

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

2017/HP/0033

BETWEEN

ASSOCIATED TOBACCO  
COMPANY ZAMBIA LIMITED



PLAINTIFF

AND

WILDLAND COMPANY LIMITED

DEFENDANT

*Before the Honourable Lady Justice C. Lombe Phiri in Chambers*

*For the Plaintiff: Mr. G Pindani - Messrs. Chonta, Musaila & Pindani Advocates*

*For the Defendant: Mr. A. Kearnes - Messrs. Willa Mutofwe & Associates*

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## JUDGMENT

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### CASES REFERRED TO:

1. **Miller v Minister of Pensions (1947) 2 All ER 372**
2. **J.Z Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited (2002) Z.R 112**
3. **Pangaea Renaissance Securities Limited v Lilayi Development Limited (2010/HPC/0589)**
4. **Lusaka West Development Company Limited and Others v Turnkey Properties Limited**
5. **Khalid Mohamed v The Attorney General (1982) Z.R. 49**
6. **Wilson Masuso Zulu v Avondale Housing Project (1982) Z.R 172**
7. **Savenda Management Services v Stanbic Bank Zambia Limited (Appeal No. 37/2017)**
8. **Workers Compensation Fund Control Board v Chaplin Sawono (Appeal No. 11/2017)**

9. Penelope Chishimba Chipasha Mambwe v Millington Collins Mambwe (Appeal 222 of 2015)
10. Herman Josef Kibler v Apollo Agricultural Holdings Limited (Selected Judgment Number 26 of 2018)
11. Hadley v Baxendale [1854]9 ex341
12. Ndola Energy Company Limited v Lamamuda Limited (Appeal No. 62/2014)
13. Brian Royle Maggs T/A BM Builders (A firm) v Guy Anthony Stayner Marsh [2006] EWCA Civ 1058
14. The Rating Valuation Consortium, D.W. Zyambo & Associates (Suing as a firm) vs. Lusaka City Council, Zambia National Tender Board (2004) Z.R 109
15. D.P. Services Limited vs. Municipality of Kabwe (1976) Z.R 110
16. Kasengele v. Zambia National Commercial Bank Limited (SCZ Judgment No 11 of 2000)
17. Base Chemicals Zambia Limited, Mazzonites Limited vs. Zambia Air Force and The Attorney General (SCZ Judgment No. 9 of 2011)
18. Zambian Breweries Plc v Lameck Sakala (SCZ Appeal No. 173 of 2009)
19. William David White v E F Hervey (1985) Z.R 179

**LEGISLATION REFERRED TO:**

1. Law Reforms (Miscellaneous Provisions) Act 1934
2. High Court Act, Chapter 27 of the Laws of Zambia

**OTHER MATERIALS REFERRED TO:**

1. Bryan A. Garner Black's Law Dictionary 8<sup>th</sup> Edition 1999
2. Chitty on Contracts General Principles, Volume 1, 28<sup>th</sup> Edition
3. Chitty on Contracts General Principles, 27<sup>th</sup> Edition
4. P. Murphy on Evidence 5th Edition (1995) Universal Law Publishing

5. **Edwin Peel Treitel on the Law of Contract 13<sup>th</sup> Edition, 2011**
6. **G. Monahan on Essential Contract Law, 2<sup>nd</sup> Edition, Cavendish Publishing (Australia) Pty Limited 2001**
7. **Chitty on Contracts General Principles, 25<sup>th</sup> Edition**

## **1 INTRODUCTION**

- 1.1 The Plaintiff in this matter has sued the Defendant for payment in relation to supply of farming inputs and money that was borrowed in furtherance of growing tobacco. On the other hand the Defendant has also filed a counterclaim for failure by the Plaintiff to deliver up farming inputs resulting in the Defendant making a loss on their crop.
- 1.2 The Plaintiff commenced the action by Writ of Summons and Statement of Claim. The Defendant entered appearance and filed its Defence and Counterclaim. The Plaintiff proceeded to file its reply and a defence to the Counterclaim.
- 1.3 At trial the parties each called a witness who provided oral evidence. The parties also filed their respective arguments in support of their respective cases.

## **2. PLEADINGS**

### **2.1 PLAINTIFF'S WRIT AND STATEMENT OF CLAIM**

- 2.1.1 The claims as endorsed in the Writ of Summons dated 10<sup>th</sup> January, 2017 were stated as follows:

- i. Payment of the outstanding sum of **US\$26,568.06** being due in respect of various farming inputs obtained and monies borrowed by the Defendant from the Plaintiff at the Defendant's own request and instance.*
- ii. Interest thereon at current Bank lending rate.*
- iii. Costs of and incidental to this action.*
- iv. Any other relief which the court may deem fit.*

**2.1.2** In the Statement of Claim, which was amended on 17<sup>th</sup> March 2017, it was stated that on diverse dates but during the 2013/2014, 2014/2015 and 2015/2016 farming seasons, the Defendant at its own request and instance, entered into verbal agreements with the Plaintiff for the supply of various farming inputs on credit to grow tobacco during the said seasons. It was further stated that by the terms of the said agreement the Defendant was to pay back for the total cost of farming inputs and monies obtained and/or borrowed from the Plaintiff after harvesting and selling the tobacco crop at the end of each farming season.

