IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE AND LUSAKA
(CIVIL JURISDICTION)

APPEAL NO 219 OF 2004

BETWEEN

PANAYIOTIS NEOCLEOUS	1st Appellant
ALEX NEOCLEOUS	2nd Appellant
DRILL MASTER LIMITED	3rd Appellant
H TWO O LIMITED	4th Appellant

and

MARIOS SOLOMON	1st Respondent
DRILL BUSINESS DIAZ LIMITED	2nd Respondent

Coram: Chirwa, Silomba JJS and Kabalata Ag. JS on 1st November 2005 and 20th March 2007.

For the Appellant: Mr C K Chuula of Chuula & Co.
For the Respondent: Mr W M Kabimba of Kabimba & Co.

JUDGMENT

Chirwa, JS delivered the Judgment of the Court:

Cases referred to:

1. Malawo V Bulk Carriers Of Zambia [1974] Z R 185
2. Kenmuir V Hattingh [1974] Z.R 182
3. ZCCM V GOODWARD SCZ Judgment No 7 of 2000
4. Y B & F *Transport V Supersonic Motors* SCZ No 2 of 2000 .

The late delivery of this judgment is deeply regretted. This was due to our internal administrative mishaps.

The appeal arises from the judgment rendered in the High Court in favour of the respondent in respect of some drilling rig and a leyland truck

all valued at US $90,000. The respondents' claim in the Court below was for the return of the said drilling rig and truck or their value and for an account on the 145 bore holes drilled using the same drilling rig. The appellants' counter-claims for an account on alleged private works done by the 1st Respondent; return of rotary head for the mobile drilling machine or value of the same and loss of business for non-use of the drilling machine, were dismissed.

The common facts per evidence are that the 1st Respondent bought a drilling rig and truck whilst he was in Cyprus and consigned these to the 2nd and 3rd Appellants here in Zambia. The 3rd Appellant was a company incorporated here in Zambia carrying on business of drilling bore holes. The 1st and 2nd Appellants verbally agreed to purchase the drilling rig and truck bought in Cyprus by the 1st Respondent and consigned to the 2nd and 3rd appellants here in Zambia. The 1st Respondent alleged that the rig and truck cost him US $80,000 and US $ 10,000 respectively.

On his arrival in Zambia, the 1st Respondent was employed by the 3rd Appellant and was operating the drilling rig. The 1st Respondent alleged that the drilling rig was used by the 3rd Appellant to drill 145 bore holes under contract with government and individuals but that the 1st Respondent had not benefited from these and has not been paid the purchase price for the rig and truck hence his prayer for the recovery of the purchase price for the rig and truck or their return and on account for the 145 bore holes drilled using the same.

The defence on the other hand claimed that the full purchase price for the rig and truck were paid and ownership of the same passed on to the 2nd Appellant. Because of the dispute involving the same rig and truck, the appellants lost business in the sum of US $ 229,600 because the 1st Respondent removed the rotary head of the drill under the pretext that he was going to repair it when in fact he did not. They further claim for an account for the private jobs that the 1st Respondent did whilst he was an employee of the 3rd Appellant.

On the evidence before her, the learned trial judge found as a fact that the purchase price for the rig and truck was in fact US $16,000 and US $10,000 respectively. She further found that this had not been paid. The learned trial judge further ordered the appellants for an account for the 145 bore holes drilled using the said rig and truck. The learned trial judge further dismissed the appellants' counter-claims of loss of business as a result of the 1st Respondent removing the rotary head from the rig saying that the machine was not theirs as they had not paid for it. She further declined to order 1st Respondent to account for the alleged private jobs done by him as there was no evidence to support the same. It is against these findings and awards that the appellants have appealed.

