

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

**1998/HP/1946**

BETWEEN:

**POWER EQUIPMENT LIMITED**

**PLAINTIFF**

**AND**

**GOLDTRONICS LIMITED**

**1<sup>ST</sup>**

**DEFENDANT**

**BARCLAYS BANK ZAMBIA PLC**

**2<sup>ND</sup>**

**DEFENDANT**

*Before the Hon. Mr. Justice Dr. P. Matibini, SC, this 3<sup>rd</sup> day of October, 2012.*

*For the plaintiff; Mr. Nzonzo of Messrs Simeza Sangwa and Associates.*

*For the 1<sup>st</sup> defendant: No appearance.*

*For the 2<sup>nd</sup> defendant: Mr. Chibalabala of Messrs D.H. Kemp and Company.*

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**J U D G M E N T**

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**Cases referred to:**

1. *Lee v Butler [1893] 2Q.B. 318.*
2. *Cornish v Accident Insurance Company [1889] 23 Q.B.D. 453*
3. *Dawson's Limited v Bonnin [1922] 2 A.C. 413.*
4. *Newtons of Wembley Limited v Williams [1944] 3 ALL E.R. 532.*
5. *Chipango v Attorney General (1970) Z.R. 31.*
6. *Schuler (L) AG v Wickman Machine Tools Sales Limited [1974] A.C. 235.*
7. *Cehave v Brema Handelgesellschaft mbH [1976] Q.B. 44.*
8. *Tradax v International SA Goldschmidt SA [1977] 2 Lloyd's Rep 604.*
9. *Re Bond Worth Limited [1980] Ch 228.*
10. *Bunge Corp v Tradax Export SA [1981] 1 W.L.R. 711.*

11. *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Limited* [1996] 2 B.L.C. 69.
12. *Lonrho Cotton Zambia Limited v Mukuba Textiles Limited* SCZ Judgment No. 168 of 2000 (unreported).
13. *Association of British Travel Agents Ltd v British Airways Plc* [2002] 2 ALL E.R. 204.
14. *Mulungushi v Chomba* (2004) Z.R. 96.
15. *Masiye v Phiri* (2008) Volume 2, Z.R. 56.
16. *Indo-Zambia Bank Limited v Muhanga* (2009) Z.R. 266.

**Legislation referred to:**

1. *Factors Act 1889, s.9.*
2. *Sale of Goods Act, 1893 ss.1, 5 (1), 12 (1); 18, 21 (1); 22 (1),and 25 (2).*
3. *British Acts Extension Acts cap 10, s.2.*

**Works referred to:**

1. A.G. Guest, *Benjamin's Sale of Goods First Edition*, (London, Sweet and Maxwell, 1974).
2. M. Bridge, *Benjamin's Sale of Goods Eighth Edition*, (London, Thomson Reuters (Legal) Limited, 2010).
3. H.G. Beale, *Chitty on Contracts, volume 11, Specific Contracts, 28<sup>th</sup> Edition* (London, Sweet and Maxwell, 1999).
4. H.G. Beale, *Chitty on Contracts, Volume 1, General Principles, 31<sup>st</sup> Edition*, (London, Thomson Reuters (Legal) Limited, 2008).
5. Roy Goode, *Commercial Law, 2<sup>nd</sup> Edition*, (London and Dubling Butterworths, 1995).
6. Kim Lewson, *The Interpretation of Contracts, Fourth edition*, (London, Sweet and Maxwell 2007).
7. Mark Adler, *Clarity for Lawyers: Effective Legal Writing, Second edition*, (London, Law Society, 2007).
8. *Halsbury Laws of England, 4<sup>th</sup> Edition, Volume 4.*

This action was commenced on 18<sup>th</sup> August, 1998, by way of writ of summons. The plaintiff's claims are for the following:

1. the return of the MF 930 – 60 KVA generator set serial number 64888/002, currently in the possession of the 1<sup>st</sup> defendant which generator set has not been paid for;
2. damages for use of the said generator set from the date it was placed into the possession of the 1<sup>st</sup> defendant, until to date;
3. preservation order of the said generator set; and
4. Costs.

The writ of summons is accompanied by a statement of claim dated 8<sup>th</sup> August, 2002. The brief history of this matter as disclosed in the statement of claim is that the plaintiff was the owner of the MF 930 – 6KVA generator set serial number 64888/002. On or about 12<sup>th</sup> May, 1998, the plaintiff offered it for sale to the 1<sup>st</sup> defendant. The generator was offered for a price of US 15, 140=00. And on condition that the full purchase price was paid by 21<sup>st</sup> April, 1998.

