

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

2021/HP/043

B E T W E E N

FELOPATER ZAMBIA LIMITED



PLAINTIFF

AND

UNION GOLD ZAMBIA LIMITED

DEFENDANT

**BEFORE HON. MRS. JUSTICE S. M. WANJELANI IN CHAMBERS
ON 24TH MAY, 2024.**

For the Plaintiff: R Nyirenda, Messrs Ferd Jere and Company

*For the Defendant: J. R Mutemi, Messrs Theotis Mutemi Legal
Practitioners*

JUDGMENT

Cases referred to:

- 1. Tijem Enterprises Limited v Children International Zambia Limited [2011] 1 ZR 75*
- 2. Febian Musialele v. Evans Chipman (2011) ZR Vol.2.*
- 3. Rating Valuation Consortium and Another v Lusaka City Council and Another (2004) Z.R. 109*
- 4. Sakiza Spinning Limited v Weave Plastics Industries Limited, Appeal No 113 of 2022*
- 5. Investrust Bank v Ibrahim Diab, Appeal No. 197/2016*

6. *The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) Vs the Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109 (S.C.)*
7. *Daniel Peyala v Zambia Consolidated Copper Mines, SCZ Appeal No.21 of 2012*
8. *Leslie Chikuse v Jeremy Bakangaba Tshinkobo CAZ Appeal No. 21 of 2020*

Materials referred to:

1. Edwin Peel - *Treitel the Law of Contract*, 14th Edition, Sweet and Maxwell (2015)
2. G. G. Beale et al, *Chitty on Contract; General Principles*, 32nd Edition; Sweet and Maxwell
3. *Halsbury's Volume 22*, 5th Edition

1.0 INTRODUCTION

1.1 This Matter was commenced on 19th January, 2021, by way of Writ of Summons and Statement of Claim wherein the Plaintiff seeks reliefs from the Defendant couched as follows:

1.1.1 *Damages for breach of contract;*

1.1.2 *USD12,000 as compensation for the loss of earnings of Commission;*

1.1.3 *In the alternative, USD10,000 as Professional Charges;*

1.1.4 *Interest on sums due;*

1.1.5 *Costs; and*

1.1.6 *Any other reliefs the court may deem fit.*

sum of USD12,000.00, in Professional Charges and that consequently the Plaintiff has suffered loss and damages

- 2.4 In its Defence, the Defendant stated that it was in the public knowledge that it was constructing Bonanza Hotel in Lusaka and that Mr. William Rezk, a Director in the Plaintiff Company, proposed to introduce the Defendant's representatives to various companies in the business of supplying goods that the Defendant needed to furnish the Hotel.
- 2.5 It was averred that in furtherance of the said proposal, a Meeting took place on or about 10th April, 2019, during which Mr. Rezk introduced the Defendant's Directors, Frangeskides Peter and Christopher O'Donnell, to Mahmoud Galal, a representative from Oriental Weavers Company in Egypt. It was stated that the purpose of the Meeting was to merely establish if Oriental Weavers could supply the standard and quality of carpets required by the Defendant, therefore, Mr Mahmoud Galal took samples of carpets to the Meeting.
- 2.6 The Defendant stated that it was not satisfied with the carpet samples, in terms of coloration and design, thus it was stated that the Defendant was to pick its own specifications to include the colours and designs of the carpets and Oriental Weavers would proceed to manufacture carpet samples in line with the said specifications.

- 2.7 The Defendant stated that it was discussed that the Defendant could proceed to make an order for the carpets if Oriental Weavers produced standard and quality samples that were approved by the Defendant and the Architects of the Hotel, at an acceptable price and in a timely fashion to meet the construction time line of the Hotel.
- 2.8 It was averred that following that Meeting, Mr Rezk proposed that he and the Defendant's representatives travel to Egypt for purposes of introducing them to Oriental Weavers in Egypt and other suppliers and that Mr Rezk's travel expenses, accommodation and all other expenses relating to the trip were paid for by the Defendant.
- 2.9 It was vied that the Defendant's representatives Frangeskides Peter, Abhijit Menon, and Naomi Robinson travelled to Egypt with Mr Rezk in or about June, 2019, and that whilst in Egypt, Mr Rezk introduced the Defendant's representative to Oriental Weavers, who stated that the carpet samples were to be manufactured in Egypt and sent to the Defendant as was discussed at the Meeting held on or about 10th April, 2019.
- 2.10 The Defendant alleged that it did not enter into any verbal agreement with the Plaintiff and has never engaged it to secure suppliers in consideration of the earning 20%

Commission from the suppliers, upon the Defendant purchasing the goods.