There were four grounds of appeal, namely:-

i) The Honourable Judge of the High Court erred in fact and

law by making an inconclusive determination of the matter as regards the payment of the purchase price or the possession of the subject matter of the action.

ii) The Honourable Judge of the High Court erred in law and in fact in awarding the possession of the subject matter as an alternative remedy when in fact quantifiable damages would suffice .

iii) The Honourable Judge of the High Court erred in law and fact by ruling that an account be made by the appellant and that payment be made to the respondent when in fact the respondent did not plead for payment.

iv) The Honourable Judge of the High Court seriously misdirected herself against the evidence tendered in making a finding of fact that the appellants had not paid the respondent the purchase price for the subject matter of the proceedings.

These grounds of appeal were argued in detail in written heads of arguments. At the hearing of the appeal, Counsel for the appellant indicated that he was withdrawing ground 1 as it was the same as ground 4 but in his written heads of arguments he has indicated and argued grounds 1 and 4 together. The gist of grounds 1 and 4 is that the learned trial Judge erred in law in finding that the purchase price for the rig and truck had not been paid when he disbelieved the respondents on the price and freight charges. It was argued that the respondents having lied on material facts, there was no good reason for believing them that the

purchase price was not paid. It was submitted that the whole transaction was verbal. It was submitted that there being no good reason for accepting that the purchase price was not paid, the finding of a fact that the purchase price was not paid should be set aside by this Court as the trial Court fell into error in assessing the evidence before her and on the authority of **MALAWO V BULK CARRIERS OF ZAMBIA(1)** and **KENMUIR V HATTINGH (2)** this Court, as an appellate Court, can upset that finding.

The second ground of appeal was that the learned trial judge erred in ordering re-possession of the goods in issue when their value is ascertainable. This, it was submitted should have been done in accordance with Section 39 of the Sale of Goods Act, 1893. Basically, it was argued that since the respondent lost possession of the goods to the appellant, they lost lien on them and as such they could not claim. It was submitted that the learned trial judge erred in overlooking the Sale of Goods Act, which Act applied to the case and as such this was a misdirection as stated in the cases of **ZCCM V GOODWARD (3)** and **Y B & F TRANSPORT V SUPERSONIC MOTORS (4).**

In the alternative, it was argued that if the price was not paid and ownership of the goods was reserved in the Respondents until payment made, then the entire transaction would have been caught by the Hire Purchase Act, Cap. 399 and failure to comply with the Act meant that Section 25 of the Act applies and it means that ownership passed on to the appellants and as such the respondents had no say over the use of

the goods in issue and cannot claim any account for the 145 bore holes drilled using the rig and the truck.

The third ground was that the learned trial Court erred in ordering an account and payment to be made when the respondent never pleaded payment. This was argued in conjunction with ground 2. It was further argued that the learned trial Judge erred when she purported to order an account on the ground that ownership in the goods did not pass to the appellant as the action was not based on shareholders dividends but based on ownership of the goods in issue. The issue of dividends should be dealt in the normal manner by the Directors of the Company in which event all Directors would be entitled and not only the respondent.

In response to these arguments, Counsel for the Respondent on grounds 1 and 4 submitted that the findings of fact were made upon assessment of the demeanor of the witnesses and cannot be upset by an appellate court that did not have opportunity to see the witness. It was further argued that the Court took into account the fact that the 1st and 2nd Appellants and DW 1 were biological relations and as such there was a danger of their evidence being biased. It was submitted that in the circumstances of this case, there is no basis on which this Court can upset the findings of the trial Court based on the credibility of witnesses.

On ground 2, it was submitted that Sales of Goods Act had been misinterpreted by the appellant and that although the learned trial judge did not specifically refer to the Sales of Goods Act, her assessment of

evidence and findings fell under Section 17 of the Act in that in addition to the fact that the parties agreed that ownership would only pass after payment, the conduct of the parties and circumstances of the case clearly showed that the parties never intended ownership in the goods to pass to the appellants upon delivery but after payment. The goods were merely consigned to the 3rd appellant for the purposes of Customs clearance only. The Court having found that the goods had not been paid for, was entitled to hold an inference from the conduct of the parties that ownership had not been transferred.