On or about 12<sup>th</sup> May, 1998, the 1<sup>st</sup> defendant having failed to pay for the generator, the plaintiff made an application to Court for an order to preserve the generator at the 1<sup>st</sup> defendant's premises; at plot number 4556, North-end, Cairo road, Lusaka. The order was granted.

Subsequently, by a default judgment dated 15<sup>th</sup> June, 1998, the 1<sup>st</sup> defendant was ordered to return the generator to the plaintiff. The plaintiff on recovering the generator sold it to a third party. In the default judgment, the plaintiff was further awarded damages as compensation for use, and depreciation of the generator during the period when it was in the custody of the 1<sup>st</sup> defendant. The damages were to be assessed by the Deputy Registrar.

On 8<sup>th</sup> July, 1998, long after the default judgment had been entered, the 2<sup>nd</sup> defendant applied to be joined to the proceedings. After its joinder, the 2<sup>nd</sup>

defendant filed a defence and counterclaim. In the defence and counterclaim, dated 22<sup>nd</sup> August, 2002, the 2<sup>nd</sup> defendant contends that it bought the generator in dispute from the 1<sup>st</sup> defendant. And was therefore not privy to the agreement between the plaintiff and the 1<sup>st</sup> defendant.

The 2<sup>nd</sup> defendant also avers in the defence and counterclaim that upon being joined to these proceedings, it made an application to set aside the judgment in default of appearance dated 15<sup>th</sup> June, 1998. The application was allowed. And the Court ordered that the action proceed to trial and be determined on its merits.

In the counterclaim, the 2<sup>nd</sup> defendant particularized the claim as follows: that on or about the 24<sup>th</sup> December, 1997, the 2<sup>nd</sup> defendant purchased from the 1<sup>st</sup> defendant the generator in issue at a price of US 26, 450=00. In fact, the 2<sup>nd</sup> defendant paid the kwacha equivalent in the sum of K 38, 590, 550=00. At the time of the purchase of the generator, the 2<sup>nd</sup> defendant had no prior notice of the agreement or transaction between the plaintiff and the 1<sup>st</sup> defendant, in connection with the same generator.

The 2<sup>nd</sup> defendant disclosed that it purchased the generator for its use at its Choma branch. And at the time that the plaintiff obtained the order for preservation, the generator had already been installed at its branch. Thus, the plaintiff relying on the order of preservation, removed the generator from the 2<sup>nd</sup> defendant's branch in Choma. As a result of that action, the 2<sup>nd</sup> defendant is claiming the following:

1. damages for loss of use of the generator;
2. an order that the plaintiff do surrender and deliver the generator to the 2<sup>nd</sup> defendant; or
3. alternatively that the plaintiff do refund the 2<sup>nd</sup> defendant the purchase price of US 26, 450=00 or kwacha equivalent being the money which was paid by the 2<sup>nd</sup> defendant.

On 28<sup>th</sup> August, 2002, the plaintiff, filed a reply and defence to the 2<sup>nd</sup> defendant's counterclaim. The plaintiff contends that the generator, was its property, and sold it to the 1<sup>st</sup> defendant in a conditional sale agreement. The plaintiff reiterated that it was not a party to the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants. And at no time did it authorize the 1<sup>st</sup> defendant to resale the generator before the title passed. The plaintiff however concedes that it retrieved the generator from the 2<sup>nd</sup> defendant. But it denies that the 2<sup>nd</sup> defendant suffered any damage. Be that as it may, the plaintiff contends that if the 2<sup>nd</sup> defendant suffered any damages, then those damages should be laid before the 1<sup>st</sup> defendant because the plaintiff was not privy to the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendant.

The trial of this action was conducted on 27<sup>th</sup> October, 2010. The plaintiff called one witness by the name of Wise Chibindi. For convenience sake, I will continue to refer to Wise Chibindi as PW1. PW1 is the Finance Manger of the plaintiff company. He recalled that on or about 12<sup>th</sup> February, 1998, the plaintiff entered into a Sale Agreement with the 1<sup>st</sup> defendant for the sell of a 60 KVA generator, or to be specific, an MF 8930. The plaintiff sold the generator to the 1<sup>st</sup> defendant as agents for *Merfuy Fergusson*; the suppliers of the generators. The generator was sold to the 1<sup>st</sup> defendant on 12<sup>th</sup> February, 1998, at a purchase price of USD 15 040=00.