- 2.11 It was stated that the Defendant was not aware of or privy to any agreement between the Plaintiff and the suppliers that the Plaintiff was to be paid Commission upon the Defendant purchasing the goods and further that the Plaintiff and the suppliers were communicating in a foreign language thus the Defendant's representatives did not understand much of what was said.
- 2.12 The Defendant also stated that no samples were approved from Oriental Weavers by Christopher O'Donnell and Naomi Robinson and that as at February, 2020, more than 10 months later, Oriental Weavers stated that it was faced with a heavy workload hence the delay.
- 2.13 That consequently, the Defendant decided to engage another company to supply the carpets and verbally informed Oriental Weavers of its decision.
- 2.14 Further, the Defendant stated that it was not supplied mirrors and glasses by Dr Aigh and that it did not make any order to purchase goods from Oriental Weavers as they did not manufacture the required carpet samples.
- 2.15 In conclusion, Defendant denied entering into any agreement with the Plaintiff and that it has never engaged the Plaintiff to be its agent for purposes of securing suppliers. That consequently, it is not liable to pay Commission or any Professional Charges to the Plaintiff,

let alone, owe the Plaintiff any sum of money as a result of the alleged breach.

3.0 **THE HEARING**

- 3.1 **Antony William Rezk** (PW), a Director in the Plaintiff Company, filed a Witness Statement in which he stated that the Plaintiff is and has always been in the business of general trading, dealing with tiles, carpets, sanitary wears, glasses and building material.
- 3.2 He stated that sometime in 2019, the Defendant, through its Director, approached the Plaintiff informing the Plaintiff that they were building a big hotel at a place called Bonanza near the Airport, and therefore needed building materials. He vied that the Defendant, with the full knowledge of the Plaintiff's business and expertise, engaged the Plaintiff to secure reputable suppliers from Egypt who had suitable supplier advantages in price and quality because Egypt is part of the COMESA and has faster trade routes with China.
- 3.3 PW explained that at this point, the agreement was that the Plaintiff would get its Commission from the supplier. He stated that following this, the Defendant's agents, Peter, Naomi, Abhijit and himself travelled to Egypt where the Plaintiff had secured the building materials.
- 3.4 PW stated that after successful negotiations and customization on the quality, as well as specification of the materials needed, he proceeded to facilitate the making of

diverse samples which were approved by the Defendant. He vied that following this, he engaged various suppliers to supply the materials as selected and approved by the Defendant, and two containers of glasses were loaded to the Defendant for the same project and that the same was delivered through DHL.

- 3.5 PW added that the business transactions were going on well and the Plaintiff was involved in the transactions between the Defendant and the suppliers at all times and to this end, he referred to pages 1-36 of the Plaintiff's Bundle of Documents, showing correspondence between the Plaintiff, Defendant and the suppliers.
- 3.6 PW averred that the problem arose when the Defendant decided to start by-passing the Plaintiff Company by not sharing information concerning the transaction. He added that once he discovered this, he immediately informed the Defendant of his disappointment regarding the issue and that he would protect the interests and rights of the Plaintiff.
- 3.7 In addition, PW stated that the Defendant made another attempt to by-pass the Plaintiff with regards to a separate transaction which the Defendant's Director acknowledged after confrontation and he also expressed his disappointment regarding the issue as this was contrary to the agreement. PW referred to page 40 of the Plaintiff's

Bundle of Documents which he stated shows the Director of the Defendant Company's response on the issue.

- 3.8 PW went further to state that following this, sometime in January, 2020, he wrote a reminder to the Defendant concerning the delay of the Orders, which reminder is appearing at page 41 of the Plaintiff's Bundle of Documents. He added that at this point, the Defendant would inconsistently copy him in the emails regarding the transactions with the supplier.
- 3.9 He explained that the Defendant had, however, selected the preferred material that they needed and instructed the supplier to proceed and facilitate the same to be delivered as per pages 77-79 of the Plaintiff's Bundle of Documents, where the emails containing these instructions are appearing.
- 3.10 He stated that the suppliers took note of the instructions and proceeded to act accordingly and that the suppliers worked on all that was needed by the Defendant and were ready for delivery. But that due to miscommunication within the Defendant's Company, the Defendant could not decide on what exactly it wanted leading to the delay as this confused the supplier. The Witness referred to pages 160-166 of the Plaintiff's Bundle of Documents where he stated that the miscommunication was brought to the Defendant's attention.

