

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**

2013/HP/0490

(Civil jurisdiction)

BETWEEN:

**PATRICK SYLVESTER BANDA
(T/a Elipama Enterprises)**

PLAINTIFF

AND

KIZITO MULUNDA

DEFENDANT

Before: Hon. Judge B.M.M. Mung'omba on this 10th day of December, 2014.

For the Plaintiff: Mr. C. Sianondo, of Messrs Malambo & Company

For the Defendant: N/A

J U D G M E N T

Cases referred to:

1. *Pekeza Bakery Limited, Divine Foods Take Away and Butchery limited vs. Aetos Tranfarm Limited, Stillianos George Koukoudis-2004/HK/331.*
2. *Robert Simeza and 3 others vs. Elizabeth Mzyeche—SCZ Judgment No. 23 Of 2011.*
3. *Monarch Steamship Company Ltd vs A/B Karishamns Olgefabriker and Others (1949) 1 All ER 1.*
4. *Printing & Numerical Registering Company vs Simpson.*
5. *Colgate Palmolive Zambia Inc vs Able Shemu Chuka & 10 others*

Legislation referred to:

- 1. *English Law (Extent of Application) Act, Cap 11; s, 2 (c)*.**
- 2. *Rules of the Supreme Court 1965 (White Book) 1999 edition; O.35/1/1***
- 3. *Sale of Goods Act of 1893; Ss. 51, 54***

Works referred to:

Phipson on Evidence, Seventeenth Edition, (Thomson Reuters (Legal Limited 2010).

This action was commenced on 16th April, 2013 and amended on 3rd July, 2013, by way of writ of summons. The endorsement on the Writ reveals that the Plaintiff claims for:

- 1) Damages for breach of contract;
- 2) Payment of K63, 000.00, being the current price of the maize;
- 3) Interests, and
- 4) Costs

In the statement of claim that accompanied the writ of summons also dated 16th April, 2013 and amended on 3rd July, 2013, the Plaintiff avers that he is a businessman who is engaged in the buying and reselling of maize and maize products. The Defendant is a businessman and a farmer engaged in the selling of maize.

The Plaintiff states that on 10th October, 2012, the Defendant agreed to sell 42 tons of maize to the Plaintiff. The Plaintiff bought the 42 tons of maize from the said Defendant. On the same date of 10th October, 2012, the Plaintiff did pay K42, 000,000.00 (now K42, 000.00) to the Defendant, receipt of which the Defendant acknowledged, as consideration of the said maize.

It was a condition of the said sale that the maize could be loaded by the Plaintiff at any time and put into his custody. On 13th October, 2012, the Plaintiff was desirous of collecting the said maize but in breach of the agreement, the Defendant failed and/or neglected to honor his obligation despite numerous reminders.

The Plaintiff avers that the current price of one kilogram (1Kg) of maize is K1.50. The 42 tons translate into K63, 000.00. It is contended that by virtue of the Defendant's default, the Plaintiff has suffered damages and now claims as per the endorsement on the writ aforesaid.

The Defendant's defense, filed in this matter on 24th April, 2013, may be summarized as follows: that he admits doing business with the Plaintiff but the transaction failed due to the Plaintiff's long absence. That he sold the maize worth K34, 000.00 to the Plaintiff which the said Plaintiff did not collect until the rain season started and destroyed the maize.

The Defendant argues that when he realized that the loss would be too excessive, he sold part of the maize and bought farming inputs for a new crop which was had not yet been harvested. He denies owing the Plaintiff the amounts demanded but admits owing the known quantity of maize worth K34, 000.00.

It is his position that when the maize (new crop) is harvested, the Plaintiff is free to collect his crop. He prays that the Court dismisses this matter for lack of merit and for being an abuse of Court process.

I heard this matter on 15th October, 2014. At the hearing, Counsel for the Plaintiff informed me that at the last adjournment, on 30th June, 2014, Counsel for the Defendant was before Court. I agreed. However, there was no communication as to why Counsel and the Defendant were not before Court on this day. Mr. Sianondo requested for the mater to proceed.

Considering that Counsel for the Defendant was before Court on 24th June, 2014 when the matter was last adjourned to the day when the matter was heard; and having failed and/or neglected to tender any explanation for his absence, I was left with no option but to proceed with the matter.