PW1 also testified that the agreement between the plaintiff and the 1<sup>st</sup> defendant was that the 1<sup>st</sup> defendant had to pay for the generator by 21<sup>st</sup> April, 1998. However, by 17<sup>th</sup> April, 1998, the 1<sup>st</sup> defendant had not paid for the generator. Thus on the same day; on 17<sup>th</sup> April 1998, a reminder was sent to the 1<sup>st</sup> defendant to make good the payment. Despite the reminder, the 1<sup>st</sup> defendant did not still make good the payment.

As a result, the plaintiff proceeded on 12<sup>th</sup> March, 1998, to obtain an *ex parte* order for preservation of the generator. Following the issuance of the order,

the plaintiff recovered the generator which was in possession of the 2<sup>nd</sup> defendant. After, recovering the generator, it was kept at plot 4556, Cairo road, Lusaka; the premises of the plaintiff. PW1 testified further that after the plaintiff recovered the generator, sometime in June, 1998, the plaintiff obtained a default judgment against the 1<sup>st</sup> defendant, and proceeded to advertise the generator for sell to third parties. The generator was eventually sold to a third party sometime in 1999. Later, the judgment in default obtained by the plaintiff was set aside sometime in 2000. The judgment in default was set aside after the generator had already been sold to a third party.

The 2<sup>nd</sup> defendant also called only one witness by the name of Philimon Kancheya. For convenience, I will continue refer to Philomon Kacheya as DW1. DW1 is the erstwhile Service Manager for the 2<sup>nd</sup> defendant. DW 1 recalled that sometime in early December, 1997, he was informed that there was intermittent power supply at the Choma branch. As a result of this intermittent supply of power, DW1 recognized the need to install a generator at the branch. In due course, the 2<sup>nd</sup> defendant authorized the purchase of the generator from the 1<sup>st</sup> defendant. The generator was purchased at a sum of K 38, 590, 550=00. And it was delivered to the 2<sup>nd</sup> defendant towards the end of February, 1998. Sometime in May or June, 1998, the plaintiff went to the 2<sup>nd</sup> defendant's branch in Choma with a preservation order. With the order in hand, the plaintiff recovered the generator from the 2<sup>nd</sup> defendant. At that point, the 2<sup>nd</sup> defendant had no knowledge why the plaintiff recovered the generator from the branch, because the 2<sup>nd</sup> defendant transacted with the 1<sup>st</sup> defendant.

DW1 further confirmed that the 2<sup>nd</sup> defendant's counterclaim is that the plaintiff should return the generator to the 2<sup>nd</sup> defendant. Or in the alternative, refund the 2<sup>nd</sup> defendant the full value of the purchase price paid by the 2<sup>nd</sup> defendant to the 1<sup>st</sup> defendant.

At the close of the trial, on 27<sup>th</sup> October, 2010, I directed counsel to file written submissions in support of their respective cases. The plaintiff filed its submissions on 19<sup>th</sup> November, 2010. After narrating the background to this case, and summarizing the evidence of the respective witnesses for the plaintiff, and the 2<sup>nd</sup> defendant, Mr. Nzonzo posed the following fundamental question: who between the plaintiff and the 2<sup>nd</sup> defendant has a better claim of right to the generator. Mr. Nzonzo argued that the plaintiff's evidence points to the fact that the plaintiff and 1<sup>st</sup> defendant entered into an agreement for the purchase and sell of the generator. The terms of the contract were that the plaintiff would sell to the 1<sup>st</sup> defendant on condition that the full purchase price was paid to the plaintiff by 21<sup>st</sup> April, 1998; failing which the plaintiff would exercise its right to repossess the generator.

Mr. Nzonzo substituted that the contract between the plaintiff and the 1<sup>st</sup> defendant is a conditional sale agreement. A conditional sale agreement, Mr. Nzonzo submitted is explained by Roy Goode, Commercial Law, (1995) 2<sup>nd</sup> Edition, (London and Dubin, Butterworths, 1995) at pages 763 - 764 in the following terms:

*"A conditional sale agreement is an agreement for sale under which the title remains in the seller until the purchase price has been paid in full or the buyer has complied with any other conditions prescribed by the agreement for the transfer of the title to him...."*

*The typical agreement will require the buyer to maintain punctual payment of the installments, to keep the equipment in his possession comprehensively insured and in good repair and condition, not to sell or otherwise dispose of it and not to allow any lien to be created on it, e.g. for repairs. The agreement will contain a provision entitling the seller to terminate the agreement and repossess the equipment in various events, including breach of the buyer's obligations....."*