**2.1.3** It was also stated that during the 2013/2014 farming season, the Defendant borrowed the sum of **US\$7,888.00** from the Plaintiff and none of it was paid back. That the **US\$7,888.00** was carried forward to the 2014/2015 farming season. That in the same farming season the Defendant borrowed a sum of **US\$ 29,565.47** bringing the total to **US\$37,453.47**. The Plaintiff further stated that **US\$13,442.45** was paid through tobacco supplies to the Plaintiff leaving an outstanding

balance of **US\$24,011.02**. The Defendant again borrowed a sum of **US\$26,493.55** bringing the total outstanding amount to **US\$53,061.61**. Thereafter, the Defendant paid **\$26,493.55** worth of tobacco supplies to the Plaintiff leaving an outstanding balance of **US\$26,568.06**.

**2.1.4** It was stated that the Defendant repeatedly breached its debt repayment obligations, despite harvesting and selling tobacco crops. That the Plaintiff made several reminders and wrote demands for payment of the outstanding debt but to no avail. In response to the letter of demand, the Parties had a meeting where it was proposed that the Defendant would start liquidating the debt in monthly instalments of **US\$100.00** but had failed to fulfil its promise.

**2.1.5** It was stated that the Defendant is indebted to the Plaintiff in the sum of **US\$ 26,568.06** and has as a result suffered loss and damage by the Defendant's undue delay and failure to settle its debt to the Plaintiff.

## **2.2 DEFENCE AND COUNTERCLAIM**

**2.2.1** The Defendant denied that it expected to pay back the money owed to the Plaintiff in one farming season. It was stated that the term of the agreement was that the money advanced would be paid back in full over 3 farming seasons as it was not economically viable to do so in one farming season.

season in which the crop is grown. That had the defendant been availed with finance for capital investments, then the situation would have been different as capital investments need enough time to pay against the capital injection on the farm. It was stated that the Defendant was obliged to pay back the loans.

**2.3.2** It was stated that the Plaintiff sent a demand letter dated 13<sup>th</sup> April 2016 to the Defendant. Further that the Defendant responded leading to a joint meeting to discuss the loan repayment. The Plaintiff prior to engaging Counsel, demanded for payment of the outstanding balance of **\$26,568.06** on numerous occasions both through phone as well as verbally and meetings were held twice at the Plaintiff's offices at which the defendant requested for time to come up with a feasible payment plan.

**2.3.3** It was further stated that the letter dated 5<sup>th</sup> May 2016 and the Plaintiff's demand letter are not privileged documents. Further that the debt was long overdue which debt was due for payment immediately the defendant harvested and sold the crop. It was stated that any funds/inputs that were advanced were recoverable within the same farming season the funding was received.

## **2.4 DEFENCE TO COUNTERCLAIM**

**2.4.1** The Plaintiff stated that no agreement was ever entered into with the Defendant as what was owed the previous season was not paid back. It was also stated that if any losses were

occasioned it was for the Defendant to bear the same. It was further stated that there was no communication whatsoever by the defendant to the Plaintiff of any alleged losses suffered.

**2.4.2** It was stated that during the 2013/2014 farming season, the Defendant borrowed the sum of **US\$7,888.00** from the Plaintiff out of which nothing was paid. Further that the said amount was carried forward into the 2014/2015 farming season. It was further stated that the Defendant again borrowed a sum of **US\$29,565.47**, during the 2014/2015 farming season, bringing the total amount owed to **US\$37,453.47** inclusive of the amount carried forward from the previous season. That out this total amount **US\$13,442.45** was paid to the Plaintiff through tobacco supplies leaving an outstanding balance of **US\$24,011.02**. That in the period 2015/2016, the Defendant again borrowed a sum of **US\$26,493.55** bringing the total outstanding sum to **US\$53,061.61** inclusive of the amount carried forward aforesaid from the previous season out of which it paid a sum of **US\$26,493.55** through tobacco supplies to the Plaintiff leaving an outstanding balance of **US\$26,568.06**.

### 3. TRIAL

**3.1 Daniel John Banda**, an accountant in the Plaintiff company, was the plaintiff's first witness (**PW1**). His evidence was to the effect

that the Plaintiff company was a merchant company that buys tobacco from farmer and sells to cigarette manufacturers through the Tobacco Board of Zambia floors. He further testified that the company also provides short term seasonal loans, recoverable at the end of the season when the tobacco was taken to the Plaintiff. He testified that he knew the Defendant company as they had approached the Plaintiff company for assistance to enable them meet their shortfalls in running of their farm in 2013. He testified that this was between August and September 2013. **PW1** further testified that the Defendant had approached the Managing Director of the Plaintiff who then conveyed this message to him. **PW1** testified that after their internal processes he met Mrs Candy Marandola from the Defendant Company to discuss the facility and the funds needed. He testified that **DW1** explained that she had prepared 5 hectares of land to grow the crop. However, she now just needed money for chemicals, fertilisers, flute pipes and wages. **PW1** stated that in this regard US\$12,700 was disbursed for the 2013/2014 farming season.