- 3.11 He averred that what was shocking was that on, 25th February, 2020, at 3:25 PM, the Defendant, through Christopher O' Donnell, decided to cancel the contract on the basis of the delay caused by their confusion and that on the same day and exactly a minute late at 3:26 PM, one Vicky Koopman wrote to the suppliers confirming the orders and instructing that the same be sent. The emails are appearing on pages 168-174 of the Plaintiff's Bundle of Documents.
- 3.12 He averred that the supplier communicated to all the Parties involved that the materials were already sent and would be ready for pickup on the 27th February, 2020, at 7:30 PM but that there was no response to this email.
- 3.13 PW averred that the Defendant had no right to cancel the contract as the delay was caused by its own confusion whilst the suppliers had already met their end of the deal in delivering the goods and that this resulted in the Plaintiff losing a USD 20,000.00, Commission from the suppliers. He added that the Defendant has also refused to pay the Plaintiff the sum of USD 12,000.00, in Professional Charges which the former had agreed to.
- 3.14 In cross-examination, PW stated that he is Director of the Plaintiff; is involved in the day to day running of the Company; was the principal person dealing with the Defendant; and that he was approached by the Defendant sometime in 2019.

- 3.15 He responded that prior to the transaction, the Defendant had not had any business with the Plaintiff and that the Defendant informed him that they needed building materials. He testified that the Defendant engaged the Plaintiff to secure reputable suppliers from Egypt but that he did not have the terms of engagement before Court as it was all verbal.
- 3.16 PW explained that the Plaintiff is involved in general trading and sourcing suppliers from Egypt to businesses in Zambia and that this comprises 50% of the Plaintiff's business. He stated that he was approached by Peter and added that if the Defendant had entered into a contract with a supplier, the beneficiary of the money would have been the supplier, with his consent.
- 3.17 He added that it was agreed that he would get Commission from the supplier. He disclosed that he did not get the Defendant to sign a Non-Disclosure Agreement or any agreement to stop the Defendant from communicating with the supplier directly.
- 3.18 PW told the Court that the Defendant asked him to accompany them to Egypt and paid for his trip and accommodation while he catered for his meals. He said that whilst in Egypt, he introduced the Defendant to some suppliers and that the Defendant did not find its own suppliers. He stated that they were in Egypt for 5 days.

- 3.19 In re-examination, PW stated that his agreement with the Defendant was verbal and that he did not sign a Non-Disclosure Agreement.
- 3.20 The First Defendant Witness was **Christopher O' Donnell** (DW1) who according to his Witness Statement, is a Director in Union Gold Zambia Limited, the Defendant herein. He stated that sometime in 2019, the Plaintiff and the Defendant engaged in discussions during which, the Plaintiff's Director, Anthony William Rezk (PW) proposed to introduce the Defendant's representatives to various companies in the business of supplying goods that the Defendant needed to furnish the Hotel.
- 3.21 DW1 added that during the discussions, there was no agreement, verbal or otherwise, between the Parties to the effect that the Plaintiff was being engaged as the Defendant's agent to secure suppliers of the goods that the Defendant needed to furnish the Hotel or that the Plaintiff would be paid a Commission to secure said suppliers.
- 3.22 DW1 averred that subsequent to the proposal made by the Plaintiff, a Meeting was convened on 10th April, 2019, attended by himself, Mr. Peter Frangeskides (the Defendant's Directors), Mr. Mahmoud Galal, a representative from Oriental Weavers in Egypt and PW (Mr. Rezk) on behalf of the Plaintiff. He stated that during the Meeting, PW introduced them to Mr. Mahmoud Galal of Oriental Weavers as potential suppliers.

- 3.23 DW1 said that the purpose of the Meeting was to merely establish if Oriental Weavers could supply the standard and quality of carpets required by the Defendant. He vied that in this regard, Mr. Mahmoud Galal brought samples of carpets to the Meeting, but the Defendant was not satisfied with their coloration and design. That further to the above, the Defendant, suggested that it would pick its own specifications to include colours and designs of the carpets after which Oriental Weavers would proceed to manufacture carpet samples in line with the said specifications.
- 3.24 He averred that the Defendant had also engaged a professional Interior Designer to design the carpets it required and their Designer was equally not satisfied with the samples provided by Oriental Weavers. DW asserted that after the Meeting, Oriental Weavers requested that the Defendant share the CAD Drawings so that it could start work on quantifications, seeming diagrams and flood in plans for all areas, which would help them send the best quote they could offer. The Witness referred to page 1 of the Defendant's Bundle of Documents.
- 3.25 DW1 added that the Defendant continued discussing colour pallets for the carpets, designs and other carpet specifications with Oriental Weaver and that all negotiations on the quality, specification and customisation of the carpets needed by the Defendant

from Oriental Weavers were done by it. He added that at no point did the Plaintiff or its representative, PW, negotiate on the quality, specification and customisation of the carpets.