The learned author, of Commercial Law, (supra) goes on to state at page 767, Mr. Nzonzo pointed out that:

*“In principle, the seller can assert his title against any third party into whose hands the equipment may pass as the result of an unauthorized disposition by the buyer.”*

Furthermore, Mr. Nzonzo submitted that the learned authors of Chitty on Contracts Volume II, Specific Contracts 28<sup>th</sup> Edition (London, Sweet and Maxwell, 1999) define, a conditional sale agreement at page 1102 as:

*“One for the sale of goods under which the purchase price or part of it is payable by installments and the property in the goods is to remain in the seller (notwithstanding that the buyer is to be in possession of the goods) until such conditions as to payment of installments or otherwise as may be specified in the agreement are fulfilled).”*

In view of the foregoing, Mr. Nzozo argued that following the conditional sale agreement entered into between the plaintiff and the 1<sup>st</sup> defendant, title in the generator remained in the plaintiff until such time when the condition was satisfied. That is, when the purchase price was paid in full. In the premises, Mr. Nzozo contends that since there was a total failure of consideration, the title did not pass from the plaintiff to the 1<sup>st</sup> defendant. Furthermore, he contends that upon failure to pay the purchase price, the plaintiff had the right to repossess the generator, and subsequently sell it to a third party following the judgment in default. The judgment in default, Mr. Nzonzo argued, was only set aside long after the generator was sold. Thus, Mr. Nzonzo maintains, since title under a conditional sale agreement does not pass until the condition is satisfied, the 1<sup>st</sup> defendant had no title to pass to the 2<sup>nd</sup> defendant.

Mr. Nzonzo also argued that 1<sup>st</sup> defendant’s obligation to pay the full purchase price by 21<sup>st</sup> April, 1998, was a condition precedent to the passing of title and completion of the contract. In this respect, he submitted that it is trite law that failure to satisfy a condition precedent renders a contract void. In aid of this submission, Mr. Nzonzo relied on the case of *Chipango v Attorney General (1970) Z.R. 31* where the following view was expressed:



*“It is true that in the case of a contract, breach of a condition precedent prevents the contract from ever becoming operative. Whereas breach of a condition subsequent need not render the contract void, but may be answerable in damages only.”*

Mr. Nzonzo submitted that in light of the *Chipango* case (supra), and also granted that the 1<sup>st</sup> defendant failed to pay for the generator in full, the contract did not become operative. The net result, Mr. Nzonzo contends, is that the title in the generator remained with the plaintiff.

The second limb of Mr. Nzonzo’s submission relies on the principle of *nemo dat quod non habet*. Translated literally this means that:

*“no one can give that which he has not.”* (See *Mulungushi v Chomba* (2004) Z.R. 96). In this regard it was argued on behalf of the plaintiff that since the 1<sup>st</sup> defendant did not have title to pass, then the common law rule of *nemo dat quod non habet*, applies to the present case.

Mr. Nzonzo also drew my attention again to the learned author of Commercial Law (supra), when he states at page 60 as follows:

*“The rule of common law is that only the legal owner of goods or one who has been authorized or otherwise held out as entitled to dispose of them can make a disposition which will be effective to deprive the legal owner of his title or encumber his interest in principle. Therefore, the owner is entitled to pursue his goods into the hands of an innocent purchaser for value, and to assert proprietary rights over the proceeds and products of his property...”*

The preceding position, Mr. Nzonzo submitted, is encapsulated in section 21 (1) of the Sale of Goods Act 1893, when it enacts that:

*“Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from, denying the seller’s authority to sell.”*

Mr. Nzonzo argued that the principle enunciated in section 21 (1) of the Sale of Goods Act was adopted by the Supreme Court in the case of *Lonrho Cotton Zambia Limited v Mukuba Textiles Limited SCZ judgment No. 178 of 2000 (unreported)*. Mr. Nzonzo submitted that in the *Lonrho Cotton Zambia Limited case (supra)*, the Supreme Court held, *inter alia*, that where goods are sold by one person who is not the owner, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. In this case, Mr. Nzonzo argued that the 1<sup>st</sup> defendant could not sell to the 2<sup>nd</sup> defendant a generator which did not belong to it. Furthermore, Mr. Nzonzo contends that on the facts of this case, there is no evidence before this Court to show or suggest that the plaintiff by its conduct can be stopped or precluded from denying the 1<sup>st</sup> defendant's purported authority to sell in order to perfect the 2<sup>nd</sup> defendant's title to the generator. Mr. Nzonzo therefore urged me to dismiss the 2<sup>nd</sup> defendant's claim for the generator.