In support of his case, the Plaintiffs called two witnesses. **PW1** was the **Andrew Kazilale Miti**. His testimony was that he was tasked to purchase maize from Kabwe on behalf of a company named Elipama Enterprises. He engaged an agent known by the names of Lazarus Mulombe. The said Lazarus Mulombe introduced PW1 to a prominent Kabwe farmer named Kizito Mulunda, the Defendant herein.

According to PW1, the Defendant had some stock of maize. They made three (3) successful transactions for a start. Regarding the fourth transaction, the Defendant was, on 10th October, 2012, given an advance payment amounting to K42, 000.00 for the purchase of maize. The maize was supposed to be collected in three days' time from the date of the advance payment.

However, on the arranged day, the Defendant did not avail himself at his farm. His mobile phone was equally unreachable. The Plaintiff had to send the truck back to Petauke.

The next time the Plaintiff managed to communicate with the Defendant, the Defendant informed him to proceed to Kabwe to collect the maize. Again when the truck reached Kabwe, the Defendant was not available. He even changed his mobile phone number.

PW1 stressed that the Defendant had agreed to the sale of 42 tonnes but that the maize was never collected. He testified that at the time of the transaction, the price of the maize was K1, 500 per kilogram. He told Court that they had signed an agreement shown at page one (1) of the Plaintiff's

Bundle of Documents. The sum indicated thereon is K42, 000, 000.00 (now K42, 000.00).

PW2 was **Patrick Sylvester Banda**, the Plaintiff in this matter. His testimony was not different from that of **PW1**. He stated that he is the Director of Elipama Enterprises. He confirmed engaging PW1 to purchase maize on behalf of Elipama enterprises.

PW2 also confirmed the document shown at page one of the Plaintiff's Bundle of Documents as the agreement relating to the purchase of maize between PW1 and the Defendant. He urged the Court to grant him the claims as pleaded.

The foregoing was the evidence in this case.

At the close of the hearing, I adjourned the matter to 27th November, 2014 for judgment.

On 23rd October, 2014, I received the Plaintiff's written submissions to buttress his claims. Counsel started by attacking the Defendant's assertion that he does not owe K42, 000.00 but K34, 000.00. This attack was on the basis that the Defendant has not adduced evidence to support this assumption.

Learned Counsel proceeded to submit that that there is, in this case, an agreement shown at page one of the Plaintiff's Bundle of Documents, that has been breached by the Defendant. On the concept of breach of contract, Counsel drew my attention to Black's Law Dictionary, 8th Edition, 2004 at pages 199 - 200. This authority defines breach of contract as:

"the violation of a contractual obligation by failing to perform one's promise, by repudiating it, or by interfering with another party's performance. Every breach of contract gives rise to a claim for damages, and may give rise to other remedies.

On this authority, Counsel argues that the contract entered into between the Plaintiff and the Defendant was breached by the fact that the Defendant failed to perform his part of the contract. The Defendant was obligated to make the maize available at any time for the Plaintiff to load and collect it as it had already been paid for.

Counsel further argues that there was no existing or implied term that the Plaintiff would accept maize that was to be harvested at a later date as the Defendant claims through his defense at page 8 of the Plaintiffs Bundle of Pleadings. The Plaintiff had contracted to buy maize that was readily available and merely had to be collected by the Plaintiff at any time, Counsel submitted.

Counsel submitted that on the basis of the testimony of PW1 the Plaintiff is entitled to the money that was paid to the Defendant as he failed to perform his part of the agreement and no consideration was given for the sum advanced. On this argument he drew my attention to *McGregor on Damages 15th edition* at pages 29-30. The author elaborates on effect of non-performance under a contract.

Learned Counsel further submitted that as at 16th April 2013, when this action was brought against the Defendant, the price of the amount of maize intended to be bought was at K63, 000. 00. Thus Counsel submitted that going by the principles enunciated by McGregor on Damages cited above, the Court should consider awarding the Plaintiff the basic loss which is the current market value of the maize.

In furtherance of the above arguments, it was submitted that the Plaintiff be awarded damages because the action of the Defendant has clearly led to the Plaintiff suffering loss and damages. In this respect, Section 51 of the Sale of Goods Act of 1893 which applies to Zambia by virtue of section 2(c) of the English Law (Extent of Application) Act, Chapter 11 of the Laws of Zambia was cited. It states that:

“51. - (1) where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery,

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.”