3.26 He vied that subsequent to the Meeting of 10th April 2019, Mr. Rezk requested that the representatives of the Defendant and himself travel to Egypt for purposes of introducing them to Oriental Weavers in Egypt and other Suppliers. He stated that the Defendant was not averse to this proposal because Egypt is a manufacturing hub with global supply chains. He said that in pursuance of this request, the Defendant paid for Mr. Rezk's travel expenses, accommodation and all other expenses related to the trip.

3.27 DW1 averred that the Plaintiff and the suppliers continued discussing carpet designs, colours, and other carpet specifications but no carpet sample was ever manufactured and approved by the Defendant either through himself or any Director of the Defendant as late as February, 2020. DW1 referred to the email correspondences between the Defendant and Oriental Weavers at pages 20 to 90 of the Plaintiff's Bundle of Documents.

3.28 DW1 also stated that Oriental Weavers delayed in manufacturing carpet samples contrary to agreed timelines and that on 25th February, 2020, he emailed them to follow up on the carpet sample and emphasized

their need to promptly make progress on the samples so that the Defendant could place an order.

3.29 He added that Mr. Mostafa from Oriental Weavers responded to the email and stated that Oriental Weavers had put the samples on the machine already and attributed the delays due to heavy workload. DW1vied that notwithstanding the warning, Oriental Weavers failed to manufacture the carpet samples for the Defendant's approval on time and no sample was received or approved by the Defendant on 25th February, 2020.

3.30 He contended that the approval of the samples preceded any order that the Defendant would have made and because Oriental Weavers did not avail them with any samples, the Defendant did not make any orders to purchase any goods from them.

3.31 He also stated that as a result of the delay by Oriental Weavers, the Defendant aborted discussions with them and advised them that the Defendant was not prepared to move forward and requested them to stop work immediately.

3.32 He reiterated that the Defendant did not enter into any agreement with the Plaintiff for Professional Charges nor was it aware of or privy to any agreement between the Plaintiff and the suppliers. He restated that the Defendant never engaged the Plaintiff to be its agent for purposes of securing suppliers for the goods it needed to furnish the

Hotel and thus it is not liable for any alleged loss or damage.

- 3.33 DW1 concluded by stating that the Defendant does not owe the Plaintiff any sum of money and further that the Plaintiff has not suffered any loss or damage, and not entitled to the reliefs claimed in the Statement of claim.
- 3.34 In cross-examination, DW1 testified that the Plaintiff through Mr Rezk (PW) introduced him to Oriental Weavers and that he believed that it was Mr Rezk, a representative of Oriental Weavers who made the invitation to visit their factory.
- 3.35 He stated that there was one other project with the Plaintiff which was successful and that the Defendant purchased two containers of glass from the Plaintiff. DW1 said that they sent a large team to Egypt and that the Plaintiff was regarded as supplier. DW1 responded that he never at any point discussed the issue of Commission with the Plaintiff. He averred that they believed that the Plaintiff was a supplier as demonstrated by the supply of two containers of shower glasses and wondered how a supplier could charge Commission.
- 3.36 He also stated that the miscommunication was because Oriental Weavers thought they were designing a carpet for the bedrooms when there were two types required. He also added that Vicky was an employee of the Interior Design

Company that was contracted by the Defendant to come up with the design for the Hotel.

- 3.37 When asked if it is the Defendant that changed the colour three weeks before the order could be made, he responded that there was a change in orientation. DW1 stated that there was no order cancelled and that he had never seen any samples. He responded that if the transaction had gone through, they would have taken out the order through the Plaintiff who was being introduced as agent.
- 3.38 In re-examination, DW1 stated that confusion arose from Oriental Weavers who wanted to go back to design after two months of discussion and that they were not aware of the two designs two weeks before the email. He stated that he sent an email to Oriental Weavers following up on the carpet sample and they replied that it was in progress and that a week later, they sent an email that the sample was on the machine. He added that a week earlier they had been told a similar story and so they could not tell if they were being told the truth.
- 3.39 DW1 averred that the Plaintiff was introduced as agent through email but they did not see any agreement or exclusivity agreement in relation to Oriental Weavers. He averred that they had no formal agreement, in place for the Plaintiff as an agent and approached them for quotation for different material for the Project.