- 3.2** It was **PW1's** evidence that money was disbursed to **DW1** for the 2013/2014 season in the sum of \$12,700.00. Reference was made to statements exhibited at pages 1-6 and 27 of the Plaintiff's Bundle of Documents to show the disbursements. **PW1** stated that as at 30<sup>th</sup> April 2014, the Plaintiff company had disbursed about \$12,700.26 to the Defendant. **PW1** further testified that the defendant took to them tobacco amounting to \$13,442.45 which was auctioned through Tobacco Association of Zambia. It was



stated that Associated Tobacco bought the tobacco off the auction floor as was evidenced by the entry on the statement at page 6 of the Plaintiff's Bundle of Documents.

- 3.3** PW1 testified that after the auction of the tobacco, the Plaintiff company recovered its loan and the balance of \$742.19 was paid to the Defendant company. PW1 testified that the Defendant, having paid off its loan, then requested for another facility. That as the Plaintiff was happy with the performance of the Defendant in the previous season, the Plaintiff disbursed another loan of **US\$53,000.00** to DW1 for the 2014/2015 season. The said loan was in the form of chemicals, fertilisers and cash as reflected in the statement per pages 26 and 27 of the Plaintiff's Bundle of Documents. PW1 explained that in 2014 they disbursed US\$24,011.02. That this amount was carried over to 2015 resulting in a total of US\$53,061.61.
- 3.4** PW1 testified that the Defendant company was expected to generate tobacco valued over **\$53,061.61** and the excess would have been paid to her. However, the Defendant on took tobacco valued at **\$26,493.55** which was applied towards the loan amount leaving a balance of **\$26,568.06**. It was stated that the amount still remains outstanding.
- 3.5** PW1 testified that the Plaintiff had entered into an agreement with an agrochemical dealer, ATS, to enable the Defendant get chemicals. Reference was made to pages 3 and 6 of the Plaintiff's Bundle of Documents as proof of the disbursements that were

made to the Defendant. **PW1** pointed out that according to the invoices the Defendant obtained chemicals amounting to **ZMW6,182.56**. **PW1** also referred to invoices and payment vouchers in the Plaintiff's Bundle to show disbursements of **K1,638.04, ZMW 654.00, ZMW632.50 and K500**. He then cross-referenced the disbursements to entries on the statements.

**3.6** **PW1** testified that the agreement between the parties was seasonal finance payable each year with the tobacco that the Defendant would take to them. He stated that the facility was not long term. Also that the facility was revenue backed against the crop grown therefore it was not a capital based facility.

**3.7** **PW1** further testified that in 2015/2016 season he personally called Candy demanding for the balance to be paid. He stated that she went to his office in 2015 and explained that she had challenges with money but that she was trying to make efforts to raise the money through other businesses. **PW1** testified that some time in 2016 Candy requested that she be assisted to grow over 10 hectares of tobacco so that she could pay back the outstanding amount but that **PW1** rejected this request. **PW1** testified that when he visited Candy's office she initially stated that she would try and pay US\$1000 on a monthly basis, a proposal which was rejected. He stated that she then said should could only pay back US\$100 per month. **PW1** testified that it was after this meeting that a letter of demand was sent to the Defendant for the sum of US\$ 29,224.86, which included a 10% collection fee for the lawyers.

- 3.11 **PW1** clarified that the Plaintiff was in the business of buying tobacco and selling to the manufacturer.
- 3.12 **PW1** further confirmed that in the first year the Defendant produced 5 hectares of tobacco, and the same was used to pay back the loan advance. It was confirmed that a total of \$53,000.00 was given to raise crop on 10 hectares. **PW1** denied that the Plaintiff company carries out inspections. He also clarified that Mr McGregor's role was not that of a full-time agronomist. He stated that in relation to the Defendant his role was to visit farmers. **PW1** testified that his job was to monitor and collect money owed. **PW1** also stated that their interest was merely to collect the money from the sale of the tobacco on the auction floor. He also stated that no one went to monitor the crop. **PW1** further testified that the visit by Mr. McGregor was at the request of the Defendant, and **PW1** was not aware when it happened. He further stated that Mr McGregor had since left the Plaintiff company.
- 3.13 **PW1** also confirmed that it was his responsibility to disburse funds and not the managing director. The loan was not for capital nor was **PW1** aware of any agreement to refurbish the Defendant's land. **PW1** denied offering any consultancy services to the Defendant company and that Mr McGregor's role was to visit all the farmers to advise them on how to grow crops.
- 3.14 It was also confirmed by **PW1** that an agreement was entered into with ATS and OMNIA where the Plaintiff company was invoiced and they paid. The debt to OMNIA is still outstanding as per page

6 of the Plaintiff's Bundle of Documents and is claimed as it is still outstanding.