Mr. Nzonzo also invited me to take note of the fact that under the purported agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants, it was an express term in the quotation from the 1<sup>st</sup> defendant that the equipment was available ex stock. And delivery was to be made immediately after receipt of the order with payment. This position is evidenced, Mr. Nzonzo submitted, by the letter of offer dated 17<sup>th</sup> December, 1997, contained at page two of the 2<sup>nd</sup> defendant's bundle of documents. Mr. Nzonzo submitted further that it is common knowledge that when an item is available ex stock, it means that it is already in stock and ready for delivery. In this case, Mr. Nzonzo argued that the generator was paid for on 24<sup>th</sup> December, 1997. Therefore, the 1<sup>st</sup> defendant ought to have delivered the generator to the 2<sup>nd</sup> defendant on the same day or soon thereafter. Instead, it took two months for the 1<sup>st</sup> defendant to supply the generator. The 2<sup>nd</sup> defendant's witness failed to offer

any explanation why it took the 1<sup>st</sup> defendant long to deliver the generator to the 2<sup>nd</sup> defendant, so Mr. Nzonzo contended.

Mr. Nzonzo also argued that at the time the 1<sup>st</sup> defendant sent the quotation to the 2<sup>nd</sup> defendant, and it purportedly contracted to purchase the generator, the generator was not available. The generator was only available around February, 1998, when the plaintiff delivered the generator to the 1<sup>st</sup> defendant. Moreover, Mr. Nzonzo submitted that the description of the generator set paid for by the 2<sup>nd</sup> defendant, and that was subsequently recovered from its premises differed fundamentally in size. In this regard, Mr. Nzonzo maintained that whilst the 2<sup>nd</sup> defendant purchased a 1X50 KVA 3 phase generator; the plaintiff recovered from the 2<sup>nd</sup> defendant a 1X60 KVA MF 930 generator that it initially supplied to the 1<sup>st</sup> defendant. In fact, Mr. Nzonzo contends that the 2<sup>nd</sup> defendant acquired from the 1<sup>st</sup> defendant an asset it did not contract to purchase.

Mr. Nzonzo submitted that it may be contended by the 2<sup>nd</sup> defendant that the agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was an agreement as to future goods as envisioned under section 5 (1) of the Sale of Goods Act, 1893. Mr. Nzonzo submitted that the argument cannot be sustained because it was a term of the agreement that the equipment was available ex stock. And delivery was to be done immediately upon receipt of the order together with the payment. Mr. Nzonzo submitted that it therefore follows that the generator which was subsequently obtained by the 1<sup>st</sup> defendant under the agreement with the plaintiff could not have been appropriated to the earlier agreement with the 2<sup>nd</sup> defendant who purchased a specific ascertainable asset which was different from what it subsequently acquired. It also follows from what has been stated above that the 1<sup>st</sup> defendant could not pass valid

title to the generator to the 2<sup>nd</sup> defendant, because it was not the subject matter of the agreement between the parties.

Mr. Nzonzo also argued that the 2<sup>nd</sup> defendant may also attempt to rely on section 25 (2) of the Sale of Goods Act, 1893, to oust the application of the “*nemo dat*” rule, and claim title to the generator in issue. Mr. Nzonzo submitted that this is due to the fact that section 25 (2) deals with a buyer in possession of the goods sold to an innocent third party. Mr. Nzonzo argued that however, in this case, the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendants was concluded upon paying the purchase price in full on 24<sup>th</sup> December, 1997. Yet the agreement between the plaintiff and the 1<sup>st</sup> defendant was only entered into in February, 1998. It is only then Mr. Nzonzo contended that the 1<sup>st</sup> defendant came to have possession of the generator in issue.

Mr. Nzonzo submitted that the 1<sup>st</sup> defendant was therefore not a buyer in possession of the generator at the time it sold the differently described generator to the 2<sup>nd</sup> defendant in December, 1997. Mr. Nzonzo therefore submitted that section 25 (2) only applies in a situation where the sale or disposition of the goods to the innocent purchaser is made subsequent to the obtaining possession with consent of the owner. And not prior to the obtaining of such possession. Mr. Nzonzo argued that in this case there was neither consent obtained from the plaintiff to sell the generator to a third party, nor was the 1<sup>st</sup> defendant a buyer in possession because the generator was not yet in possession of the 1<sup>st</sup> defendant in December, 1997.