- 3.40 The Second Defence Witness **Frangeskides Peter (DW2)** whose Witness Statement contained facts similar to those of DW1. He reiterated that there was no agreement verbal or otherwise between the Parties as regards engaging the Plaintiff in the discussions as the Defendant's agent, to secure suppliers of the goods that the Defendant needed to furnish the Hotel or to the effect that, the Plaintiff would be paid a Commission to secure suppliers of the goods that the Defendant needed to furnish the said Hotel.
- 3.41 He rehashed the discussion of the Meeting convened on 10th April, 2019, and the attendees; the trip to Egypt and the fact that no order was placed for Oriental Weavers to supply anything due to the delay occasions by the latter. He referred to, *inter alia*, the email dated 25th February, 2020, at page 167 and 175 of the Plaintiffs Bundle of Documents.
- 3.42 During cross-examination DW2 responded that he travelled to Egypt in 2019 and that whilst there, PW paid for local transportation. He averred that the first Meeting was organised by Oriental Weavers and the subsequent meetings by the Plaintiff.
- 3.43 DW2 answered that according to the Meeting they had in Lusaka, the Plaintiff was Oriental Weavers' representative in Zambia. He added that there was no agreement with Oriental Weavers as they were still negotiating but that if negotiations had been were successful, a Proforma Invoice

would have been sent to the supplier and agreed upon and that they would have gone ahead with the purchase.

3.44 DW2 also told the Court that when they returned from Egypt until they stopped dealing with Oriental Weavers, there was communication regarding the design, colours and areas that required the product. He added that they did not have a carpet deal though they did make a successful deal with a supplier for shower partition glass and mirrors and that this was carried on through the Plaintiff.

3.45 With respect to facilitating communication while in Egypt, DW2 averred that they had two teams, one went on their own to meet with various suppliers while PW escorted him to other suppliers. DW2 admitted that he received an email from PW expressing disappointment about by-passing his Company in communicating with Oriental Weavers and that he stated that he would look into it.

3.46 DW2 averred that there was no deal cancelled because they were still negotiating and that they stopped the further negotiations as per the email on page 175 of the Plaintiff's Bundle of Documents asking that Oriental Weavers should not do any more work on the Project. He averred that as a Director, he was not privy to the transaction as there are number of other Directors, and that, that decision was left to the ones concerned and privy to the transaction.

- 3.47 In continued cross-examination, DW2 stated that he was informed that transaction was stopped because the client did not meet their design and timelines and that the people who dealt with the matter had full authority. He reiterated that it was the supplier who caused the delay and not the Defendant's agent, Vicky.
- 3.48 In re-examination, DW2 testified that the sample was delivered 2 days after the email from O'Donnell to stop dealings with Oriental Weavers. He stated that he was given the information after the fact and that there were no works or samples up to that time.
- 3.49 **Naomi Robinson (DW3)** was the third Defence Witness who stated that she is the Project Manager in the Defendant Company. She rehashed DW1's testimony on the Defendant's engagement to construct Bonanza Hotel. She also explained that sometime in June 2019, she was requested by Peter Frangeskides, DW2 herein, to travel to Egypt with him as well as with Abhijit Menon, and Mr. Rezk from the Plaintiff company.
- 3.50 She asserted that her purpose of joining this trip was to meet with Oriental Weavers and give them the required floor plans so that they could start working on the design samples. DW3 vied that whilst in Egypt, she was also to travel separately with Abhijit Menon to find other suppliers that they needed whilst PW and DW2 travelled together to meet Oriental Weavers.