- 3.15 PW1** confirmed that ATC did not have a previous relationship with the Defendant and that there was no written agreement for the inputs. **PW1** denied that the agreement was for 3 years and that the letter in the Defendant's Bundle of Documents was not responded to by management.
- 3.16** In re-examination **PW1** clarified that the letter in the Defendant's Bundle of Documents was not responded to by management as it was addressed to a Mr Gavin Ross an individual and not the Plaintiff Company. It was further clarified that invoices (missing) a comprehensive statement would be prepared and paid off.
- 3.17 PW1** further clarified that tobacco goes through an auction process mandated by the Government through the Tabaco Association of Zambia and following a sale 3 invoices are issued. One goes to ATS and another one to the farmer. If the parties are happy full payment is made. Where a farmer is funded, part of the funding is then recovered and the difference is paid to the farmer. **PW1** further clarified that the agreement with OMNIA was that the Plaintiff would pay them once funds are recovered from the farmer.
- 3.18 PW1** also clarified that the agreement with the Defendant company was seasonal having demonstrated capability in the 2013/2014 season. The Plaintiff was a merchant company and did not supply consultancy to farmers.

- 3.19** McCloud Lebela Kapandila was the Plaintiff's second witness (**PW2**). He testified that in March 2019 while working for the Plaintiff company as an account's assistant, he got to know the Defendant as a tobacco supplier run by **DW1**. He testified that the Plaintiff was financing the Defendant company for growing of tobacco on a seasonal basis. **PW2** testified that he in charge of initiating payments under instruction from **PW1**.
- 3.20** **PW2** testified that upon instruction he would initiate payment in relation to the Defendant company either by cheque or cash. He stated that on one occasion he gave **DW1** cash and he issued a payment voucher as evidenced by the voucher exhibited at page 11 of the Plaintiff's Bundle of Documents. The cash was received by Clement, a manager in the Defendant company. He further testified that the payment voucher exhibited at page 12 of the Plaintiff's Bundle of Documents showed that **DW1** received and signed for money and was signed for by **PW2**. **PW2** went on to list payment vouchers he dealt with as exhibited in the Plaintiff's Bundle of Documents.
- 3.21** It was **PW2's** further testimony that the Plaintiff company financed the Defendant company on a seasonal basis. He stated that the expectation was that at the end of the season the sales would offset the debt owed.
- 3.22** In cross examination **PW2** confirmed that support was given to farmers. Further that the Plaintiff sold their tobacco and the payments were made to the farmers. **PW2** stated that ATS

provided inputs but did not know how its interests were secured, nor did he have knowledge of the agreement between the farmers and ATS. **PW2** further stated that following payments from the TAB, ATC had input before payments were made to the farmers.

**3.23** **PW2** confirmed that all vouchers were made to the Defendant and that **PW1** was in charge of the Defendant's account. He stated that **PW2** would receive verbal instructions from **PW1** when making payments. **PW2** further testified that Mr. McGregor was an agronomist, whose role was to visit farmers on behalf of ATS, monitoring what farmers were doing on behalf of the company.

**3.24** It was stated by **PW2** that the Defendant company had to pay OMNIA for fertiliser. He further stated that the Plaintiff company's representation ended on facilitating inputs. That upon payment being made to them they would pay out the excess to the farmers after recovering the loan. **PW2** testified he did not know what the agreement was between the Parties.

**3.25** In re-examination **PW2** clarified that when the Defendant company obtained inputs from Pmnia on credit. **PW2** confirmed that the Plaintiff paid the debt on behalf of the Defendant company to Omnia. **PW2** also clarified that Wildland was previously called Ivandale. He also confirmed that when a farmer brought tobacco it was sold on the sales floors at the Tobacco Association of Zambia. **PW2** further clarified that Mr McGregor was an employee of the Plaintiff company and his role was to inspect farmers and report on progress from the field.

- 3.26** Candy Paula Marandola was the first and only witness for the Defendant (**DW1**). She stated that she was the director in the Defendant Company. She also testified that on the advice of her neighbour, who was a customer of the Plaintiff, the Defendant engaged the Plaintiff in late 2013 when they decided to grow tobacco after a few years of practice. **DW1**, testified that she approached the Plaintiff company with a view of growing about two and a half hectares of the crop in order to get back into growing the crop. She testified that a verbal agreement was reached with Glen McGregor, an agronomist, towards October, 2013.
- 3.27** **DW1**, further testified that the Plaintiff company the Defendant all the inputs in the form of cash and chemicals, including whatever other support was needed to grow the tobacco crop. **DW1** testified that the in the first year the Defendant cleared the outgrower scheme. He stated that in the first year having farmed two and half hectares about, \$13,500.00 to \$14,000 was realised. **DW1** testified that the Plaintiff would give inputs for growing the crop. Further that the farmer supplies tobacco against the inputs. That once the inputs are paid off the Plaintiff pays the balance to the farmer.
- 3.28** **DW1** testified that after the first season she approached Mr Glen McGregor and it was agree that the Defendant would grow 8 to 10 hectares of tobacco and thereafter increase the area to 25 hectares in 3-4 years. It was suggested that the Defendant increase its number of barns, tractors and other inputs. She stated that on that

account the **DW1** and Mr McGregor agreed on a loan of \$50,000.00. **DW1** testified that there was no written agreement and everything was verbal. She further testified that despite her requests for a written contract from Glen McGregor and Gavin Ross none was ever forthcoming. She further stated that Mr McGregor visited her farm five to six times over two seasons.