In summary, Mr. Nzonzo argued that the matter between the plaintiff and the 1<sup>st</sup> defendant was concluded when the plaintiff recovered the generator and preserved it at its premises, to the time it obtained judgment in default and eventually sold it to a third party in order to recover the monies owned to it

by the 1<sup>st</sup> defendant who had in any event defaulted in paying for the generator. Mr. Nzonzo contends that the matter has reached this stage, because of the 2<sup>nd</sup> defendant's joinder to the proceedings; long after conclusion of the matter between the plaintiff and the defendant. Mr. Nzonzo also submits that at best the 2<sup>nd</sup> defendant's remedy lies with the 1<sup>st</sup> defendant. And therefore should have pursued its claim against the 1<sup>st</sup> defendant, instead of the plaintiff.

In any event, Mr. Nzonzo contends that the 2<sup>nd</sup> defendant has failed to prove its claim against the plaintiff. And it is also clear from the evidence that the generator which was the subject of proceedings between the plaintiff and the 1<sup>st</sup> defendant is not what the 2<sup>nd</sup> defendant contracted to buy. Further, he contends that there is nothing from the plaintiff's conduct that precludes it from asserting its rights over the generator because it was not privy to, or aware of the transaction between the two defendants. In the end, Mr. Nzonzo urged me to dismiss the 2<sup>nd</sup> defendant's counterclaim, and to award the plaintiff costs.

On 17<sup>th</sup> December, 2011, Mr. Chibalabala filed submissions on behalf of the 2<sup>nd</sup> defendant. After setting out the background to this matter, Mr. Chibalabala invited me to make the following findings of fact:

- (a) that the 2<sup>nd</sup> defendant bought a generator from the 1<sup>st</sup> defendant at the purchase price of K 38, 590, 550=00, by a cheque dated 24<sup>th</sup> December, 1997;
- (b) that the 1<sup>st</sup> defendant delivered the generator to the 2<sup>nd</sup> defendant in February, 1998, which was installed at its branch in Choma;

- (c) the plaintiff delivered a generator to the 1<sup>st</sup> defendant on 12<sup>th</sup> February, 1998, and demanded to be paid the outstanding debt of US 15, 140=00 on 17<sup>th</sup> April, 1998;
- (d) the plaintiff revoked and took possession of the generator in question from the 2<sup>nd</sup> defendant's branch in Choma through a preservation order dated 13<sup>th</sup> May, 1988; and
- (e) the plaintiff, sold the generator in question to a third party sometime in 1999.

Mr. Chibalabala submitted that the disputed facts between the plaintiff, and the 2<sup>nd</sup> defendant are as follows:

- (a) that the plaintiff sold the generator in question to the 1<sup>st</sup> defendant on condition that the latter pays the purchase price on 21<sup>st</sup> April, 1998. That is, it was a conditional sale;
- (b) that the 2<sup>nd</sup> defendant did not acquire good title to the generator it purchased from the 1<sup>st</sup> defendant;
- (c) that the generator supplied to the 2<sup>nd</sup> defendant by the 1<sup>st</sup> defendant was different, and hence invalidated the contract between the 1<sup>st</sup> and 2<sup>nd</sup> defendants; and
- (d) that the 2<sup>nd</sup> defendant was not entitled to its counterclaim.

Mr. Chibalabala after narrating and analysing the testimony of the sole witnesses of the plaintiff and 2<sup>nd</sup> defendant, posited the following issues for my determination:

- (a) whether or not the contract of sale between the plaintiff and the 1<sup>st</sup> defendant constituted a conditional sale;
- (b) whether or not the 2<sup>nd</sup> defendant acquired a good title to the generator it purchased from the 1<sup>st</sup> defendant;
- (c) whether or not the difference in the description of the generator invalidated the contract;

- (d) whether or not the 2<sup>nd</sup> defendant was entitled to its counterclaim; and
- (e) whether or not the plaintiff had a reasonable cause of action against the 2<sup>nd</sup> defendant.

After postulating the preceding questions, Mr. Chibalabala proceeded to address the questions in detail and seriatim. The first question addressed is whether or not the contract of sale between the plaintiff and 1<sup>st</sup> defendant constituted a conditional sale. Mr. Chibalabala argued that the expression “*conditional sale agreement*” is not contained in the documents forming the contract between the plaintiff, and the 1<sup>st</sup> defendant. Namely, the delivery Note dated 12<sup>th</sup> February, 1998, and the letter of demand for the payment of outstanding debt in the sum of USD 15, 140=00, dated 17<sup>th</sup> April, 1998.