- 3.51 DW3 testified that at the time they visited Oriental Weavers, she handed over all requested files of the Hotel Floor Plans so that Oriental Weavers could establish roll and cut patterns. She added that they further handed over an Image of the design that their Architect had liked.
- 3.52 She stated that they requested Oriental Weavers to make the design slightly different so it would not infringe Copyright laws and added that they were able to bring this sample back to Zambia with them, to show the rest of the Directors and the Architect.
- 3.53 DW3 further vied that they all felt the sample provided needed more design work through pattern and colour alterations, so they continued to be in back-and-forth communications with Oriental Weavers trying to finalize the design. She averred that they were then waiting on a final sample to be made from which they could finally approve and thereafter make a Purchase Order.
- 3.54 DW3 explained that the Defendant and Oriental Weavers continued discussing carpet designs, colours, and other carpet specifications but no carpet sample was ever manufactured and approved by the Defendant either through herself or any Director of the Defendant as late as February, 2020. She stated that on 5th February, 2020, she sent an email to Oriental Weavers expressing her concern over the delay in submission of samples and gave instructions for them to follow a priority schedule which

was submission of carpet designs for the Bedroom Corridor and thereafter, Conference Rooms as reflected on the email at pages 11 and 12 of the Defendant's Supplementary Bundle of Documents.

3.55 DW3 vied that despite the aforesaid email, no progress was made and on 25th February 2020, she emailed Oriental Weavers expressing her concern because they had not finalized their discussions on carpet designs, specifications for the requested and required samples to enable the Defendant to make a final approval before a Purchase Order could be made. She added that this was because, the Hotel was scheduled to open in August 2020.

3.56 DW3 averred that on the same day and having already stated that the samples were on the machine, Oriental Weavers wrote to her requesting for more specifications even though the same were already captured in a PDF Document sent to them on 13th February, 2020. She stated that she resent the Defendant's scope and requested to know when they would get the samples.

3.57 DW3 testified that Oriental Weavers failed to manufacture the carpet samples for the Defendant's approval on time and no sample was received or approved by the Defendant and that consequently, the Defendant did not make any orders to purchase any goods from Oriental Weavers.

3.58 DW3 added that the Defendant and the Plaintiff had no agreement or relationship as the correspondence and

communication was between the Defendant and Oriental Weavers. She added that the Defendant did not enter into any agreement with the Plaintiff for Professional charges nor was the Defendant aware of or privy to any agreement between the Plaintiff and the suppliers.

3.59 She re-asserted that the Defendant never engaged the Plaintiff to be its agent for purposes of securing suppliers for the goods to furnish the Hotel and thus, is not liable for any alleged loss or damage.

3.60 In cross-examination, DW3 responded that she travelled to Egypt; that she was not introduced to Oriental Weavers until DW2 asked her to join them on her trip to Egypt and also for purposes of giving Oriental Weavers an AutoCAD.

3.61 DW3 stated that she believed that the Plaintiff is Oriental Weaver's Partner and that when they travelled to Egypt, the Plaintiff's role was to assist in locating the whereabouts of the Oriental Weavers Facility and other things. She added that the trip was successful and that the design was being worked on by Vicky and Mahmoud from Egypt.

3.62 She admitted that Vicky had changed the colour pattern but stated that only the bedroom passage was affected. DW3 also admitted that Vicky caused the confusion but added that the delay was not in the conference carpets. She stated that she received a sample one week after

returning from Egypt but it needed more works as she had issues with the design.

3.63 In re-examination, DW3 stated that Conference Room carpets were the least required to complete Conference Rooms and that the supplier delayed with the main sample for bedrooms despite having been communicated to on 11th February, 2020, and him having indicated 5 days to complete. That even later when he was communicated to, he responded that it was on the machine yet to be done.

3.64 DW3 added that the design for the bedroom was approved and that the Defendant asked when they could receive the samples. She stated that there was only a change in the design specification for the bedroom passage due to price concern which was smaller in contrast with the bedroom carpets.

4.0 SUBMISSIONS

4.1 In their submissions, Counsel for Plaintiff stated that the Plaintiff and the Defendant freely agreed to enter into this agreement. Reliance was placed on the cases of **Tijem Enterprises Limited v Children International Zambia Limited**⁽¹⁾ and **Febian Musialele v. Evans Chipman**⁽²⁾ for the position that such agreement must be enforced by this Court

4.2 It was argued that there was an agreement between the Plaintiff and the Defendant and that Christopher O'Donnell made a unilateral decision, on behalf of the

Defendant Company, that the suppliers should not do anymore works on this Project due to delays of going back and forth to the drawing boards when this was because of the Defendant's team.

4.3 It was also stated that the extent of the confusion by the Defendant's team was shown by the cancellation by the Director and their Interior Designer still giving instructions to the suppliers and she further apologised for the confusion which she had been causing. It was submitted that the Plaintiff has proved its claims against the Defendant and is entitled to the reliefs sought.