- 3.30** **DW1** testified that when tobacco is sold at Tobacco Association of Zambia the revenue was sent to the Plaintiff company and not to the customer in this case the Defendant, and thereafter a balance if any is paid out to the farmer.
- 3.31** She stated that when she received a statement from the Plaintiff she was not worried about it as she had been assured by Mr Glen McGregor that the loan was expected to be paid back same over three to four years. She stated that the Defendant had not failed to pay back for the inputs. **DW1** stated that she had not been given a chance to pay back the loan as only one season had passed and she was supposed to have been given 3 seasons as agreed with Mr. McGregor.
- 3.32** In cross – examination **DW1** testified that she was supposed to be pay back in tobacco and not in cash. However, when referred to paragraph two of the defence she conceded that it was stated that payment would be made in cash. She testified that **PW1** used to give her either cheques or cash. It was **DW1**'s evidence that she did not fail to pay back the inputs, the issue was that the Defendant company was not given a chance as guaranteed by Mr



Glen McGregor. DW1 maintained that the Defendant company was to be given 3 seasons in which to pay back. She confirmed that the whole loan was paid back in 2013/2014. DW1 also confirmed that in the first season there was a balance.

- 3.33 In continued cross-examination DW1 denied that payment was to commence in the second season. DW1 confirmed that in the 2013/2014 farming season the full loan amount was paid back with tobacco and told the Court that in farming yields can be either good or bad and could not have managed to pay back the entire sum in one season owing to the hectarage.
- 3.34 According to DW1 there was too much rain in 2014/2015 which affected the crop and low yield, but no evidence of this was before the Court. DW1 stated that she only spoke to Mr. McGregor in coming to the funding arrangements. DW1 stated that she frequently followed up the issues of inputs and cash with the Plaintiff. At the end of the 2014/2015 DW1 was informed of a balance brought forward for the next season. The reason for the non-payment of the inputs was poor funds.
- 3.35 DW1 confirmed that she was not informed that funding would stop on account of balance, and that she should have been given time to pay in seasons as per the agreement. DW1 further confirmed that numerous calls were made demanding for payment of outstanding balance. DW1 could not recall receiving a letter of demand from the Plaintiff's lawyers.

3.36 DW1 further confirmed that she engaged the Plaintiff so that they could repay the money. DW1 also confirmed that the Defendant benefited from the services of Hazida. She stated that without tractors DW1 would have not managed to raise the crop. DW1 confirmed there was evidence of money that was expended on behalf of the Plaintiff. DW1 stated that she had no personal experience growing tobacco but the Defendant company had. DW1 had no receipts for the purchase of fuel for land preparation nor proof of payment of any land preparations.

3.37 DW1 testified that she had no statutory returns before Court and that this was never requested for by Mr McGregor. DW1 told the Court that PW1 never told her the financing was seasonal and not long term.

3.38 In re-examination, DW1 clarified that OMNIA was to be paid by the Plaintiff company and this was not dependant on repayments with tobacco. She further stated that she did not know Sunday Siame who received the letter of demand and maintained that she never received it.

#### 4. SUBMISSIONS

4.1 The Plaintiff began by stating that it bears the burden to prove the claims herein on a balance of probabilities as per the cases of Miller v Minister of Pensions <sup>(1)</sup> and J.Z Car Hire Limited v Malvin Chala and Scirocco Enterprises Limited <sup>(2)</sup>. Thereafter, the definition of "contract" was provided as per the learned authors of Black's Law Dictionary <sup>(1)</sup> and Chitty on Contract

**General Principles** <sup>(2)</sup>. It was submitted that there was an enforceable agreement which existed between the Plaintiff and the Defendant notwithstanding the fact that it was not reduced into writing. It was further submitted that the Plaintiff and Defendant had a mutual understanding that the Plaintiff would finance the procurement of various tobacco farming inputs on credit to the Defendant. Also that the Defendant would pay back the total cost of the tobacco farming inputs and money borrowed from the Plaintiff after harvesting and selling the tobacco crop at the end of the farming season.

- 4.2 Reference was made to the case of **Pangaea Renaissance Securities Limited v Lilayi Development Limited** <sup>(3)</sup> where the Court held that:

*"But it is not in all circumstances that an agreement or contract must always be in writing. In determining the existence or otherwise of an agreement where there is nothing in writing, the Court has to look at the facts of each case, and in particular, the conduct of and correspondence exchanged between the parties and arrive at an appropriate inference."*

- 4.3 It was also submitted that the Defendant did not dispute that an oral contract was entered into and that it accessed finance to procure tobacco farming inputs which were supplied to it. The Defendant has not disputed that it borrowed some money from the Plaintiff on the understanding that it would pay back the total cost. Further, that the money borrowed by the Defendant were

evidenced by the various payment vouchers exhibited in the Plaintiff's bundle of documents of which the Defendant signed in acknowledging receipt of funds from the Plaintiff.