It was also argued that the Section 54 of the Sale of Goods Act permits a buyer, such as the Plaintiff in the current matter, to recover the money in the event that there has been total failure of consideration. Section 54 therefore provides that:

“54. Nothing in this Act shall affect the right of the buyer or the sellerto recover money paid where the consideration for the payment of it has failed.”

Counsel stressed that having failed to give consideration for the amount tendered to him as the price of the maize, is another reason why this Court should order the Defendant to pay the Plaintiff the current market value of the property subject of the contract and damages plus interest.

Finally in his submission, learned Counsel dealt with the law supporting the decision of the Court to proceed to hear a matter in the absence of the Defendant who was fully aware of the trial date but elected to abscond himself. I was referred to the authority of ***Pekeza Bakery Limited, Divine Foods Take Away and Butchery limited vs. Aetos Tranfarm Limited, Stillianos George Koukoudis-2004/HK/331*** ⁽¹⁾ and ***Robert Simeza and 3 others vs. Elizabeth Mzyeche—SCZ Judgment No. 23 Of 2011.*** ⁽²⁾ In the latter case the Supreme Court stated that there is no procedural injustice that is occasioned when a party who is aware of the proceedings does not turn up.

Another authority cited was Order 35/1/1 of the 1999 Rules of the Supreme Court ('White Book) which states that:

(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision,"

On the above authorities Counsel submitted that there is no evidence before me to justify and/or excuse the absence of the Defendant at trial. The hearing of the Plaintiff's case in the Defendant's absence is therefore well founded at law. Counsel reiterated that the actions of the Defendant justify the award of damages to the Plaintiff plus the amount paid under the contract being the current market value of 42 tons of maize.

I have considered the matters raised and argued in this case. I have also considered the documentary evidence on record, the submissions by Counsel and the authorities cited therein.

I will begin by addressing the issue pertaining to the Defendant's absence during the trial. As earlier stated when the matter came up on 30th June, 2014, Counsel, for the Defendant, Mr. Ngulube and the Defendant were present. The matter was adjourned at the Defendants' behest to 15th October, 2014.

I am satisfied on the facts therefore that the Defendant was fully aware of the date of hearing and the failure by the Defendant to tender any reasonable explanation in my view is that he elected to dispense with his presence and by so doing I could proceed to hear the matter. I was fortified in my decision by **Order 35/1/1/ of the 1999 Rules of the Supreme Court** cited by Counsel which for ease of reference provides as follows:

"(1) Where a party with notice of proceedings has disregarded the opportunity of appearing at and participating in the trial, he will normally be bound by the decision."

The case of ***Pakeza Bakery Limited Divine Foods Take Away and Butcher Limited vs Aetos Tranfarm Limited, Stillianos Geroge Koukoudis (2004/HK/331)*** ⁽¹⁾ it was held that:

“The trial proceeded in the absence of the Defendants, and their Counsel because they had not reasonably or sufficiently excused their absence.”

I am alive to the guidance given by the Supreme Court in Case of ***Robert Simeza, Motel Enterprises Limited, Marianthy Noble, Yolande Hadjipetrou vs Elizabeth Mzyeche*** ⁽²⁾ when they stated that:

“There is no procedural injustice that is occasioned when a party who is aware of the proceedings does not turn up.”

It is clear from the foregoing authorities that the Defendant is bound by my decision notwithstanding the fact he did not avail himself at trial. The failure therefore by the Defendant to come to Court was at his own peril.

I warn myself from the onset that the burden proof in a civil matter rests upon the Plaintiff to prove their claims on a preponderance of probability.

The learned authors of **Phipson on Evidence 17th Edition** in paragraph 6 - 06 at page 151 state the following regarding the burden of proof in civil cases:

“So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantively asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons.”

Turning to the claim by the Plaintiff that he entered into a contract with the Defendant for the supply of maize, I have perused the contract of sale. For ease of reference the contract is hereunder reproduced:

“10th October, 2012

Andrew K. Miti of Elipama Enterprise has given amount of money K42,000,000.00

To Mr. Osman Kizito Mulunda

As payment for his maize at the rate 1000 per kg. With authorization to load at any time, to put in Elipama custody as the company Elipama has bought the maize. (underlining Court’s emphasis)

Andrew K. Miti

Sign.....

Mr. Osama

Sign.....

To KIZITO MULUNDA

Witness

Lazarous Mulomba

Sign.....”