On the third ground, Counsel for the respondents submitted that since the rig and truck had not been paid for and that these machines were used to drill the 145 boreholes, the machines should be said to have been doing the jobs on behalf of the owners. Furthermore, the 1st Respondent was a shareholder of H two O Limited and as such he was entitled to have an account on the jobs done by H-TWO-O Limited and that he was not claiming this to the exclusion of other Directors/Shareholders.

We have considered the case as pleaded, the evidence before the lower Court, the judgment of the lower Court and the grounds of appeal and submissions. Looking at the case as pleaded, the appellants do not deny that they entered into a verbal agreement to purchase the equipment in question although they say the verbal agreement was with the 2nd Respondent. The Appellants in their defence do not aver that they paid the purchase price. That was the main purpose of the action, to

recover the purchase price. Subsequent to that, the respondents wanted an account for the work done with the equipment. The Appellants themselves in paragraph 5 of the defence state that the 1st Respondent was both an employee and shareholder of the 4th Appellant.

The main issue on the pleadings was the cost of the equipment. From documentary evidence, especially when it came to Customs Clearance, the value was given. It seems the value given was not the true value whether by collusion or not but it was meant to avoid paying the true tax on them and as such we cannot fault the learned trial judge in taking the price as given on the customs clearance forms. On the pleading, as we have said, the appellants never said that they paid for the equipment. They actually admitted the Respondents claim. The evidence being led in the Court below on whether the price was paid or not was irrelevant, frivolous and a waste of time. Grounds 1 and 4 of the appeal are dismissed.

On ground 2, we entirely agree that where a contract of sale of goods is agreed and the goods were not intended for re-sale, one cannot talk of possible profit or replacement value. The price agreed is the damage to be paid and if there is inordinate delay, this can be taken care of by interest charged on it. We allow this ground of appeal in as far as it attacks the award or order of the return of the equipment.

The third ground of appeal is against an order for an account for the use of the equipment in drilling 145 bore holes. The claim is premised on the basis that the Respondents were still owners of the equipment and not as minority shareholders of H-TWO-O Limited. We agree with Counsel for the Appellant that this award was wrongly given. In this regard Sections 17 and 18 of the Sale of Goods Act are relevant and in construing the same the whole conduct and action of the parties have to be considered. Looking at the conduct of the parties and even the contract (verbal as it was) it can not be said that the Respondents were to have a share of profits from the work the equipment would execute by virtue of being sellers. The 1st Respondent came into Zambia to train workers of the 4th Appellant. He was an employee of the 4th Appellant and in addition, he was offered some shares in the 4th Appellant. Whether the appellants put into use the equipment immediately and made profit or not, was not the concern of the Respondents as sellers. We would therefore agree with Counsel for the Appellants that the learned trial judge misdirected herself in ordering the Appellants to render an account to the respondent for the use of machinery on the basis of being sellers as they claimed in their statement of claim. If the 1st Respondent wishes to exercise his right as a shareholder in the 4th Appellant, he has to institute proper proceedings as a shareholder and not as a seller of the equipment. This ground of appeal succeeds.

On the whole, the appeal is dismissed on ground 1 and 4 but it is allowed on grounds 2 and 3 as indicated.

For avoidance of any doubt, we confirm the learned trail judge's order that the respondents do recover from the appellants US $24,000, the cost of the equipment they sold to the appellants. We set aside the alternative order that the appellants return to the respondents the equipment. As the equipment was sold, ownership was passed on to the appellant and the respondents had no right to remove the drilling head. For the loss of the use of the equipment as a result of the responded removing the drilling head, these are to be assessed by the Deputy Registrar.

Since ownership of the equipment passed to the appellant, they cannot be ordered to render an account for the 145 bore holes drilled.

The US $ 24,000 cost price of the equipment will carry interest as ordered by the lower Court. The assessed damages will carry interest as may be ordered by the Deputy Registrar.

Each party to bear its own costs for this appeal.

D K Chirwa
JUDGE OF THE SUPREME COURT

S S Silomba
JUDGE OF THE SUPREME COURT

T A Kabuata
A/**JUDGE OF THE SUPREME COURT**