- 4.4 Reference was made to the learned authors of **Chitty on Contracts General Principles** <sup>(3)</sup>, paragraph 24-32 that:

*"The general rule is where one party failed to perform a promise which went to the whole of the consideration, the other party was released from performance as the former had not performed that which was a condition precedent to the latter's liability".*

- 4.5 The Plaintiff availed a summary of all transactions on finances accessed by or expended to the benefit of the Defendant.
- 4.6 In relation to the counterclaim it was submitted that according to the pleadings the Plaintiff was under no subsequent obligation to further avail cash advance for farming inputs to the Defendant as there was no mutual understanding between the Plaintiff and Defendant to do so. The agreement to provide financing was seasonal and not long term.
- 4.7 It was further submitted that the Defendant was still owing the Plaintiff for the cash advance availed in the previous seasons and had failed to pay back. It was submitted that the Plaintiff could not continue lending to a defaulter. The Plaintiff submitted that on the strength of the case of **J.Z Car Hire Limited v. Malvin Chala and Scirocco Enterprises Limited** <sup>(2)</sup>, the Defendant's counterclaims

were baseless because it has failed to prove any damage suffered and the loss of opportunity for profit.

4.8 It was also submitted that as a general rule '*without prejudice*' correspondence is inadmissible. The exception to this general rule was echoed in the case of **Lusaka West Development Company Limited and others v Turnkey Properties Limited**<sup>(4)</sup> and that the letter alluded to in the pleadings was not produced at trial. The proposal to settle the debt in monthly instalments of **USD100.00** fell within the ambit of the exception set out in the **Turnkey Properties Limited**<sup>(4)</sup> case as such, the Plaintiff was within its legal right to refer to the proposal for settlement.

4.9 The gist of the Defendant's submissions was that the Plaintiff's claim was for a liquidated claim or sum arising out of alleged loss and damage due to the Defendant's alleged undue delay and failure to settle a debt claimed. Further that it was based on a verbal Agreement between the parties according to the Plaintiff's position. That while the Defendant did not dispute that there was in fact a verbal agreement between the parties, it was the Defendant's contention that the arrangement was varied and/or breached by the Plaintiff when they did not fulfil their obligations to advance inputs and/or technical advice within a timely and orderly fashion or at all.

4.10 It was further submitted that despite the apparent breach of the contractual obligations the Plaintiff unilaterally elected to endeavour to seek the total repayment of the monetary equivalent

Bank Zambia Limited<sup>(7)</sup> for this proposition on the quantification of liquidated damages.

4.18 It was also submitted that the Plaintiff did not substantiate the liquidated claim for damages and it would appear that the Plaintiff simply elected an arbitrary figure without explanation, calculation or justification. It was further submitted that the Plaintiff ought to produce evidence before the Court to prove that they are entitled to their claim. Further that by not doing so it would amount to unjust enrichment on the part of the Plaintiff, as the quantum claimed would not be substantiated in evidence or at law. Refuge was found in the case of Workers Compensation Fund Control Board v Chaplin Sawono<sup>(8)</sup>.

4.19 The Defendant submitted that any damages sought must be proven by the Plaintiff. It was argued that the documentary evidence in the Plaintiff's Bundle of Documents does not provide substantive evidence of proof to maintain or uphold the sum claimed by the Plaintiff in the sum of or about **US\$26,586.06**. It was further argued that a review of the contents and nature of the Plaintiff's Bundle of Documents, which reveals that the Plaintiff's claim has been set out in United States Dollars for some yet the vast majority of the contents in the Bundle of Documents, are set out in Zambian Kwacha and the premise and rate of exchange for computation is not clear. It was submitted that a perusal of page 28 of the Plaintiff's Bundle of Documents or evidence showed a Statement in the name of a customer called McGregor, who is not

a party to these proceedings, and that the document had no probative or evidential value to connect the Defendant to this Statement and/or substantiate the Plaintiff's claim against the Defendant. Further that at page 32 of the Plaintiff's Bundle of Documents there appears to be a receipt from Hazida Motors Limited for a Kwacha payment made by the Plaintiff. In addition that the same could be seen on page 33 of the Plaintiff's purported Bundle of Documents and other discrepancies could be seen on Pages 35 and 38 of the Plaintiff's purported Bundle of Documents.

4.20 Reference was made to the case of **Penelope Chishimba Chipasha Mambwe and Millington Collins Mambwe** <sup>(9)</sup> wherein it was stated that:

*"We have stated that, with the fundamental common law principles of stare decisis and judicial precedent, in an environment such as ours which replete with both binding and persuasive case authorities of superior Courts".*

4.21 The Defendant submitted that some of the authorities cited by the Plaintiff were misconceived and simply had no binding precedent on these proceedings under doctrine of stare decisis and serve no probative value or purpose to these proceedings.

4.22 In relation to costs the Defendant relied on the case of **Herman Josef Kibler v Apollo Agricultural Holdings Limited** <sup>(10)</sup>. The Defendant sought an Order to strike out the Plaintiff's claim for failure to substantiate their claim with any particularity in either

their pleadings and/or to produce any real evidence before the Court with costs.

4.23 In relation to the counterclaim it was submitted that under common law, damages for breach of contract will only be recoverable, if they are not too remote. It was stated that this is a question of foreseeability as per the case of Hadley v Baxendale<sup>(11)</sup> as affirmed in the case of Ndola Energy Company Limited v Lamamuda Limited<sup>(12)</sup>. It was submitted that the Plaintiff failed or neglected to honour its obligations to provide inputs, technical support and finance the Defendant, as agreed between the parties. That in such circumstances, it would be in the ordinary course of things to contend that any losses and/or damages arose from the failure by the Plaintiff to honour its obligations. Further, that the Plaintiff breached its obligations in part or full to the Defendant to provide the agreed quantity of inputs, finance and/or technical support at the required times and for the period agreed and therefore, as a direct consequence the Defendant suffered the loss and/or damages as claimed in its pleadings and thus sought an order to this effect whose quantum should be established by means of assessment.

