear elucidation of the law as it pertains to damages, discussed by the Supreme Court of Zambia in the cited case of ***Finance Bank and another vs Simataa Simataa***.

The Court in that case on the issue of unliquidated damages for breach of contract, confirmed that it is normally for the Court to assess the money value of the loss suffered and to award that sum as damages, noting that damages in this form are a compensatory remedy to the injured party, not punishment of the contract breaker.

In the case of **Mhango v Ngulube**, the Supreme Court on the issue of damages payable to a party stated as follows:

“the result is that the evidence presented to the court was unsatisfactory and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount in order to remind litigants that it is not part of the judge’s duty to establish for them what their loss is.”

In *casu*, the Plaintiff not having led any evidence of the loss it claims to have suffered, the pleading alone, is not a basis to make a finding of loss to justify the award of compensatory damage. Based on the forgoing, I award the Plaintiff a token sum of Kwacha One Thousand (K1,000) as damages for breach of contract.

- 5.7 The Plaintiff has also claimed an order of attachment and or sale of the Isuzu Rigid Truck Registration No. FK 98 HP GP. In the Plaintiff’s evidence at *paragraph 4* of his witness statement, the Plaintiff has stated that the said truck was pledged as security for performance by the Defendant and continues to be in the possession of the Plaintiff. However the agreements relied on by the Plaintiff in his bundle of documents at *pages 3 and 4* of the said bundles, do not state that the truck was left as security by the Defendant.

I have also noted that the Plaintiff has not offered any evidence of ownership or title, although it appears to have been left in his possession and custody. A perusal of the documents at

pages 1 & 2 of the Plaintiffs bundle of documents, are a copy of a third party certificate of motor insurance showing the name of the insured as a *Hussain* of Johannesburg in the Republic of South Africa, and the second, being a copy of a Toll Receipt issued by the Road transport and Safety Agency, is only proof of the fact that the said truck entered Zambia on 7 December 2018. The Court also notes that the truck bears a South Africa registration number plate. It is trite that an order for attachment cannot issue after Judgment is entered or where title to the goods claimed is not clear. In the circumstances, the order of attachment and or sale is misconceived.

6. Conclusion and Orders

6.1 Having found for the Plaintiff, I am of the considered view that an order of specific performance, being an equitable remedy, may not be effective against a defendant, whose whereabouts are not known and who has not appeared in these proceedings.

6.2 I accordingly enter Judgment in favour of the Plaintiff as follows:

i. An Order for the refund of the sums of USD 40,000 and USD 4,243.00 being moneys paid to and received by the Defendant, within 30 days from the date of this Judgment.

ii. I also award the Plaintiff interest on this sum at 2% above the prevailing LIBOR rate of interest from the date of the Writ to the date of payment.

iii. On the Plaintiffs claim for damages for breach of contract, the Court has awarded him the sum of Kwacha One Thousand (K1,000.00) for reasons explained in *paragraph 5.6* above.

v. Costs are awarded to the Plaintiff, to be taxed in default of agreement.

Dated at Kitwe, thisday of January, 2021

Abha Patel

**Abha N. Patel, S.C.
JUDGE**