4.4 The Defendant in its submissions stated that the following issues are in dispute:

4.4.1 Whether there was an agreement between the Plaintiff and the Defendant as claimed by the Plaintiff;

4.4.2 Whether the Defendant could be held liable because a contract did not ensue from the negotiations between the Defendant and Oriental Weavers;

4.4.3 Whether the Defendant is liable to the Plaintiff for damages for any professional charges; and

4.4.4 Whether the Defendant is liable to the Plaintiff for damages for breach of contract and the sum of US\$12,000.00, being compensation for loss of earnings.

- 4.5 On whether there was an agreement, reference was made to the case of **Rating Valuation Consortium and Another v Lusaka City Council and Another**⁽³⁾ and it was argued that no evidence of either offer or acceptance by either Party was adduced. The Defendant argued that the only role the Plaintiff played was to introduce the Defendant to Oriental Weavers and that in DW1 and DW2's testimonies, the Plaintiff was known to the Defendant as an agent of Oriental Weavers.
- 4.6 It was submitted that the Parties did not intend that the exchanges between them would create legal relations until an order was placed and that there was no contract that ensued between the Plaintiff and the Defendant or the Defendant and Oriental Weavers. Reliance was placed case of **Sakiza Spinning Limited v Weave Plastics Industries Limited**⁽⁴⁾ for the position that a claim for damages for breach to negotiate in good faith cannot be sustained because there is no duty to negotiate in good faith as it is repugnant to the adversarial position of the Parties involved in negotiations.
- 4.7 The Defendant further argued that there was no agreement between the Parties for any professional service to entitle the Plaintiff to Professional Charges

5.0 DETERMINATION OF ISSUES

- 5.1 I have carefully considered the Pleadings and the Witness testimonies as well as the submissions by respective

Counsel. The starting point is to bear in mind that the burden of proof in civil matters has been alluded to in a number of cases, including in the case of **Investrust Bank v Ibrahim Diab**⁽⁵⁾ where the Supreme Court held, *inter alia*, that:

“It is of course peradventure that the burden of proof in civil matters lies with the Plaintiff or the party alleging, to prove his case on a balance of probabilities.”

5.2 A perusal of the evidence herein shows that the substantive facts are essentially common cause. The issue for determination is whether or not there was a verbal contract between the Plaintiff and the Defendant to warrant granting the reliefs sought by the Plaintiff.

5.3 According to the learned authors of Treitel- the Law of Contract, at Paragraph 1-001.

“a contract is an agreement giving rise to obligations based on the parties agreements which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on the agreement of the contracting parties.”

5.4 As regards the forms of contracts, the learned authors of the Halsbury’s Laws of England at page 135 opine:

“In the ordinary case the law does not require a contract to be made in any particular form, nor

according to any particular formalities. The general rule is a contract can be quite informal. A contract may be validly made either orally or in writing or partly orally and partly in writing.”

5.5 In guiding as to what may assist a Court in determining the nature of the relationship between the Parties, the Supreme Court in the case of **The Rating Valuation Consortium and D.W. Zyambo & Associates (Suing as a Firm) Vs the Lusaka City Council and Zambia National Tender Board**⁽⁶⁾ stated, *inter alia*, that:

“What should guide the court in analyzing business relationships should be whether or not the Parties conduct and communication between them amounted to an offer and acceptance. What is regarded as an important criterion is for the court to discern a clear intention of the parties to create a legally binding agreement between themselves. This can be discerned by looking at the correspondence and the conduct of the parties as a whole.”

5.6 In casu, PW, in his evidence stated that the Defendant through DW2, Peter Frangeskides, approached the Plaintiff and by an oral agreement engaged it to secure and engage suppliers from Egypt for the items for the Hotel it was constructing. It has been alleged that this is the verbal contract that has been breached by the Defendant

unilaterally cancelling the contract with Oriental Weavers resulting in loss and damage to the Plaintiff.