## 5. LAW

5.1 As is the case in all matters brought before the court, the legal burden of proving a case lies on the party that affirmatively asserts the fact in issue. Simply put if you bring a case to court you are the person to prove the allegations. At pages 89 and 90 of Murphy



on Evidence <sup>(4)</sup> the following is stated in relation to the burden of proof:

*"The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential... if the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes) referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiffs claim"*

- 5.2 The dispute herein is a factual one relating to a debt emanating from an oral contract. Chitty on Contracts <sup>(2)</sup>, Volume 1 at page 1257 defines a "debt" as;

*"A debt is a definite sum of money fixed by the agreement of the parties and payable by one party in return for the performance of a specified obligation by the other party or on the occurrence of some specified event or condition the claimant who claims payment of a debt need not prove anything more than his*

*performance or the occurrence of the event or condition, there is no need for him to prove any actual loss suffered by him as a result of the defendant's failure to pay...."*

5.6 Further, the learned author of Law of Contract <sup>(5)</sup>, at page 1, paragraph 1-001 states that:

*"A contract is an agreement giving rise to obligations, which are enforced or recognized by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties...."*

5.7 Further, a contract can be either written or oral. One of the first and most important questions in relation to an oral contract is whether or not an agreement had been reached by the parties. In the case of Brian Royle Maggs t/a BM Builders (A firm) v Guy Anthony Stayner Marsh <sup>(13)</sup>, the Court held that:

*"Determining the terms of an oral contract is a question of fact. Establishing the facts will usually as here, depend upon the recollections of the parties and other witnesses"*

5.8 The relevant principles in relation to whether or not an oral contract is valid are the same with any contract. It was stated in Essential Contract Law <sup>(6)</sup> at page 27 that:

*"A valid contract is a contract that the law will enforce and create legal rights and obligations. A contract valid ab initio (from the beginning) contains all the three essential elements of*

*formation: Agreement (offer and acceptance). Intention (to be bound by the agreement). Consideration (for example, the promise to pay for goods or services received."*

- 5.9 In the case of **The Rating Valuation Consortium, D.W. Zyambo & Associates (Suing as a firm) vs. Lusaka City Council, Zambia National Tender Board**<sup>(14)</sup> it was held that:

*"The approach of analyzing the process of reaching business relationships in simplistic terms of offer and acceptance, gives rise to complications. What is required is for the Court to discern the clear intention of the parties to create a legally binding agreement between the parties as a whole".*

- 5.10 In the case of **D.P. Services Limited vs. Municipality of Kabwe**<sup>(15)</sup> it was held that:

*"assuming that no express contract ever existed the only inference that can reasonably be drawn from the circumstances of this case is that, there must have been, at any rate an implied contract to pay for services to be rendered."*

- 5.11 In the case of **Kasengele v. Zambia National Commercial Bank Limited**<sup>(16)</sup>, the Supreme Court held that inability to pay has never been and is not a defence to a claim and neither is it a bar to entering judgment in favour of a successful litigant. The learned authors of **Chitty on Contracts**<sup>(7)</sup> at page 180 paragraph 1147 stated that:

*“The Courts have also been sensitive to the fact that non-enforcement may also result in unjust enrichment to the party who has not performed his part of the bargain but who has benefited from the performance of the other party.”*

5.12 Further, in the case of Base Chemicals Zambia Limited, Mazzonites Limited vs. Zambia Air Force and The Attorney General<sup>(17)</sup> it was held that:

*“although there was no binding contract between the parties, the appellants were entitled to damages on a quantum meruit basis.”*

5.13 Now one of the claims in this matter is that there has been a breach of a contract. It is commonplace that breach of contract gives rise to damages. The it is stated at page 828 paragraph 17-049 of Law of Contract<sup>(5)</sup> that:

*“A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, or performs defectively or incapacitates himself from performing. A breach of contract may entitle the injured party to claim damages.”*

5.14 In relation to claims for interest Section 4 of the Law Reforms (Miscellaneous Provisions) Act, states that:

*“In any proceedings tried in any Court of record for recovery of any debt or damages the Court may, if it thinks fit, order that there shall be included in the sum for which Judgment is given interest at such rate as it thinks fit on the whole or any part of*

*the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of Judgment"*

- 5.15 In the case of Zambian Breweries Plc v Lameck Sakala <sup>(18)</sup>, the Supreme Court held *inter alia* that:

*"...As to the rate of interest, and the effective date, the standard practice on debts, is to award interest on the sum owing, at the average short term bank deposit rate, from the date of issue of the writ of summons to the date of Judgment. This is pursuant to Order 36, Rule 8 of the High Court Rules. Thereafter up to the date of settlement, interest is awarded at the current lending rate, as determined by the Bank of Zambia. This is pursuant to Section 2 of the Judgments Act, CAP 81."*