The contract dated 10th October, 2012 states that the Plaintiff paid the sum of K42,000.00 to the Defendant for maize at the rate 1000 per kilogram. It further states that the maize could be loaded at anytime as the Plaintiff had already effected payment for the maize. The Plaintiff’s claim is predicated on this contract. The claim is that the Defendant has failed and/or neglected to honour his obligation owing to the fact that he has failed to deliver the maize. That this is despite numerous attempts by the Plaintiff

to collect the maize. The Plaintiff is therefore claiming damages for breach of contract.

The Defendant on the other hand (in his defence) denies owing the Plaintiff the sum of K42,000.00 but admits owing K34,000.00. The Plaintiff has strongly dispelled this assertion.

Taking into account the totality of the evidence before me, I find as a fact that the Plaintiff did enter into a contract of sell for the purchase of maize vide a contract of sale exhibited in the Plaintiff's Bundle of Documents.

The fact that there was a written contract of sale entered into, as a Court I have the duty to enforce the provisions of the contract. In this regard I draw inspiration from the case of **Printing & Numerical Registering Company vs Simpson**,⁽⁴⁾ quoted in the case of **Colgate Palmolive Zambia Inc vs Able Shemu Chuka & 10 others** ⁽⁵⁾ which states at page 8 as follows:

"If there is one thing more than another which public policy requires is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntary shall be enforced by the Courts of justice.
(underlining Courts emphasis only).

Following the contract, the Plaintiff proceeded to pay the sum of K42,000.00 (rebased). The Defendant for his part did not supply the maize as agreed therefore no consideration was given.

I therefore find as a fact that the failure by the Defendant to perform his part of the contractual obligation amounted to a breach of contract. The definition of breach of contract as provided for in **Black's Law Dictionary, 8th Edition, 2004 at pages 1999 - 2000** cited by Mr. Sianondo is illuminating in this regard.

The question that arises is what are the consequences that emanate from a breach of contract? The answer appears to be in what the learned authors of **McGregor on Damages 15th Edition** have articulated at pages 29 – 30 as follows:

“Contracts are concerned with the mutual rendering of benefits. If one party makes default in performing his side of the contract, then the basic loss to the other party is the market value of the benefit of which he has been deprived through the breach. Put shortly, the Plaintiff is entitled to compensation for the loss of his bargain..... Where the breach of contract consists in a failure to transfer property the basic loss is the market value of the property, always deducting the contract price if it has not already been paid to the person in breach.”

In relation to the case at hand, and in applying the above principles, I am persuaded to find in favour of the Plaintiff that he is entitled to compensation for the loss of the bargain. In this case the loss consists in a failure to transfer property and the basic loss is the market value of the property. The Plaintiff paid the Defendant K42,000 (rebased) for 42 tonnes of maize. I therefore award him the basic loss which is the current market value of the maize.

The Plaintiff has also argued that he is entitled to be awarded damages as the Defendant has clearly led to the Plaintiff’s loss and damages. I have gleaned the **Sale of Goods Act 1893**. In particular Section 51 and 54 make provision for the payment of damages for non delivery as well as the measure of damages to be estimated.

Section 54 provides that:

“54. Nothing in this Act shall affect the right of the buyer or the seller to recover interest or special damages in any case where by law

interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed."

In ***Monarch Steamship Company Ltd vs A/B Karishamns Olgefabriker and Others (1949) 1 All ER 1***, ⁽³⁾ it was stated that:

"where any injury is to be compensated by damages, in settling the sum of money to be given for repatriation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position, as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

In light of the foregoing, I have had no difficulty in arriving at my decision regarding whether or not the Plaintiff is entitled to be compensated by damages.

I find and hold that owing to the facts of this case that consideration totally failed as the Defendant failed to deliver the maize to date, the Plaintiff is entitled to be paid damages. I am satisfied that the Plaintiff has discharged the burden of proof and proved his claims on a balance of probability to warrant the award of sums claimed.

The sum of my decision is that I order the Defendant to pay the Plaintiff the current market value of the property (maize) subject of the contract being K63,000.00. In respect of the award for damages for breach of contract, the awarded interest will suffice.

The Judgment sum is to attract interest at the average short term bank deposit rate, from date of writ to date of Judgment, thereafter at the bank lending rate as determined until date of payment.

I award costs to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

Dated this 10th day of December, 2014

B.M.M. Mung'omba
HIGH COURT JUDGE