Mr. Chibalabala contends that the expression “conditional sale agreement”, was tendered by the plaintiff’s sole witness; PW1, during the trial on 27<sup>th</sup> October, 2010. And it is most likely an afterthought. Further, Mr. Chibalabala contends that during cross-examination, PW1 conceded that the expression “*conditional sale agreement*”, was not incorporated into the contract; it was a verbal term of the contract.

Mr. Chibalabala submitted that the learned author of Commercial Law, (supra) states the following regarding the expression “*conditional sale agreement*” at pages 763 and 764:

*“A conditional sale agreement is an agreement under which the title remains in the seller until the purchase price has been paid in full or the buyer has complied with any other conditions prescribed by the agreement for the transfer of title to him ...”*

Mr. Chibalabala also drew my attention to the learned authors of Benjamin’s Sale of Goods (London, Sweet and Maxwell, 1974) where they state:

*“Where a contract for the sale of specific goods is made subject to a condition which suspends the passing of property, the property will not pass to the buyer when the contract is made, but only when the condition is fulfilled...”*

In view of the foregoing, Mr. Chibalabala submitted that a conditional sale agreement must fulfill the following conditions:

- (a) an express or implied term that a contract is made subject to prescribed conditions; and
- (b) an express or implied term that the property in the goods will not pass to the buyer until the prescribed conditions are complied with.

Mr. Chibalabala argued that it is clear from the Delivery Note dated 12<sup>th</sup> February, 1998, as well as the letter dated 17<sup>th</sup> April, 1998, that the expression conditional sale agreement was not incorporated as a term of the contract. Consequently, Mr. Chibalabala argued that the contract of sale between the plaintiff and the 1<sup>st</sup> defendant was an unconditional sale; and not a conditional sale agreement as contended by the plaintiff. Thus, Mr. Chibalabala maintains that the property in the generator passed from the plaintiff to the 1<sup>st</sup> defendant when the contract was made. The preceding contention, Mr. Chibalabala argued, is endorsed by the learned authors of Chitty on Contract, (supra), when they state in paragraph 44-94 as follows:

*“Where there is an unconditional contract for the sale of specific goods, in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are postponed.”*

In light of the preceding propositions of law, Mr. Chibalabala submitted that the 1<sup>st</sup> defendant had a right to sell and pass title in the generator to the 2<sup>nd</sup> defendant. This submission, Mr. Chibalabala argued, conforms with the



provisions of section 12 (1) of the Sale of Goods Act 1893, when it provides that:

*“In every contract of sale, other than one to which subsection (2) of the section applies there is\_\_\_\_\_*

*(a) an implied condition on the part of the seller that in the case of sale, he has a right to sell the goods...*

*(b) an implied warranty that the goods are free, and will remain free... and the buyer will enjoy quiet possession of the goods...”*

From what has been stated above, Mr. Chibalabala argued that the issues or arguments advanced by Mr. Nzonzo in his submissions do not arise in this case. Namely:

(a) conditional sale;

(b) an unauthorized disposition by the buyer see Roy Goode, Commercial Law (supra) at page 767;

(c) Breach of condition precedent (See *Chipango v Attorney General* (1970) Z.R. 36).

(d) Rule of *nemodat quod non habet* (see *Mulungushi v Chomba* (2004) Z.R. 98); and

(e) Selling of goods by a person who is not owner. (See *Lonrho Cotton Zambia Limited v Mukuba Textiles Limited SCZ Judgment No. 168 of 2000* (unreported)).

In sum, Mr. Chibalabala submitted that the contract of sale between the plaintiff and the 1<sup>st</sup> defendant did not constitute a conditional sale agreement. Mr. Chibalabala contends that it constitutes an unconditional sale as adumbrated above.

The second issue which Mr. Chibalabala addressed in his submissions is whether or not the 2<sup>nd</sup> defendant acquired good title to the generator it purchased from the 1<sup>st</sup> defendant. Mr. Chibalabala argued that the 2<sup>nd</sup> defendant acquired good title to the generator for the following reasons:

(a) the 2<sup>nd</sup> defendant bought the generator in a market overt, and in compliance with section 22 (1) of the Sale of Goods Act, 1893, which enacts as follows:

*“Where goods are sold in market overt, according to the usage of the market, the buyer acquires a good title to the goods, provided he buys them in good faith, and without notice of any defect or want of title on the part of the seller.”*

(b) the plaintiff had no legal right to remove and take possession of the generator in question from the 2<sup>nd</sup> defendant who at the material time was the legal owner.