- 5.16 In relation to what ought to constitute a counterclaim, it is worth noting the case of William David White v E F Hervey <sup>(19)</sup>, where the Court observed the status of a counter claim as follows:

*"A further suggestion was that all the claims in the counter claim can be supported by an agreement between the parties. Here again it is an elementary rule of pleading that an agreement must be specifically pleaded. What emerges from all this is that the counter claim as it stands is undoubtedly a bad pleading which neither fulfils the objects of pleading nor discloses any cause, or causes of action in the sense that a factual situation is alleged which contains facts upon which the defendant can attack liability to the plaintiff or upon which he can establish a*

8.2 Now it is not in dispute that there was an oral agreement between the parties for the supply of inputs and provision of cash by the Plaintiff to the Defendant. It is also not in dispute that the Defendant paid back the loan from the Plaintiff in the first season. Problems seemed to have started at the end of the second season. According to the evidence of **DW1** the season had been bad and her company could not have been in a position to pay back the loan from the Plaintiff. Also in her understanding the loan from the Plaintiff was repayable over a period of three seasons rather than at the end of each season. Premised on this understanding the Defendant launched a counterclaim, as she believed she was entitled to be supplied with inputs and cash for three seasons even when she had not repaid what was loaned to her in a previous season. Regrettably there was no written contract between the parties, therefore the terms of the agreement between them could only be inferred from their conduct. From the evidence of **PW1** in the 2013/2014 farming season the Plaintiff, having been requested by the Defendant, disbursed inputs worth **US\$12,700**. That in that season the Defendant delivered tobacco amounting to **US\$13,442.45**, the surplus having been paid to the Defendant. The further evidence provided by **PW1** was that in the 2014/2015 season a further disbursement of **US\$53,000** was made to the Defendant. At the end of that season the Defendant only paid back **US\$ 26,493.55** leaving a balance of **US\$26,568.06** as the outstanding balance. The evidence of the disbursements and repayments was confirmed by the **DW1** except for the quantum in

her evidence actually tried to explain away why she was unable to make a full repayment in the 2014/2015 farming season owing to the excessive rainfall that was experienced that season. From the conduct of the parties it was clear that the expectation between the parties was that the loan repayments were supposed to be paid back at the end of the season after the season's crop of tobacco had been sold. Therefore, failure by the Defendant to pay this amount was clearly in breach of the express or implied term of the oral agreement between the parties. By conduct, the Defendant had acquiesced to this term. As stated above the conduct of the Defendant in submitting her produce, especially in the first season, where the excess of the sale was remitted to her is a clear indication that the Defendant was aware of this season to season arrangement. Further, DW1 also explained that she was unable to repay the full amount owing to unfavourable weather. If she was unaware of the requirement for her to make repayments at the end of every season, she would not have tried to explain away her failure to do so in the 2014/2015 season. In view of the foregoing I find on a balance of probabilities that the Plaintiff has demonstrated its claim against the Defendant for the payment of the outstanding sum of **US\$26,568.06**, being due in respect of various farming inputs obtained and monies borrowed. In addition the claim for interest and costs equally succeed.

- 8.3** In relation to the counterclaim, which was premised on the failure by the Plaintiff to deliver inputs to the Defendant in the 2015/2016 farming season, the evidence of the **DW1** was that the

understanding was that the loan was supposed to be paid back over a period of three seasons. DW1's assertions were based on conversations DW1 claimed she had with an agronomist, Mr. McGregor, who was employed by the Plaintiff.

- 8.4 As a general rule a party who has acted improperly or in bad faith cannot seek equitable relief from a court. If a party is in breach of a contract due to their own wrongdoing or failure to fulfill their obligations, a court may refuse to enforce the contract or limit the remedies available to that party.
- 8.5 As it has already been found that the agreement was for seasonal payments and the arguments by the Defendant cannot be sustained. There is no basis to make a finding for liability on the part of the Plaintiff. It has been admitted by the Defendant that they were owing the Plaintiff money. Further, the Defendant has tried to explain away the breach by stating firstly that 2014/2015 season was a bad season owing to weather and also that they had considered that the loan was only due for repayment at the end of three or four seasons. Clearly, the Defendant was the one in initial breach of the contract. Seeking the remedy of damages in this case cannot be justified as they are coming to equity with soiled hands. Furthermore, the Defendant, other than stating that it has suffered losses, there is no demonstration in the way of evidence what this loss was and the extent of it. It is trite that in a claim for damages there ought to be a clear demonstration of the damage caused. Mere assertions of loss and damage can not give rise to a claim for damages being sustained. In view of the foregoing the



counterclaim by the Defendant fails in total and is accordingly dismissed.

9. VERDICT

9.1 In view of the finding that the claim by the Plaintiff succeeds the following is ordered:

- i) The Defendant pay the outstanding sum of US\$ 26,568.06 being due in respect of various farming inputs obtained and monies borrowed by the Defendant from the Plaintiff at the Defendant's own request and instance.
- ii) The judgment sum be paid with interest at the current lending rate as determined by the Bank of Zambia from the time of judgment until the same is satisfied.
- iii) Costs are ordered for the Plaintiff to be taxed if not agreed upon.

Dated at Lusaka this 25<sup>th</sup> day of April 2024.



C. LOMBE PHIRI  
JUDGE