- 5.7 The Defendant denies the allegation and asserts that there was no such agreement and further submits that the Plaintiff was a supplier itself and therefore not entitled to the payment of Commission. In this regard, the role of this Court as stated in the case of **Rating Valuation Consortium** quoted above is to determine whether the conduct of the Parties reveals the presence of an agreement.
- 5.8 From the evidence adduced, I note that the Defendant and the Plaintiff had a Meeting on 10th April, 2019, and that Plaintiff did introduce Mr. Mahmoud, a representative of Oriental Weavers to the Defendant. It is also not in dispute that the Plaintiff's Director, PW (Mr. Rezk) together with some people from the Defendant Company travelled to Egypt and that the travel and accommodation costs for PW were borne by the Defendant, while the latter bore food and local costs for himself. PW further stated in his evidence and Pleadings that the Plaintiff was an agent and that the Commission was to be paid by the suppliers.
- 5.9 These facts show that while the Plaintiff did introduce the Defendant to the suppliers and of relevance herein, Oriental Weavers were to supply Carpets upon agreeing on the specifications and samples with the Defendant. The Plaintiff did state that the suppliers were to pay the

Plaintiff a Commission once a contract had been successfully performed between the Defendant and the suppliers. There is nothing before me to show that there was an intention to create a contract between the Plaintiff and the Defendant, let alone the terms agreed upon between the Plaintiff and the Defendant or that there was consideration moving from one Party to the other. The latter principle is espoused by the learned Authors of Chitty on Contract; General Principles, at page 400; as follows:

“the doctrine of consideration is based on the idea of reciprocity: “that something of value in the law” must be given for a promise in order to make it enforceable as contract.”

5.10 Thus, in order for a claim for damages for breach of contract to be sustained, there must be a valid contract in place which was breached. In the circumstances herein and based on the foregoing facts and authorities, I find that there was no verbal agreement between the Plaintiff and the Defendant to warrant this Court to grant an Order for damages for breach of contract.

5.11 With respect to the claim for the sum of US\$12,000.00, as payment for the loss of earnings of Commission to the Plaintiff, PW stated that the Defendant had no right to cancel the contract with the suppliers and that this resulted, according to his Witness Statement, in the loss

of USD20,000.00, as Commission from the suppliers. The Defendant has stated that it was not privy to the arrangement between the Plaintiff and the suppliers and cannot be liable for the alleged loss as a contract with the suppliers could only have been entered into upon the suppliers complying with the Defendant's specifications of its requirements.

5.12 I have carefully perused the evidence adduced by both Parties including the emails produced by the Parties. I observe that the Oriental Weavers were to produce samples of carpets for the Defendant and upon being satisfied with the quality of the samples, a Purchase Order would have been made for the specified rooms. However, that the Defendant, through its Director Christopher O'Donnell, by email stopped Oriental Weavers from doing any more work for the Defendant due to the delay.

5.13 There is no evidence before me to show that there was an agreement with between Oriental Weavers and the Plaintiff let alone the quantum of the Commission that would have been paid had a Contract between the Defendant and Oriental Weavers been executed. What is evident is that the Defendant and Oriental Weavers were still in discussions and had not agreed on anything upon which the Plaintiff could assert that the Defendant unilaterally cancelled the contract with Oriental Weavers resulting in loss of its Commission.

5.14 The more important issue is whether or not the Defendant is liable for the alleged loss, if any? Notably, PW in his evidence stated that the agreement was that the suppliers were to pay the stated commission, no evidence was adduced to show that the Defendant was a Party to the arrangement between the Plaintiff and the Suppliers on payment of Commission. In the case of **Daniel Peyala v Zambia Consolidated Copper Mines**⁽⁷⁾ it was held as follows:

“The principle of privity of contract provides that a contract could not confer rights or impose obligations arising therefrom on to other persons except the Parties...only Parties to a contract can sue, enforce rights or claim damages in a contractual situation.”

5.15 Further, in the case of **Leslie Chikuse v Jeremy Bakangaba Tshinkobo**⁽⁸⁾ the Court of Appeal held that:

“the doctrine of privity of contract prohibits a non-party to a contract to derive any rights or benefits out of it. Further, a non-party to a contract lacks the locus standi to sue on it.”

5.16 Guided by the authorities above, I find that there was no contractual relationship between the Plaintiff and the Defendant to warrant the Defendant being liable for any loss suffered by the Plaintiff as a result of the cancellation or failure to complete the transaction between the

Defendant and the Suppliers. I, therefore, find that this claim for loss of Commission fails and I dismiss it accordingly

5.17 On whether the Defendant is liable for the for the sum of US\$10,000.00, as Professional Charges, again no evidence was adduced before me to support this claim, and it equally fails.

6.0 CONCLUSION

6.1 In sum, I find that the Plaintiff has failed to prove its claims against the Defendant on a balance of probabilities and they are dismissed in their entirety.

6.2 Costs are for the Defendant to be taxed in default of agreement.

Delivered the 24th day of May, 2024.



.....
S. M. Wanjelani
JUDGE