Notwithstanding, Mr. Chibalabala submitted that the plaintiff was entitled to bring an action against the 1<sup>st</sup> defendant for the price of the generator. This position he maintained is consistent with the law. In fact, the learned authors of the Halsbury Laws of England, 4<sup>th</sup> edition, Volume 4, he pointed out, state in paragraph 881 in respect of remedies of the seller whose property has passed as follows:

*“Where, under a contract of sale the property in the goods has passed to the buyer and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of goods.”*

(c) In the case of *Newtons of Wembley Limited v Williams [1964] 3 ALL E.R; 532*, the plaintiff sold a motor car to a buyer who paid the purchase price by cheque. It was dishonoured. In the meanwhile, the buyer sold the car to a third party. And the plaintiffs attempted to repossess it due to lack of consideration. The Court observed as follows:

*“...the defendant having established that it bought the car in good faith, and with notice of the plaintiff's right or of any lack of authority in A..... the defendant was entitled to damages for conversion or judgment in detinue.....”*

Thus, Mr. Chibalabala submitted that in this case, the 2<sup>nd</sup> defendant acquired good title to the generator it purchased from the 1<sup>st</sup> defendant, and the plaintiff were not entitled to repossess it.

The third question that Mr. Chibalabala addressed is whether or not the discrepancy in the description of the generator invalidated the contract. Mr. Chibalabala submitted that it is clear from the evidence on record that the 1<sup>st</sup> defendant agreed to supply a 50 KVA 3 phase generator - with no specific serial number\_\_\_ to the 2<sup>nd</sup> defendant. Mr. Chibalabala submitted that instead of delivering a 50 KVA 3 phase generator, the 1<sup>st</sup> defendant delivered a different one. The 1<sup>st</sup> defendant delivered a 930-60 KVA serial number 64888/002, which the 2<sup>nd</sup> defendant accepted delivery, and installed it at its branch in Choma. Mr. Chibalabala maintains that the 2<sup>nd</sup> defendant by acceptance of a different generator set, and installing it at its Choma branch, waived its right to repudiate the contract. He also contends that the variation in the description of the generator was a mere warranty which did not go to the root of the contract.

Mr. Chibalabala also contends that nothing turns on the amount of time it took for the 1<sup>st</sup> defendant to deliver the generator set to the 2<sup>nd</sup> defendant, after it paid the purchase price on 24<sup>th</sup> December, 1997. In aid of this contention, Mr. Chibalabala relied on section 5 (1) of the Sale of Goods Act 1983, which provides as follows:

*“The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract of sale, in this Act called “future goods.”*

Mr. Chibalabala submitted that a similar argument was considered in the case of *Masiye v Phiri (2008) volume 2 Z.R. 60*, where the plaintiff and the defendant entered into a contract of sale in which the plaintiff agreed to

supply the defendant with a Mitsubishi, 30 seater Rosa mini bus at a cost of US 16, 000=00 or the kwacha equivalent. Instead, the plaintiff supplied to the defendant a Toyota coaster 26 seater bus. In the *Masiye case (supra)*, the Supreme Court observed as follows at page 62:

*“We agree with the plaintiff’s submissions that the non-delivery of the Mitsubishi Mini Bus and the delivery of a Toyota Coaster Mini Bus was treated by the defendant as a mere warranty which did not go to the root of the contract. We have, therefore, no doubt that the defendant was still bound by the earlier contract...”*

Mr. Chibalabala also drew my attention to the learned authors of Chitty on Contracts (supra) who state as follows in paragraph 4613:

*“...The property may pass to the buyer before delivery of the goods to him and before his acceptance of the goods....”*

Mr. Chibalabala contends that the variation in the description of the generator and the dates of delivery do not invalidate the contract of sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

The fourth question which Mr. Chibalabala addressed is whether or not the 2<sup>nd</sup> defendant is entitled to the counterclaim. He recalled that the plaintiff commenced this action against the 1<sup>st</sup> defendant on 12<sup>th</sup> May, 1998. And later obtained an order of preservation. At the material time, Mr. Chibalabala submits, the 2<sup>nd</sup> defendant had already purchased the generator from the 1<sup>st</sup> defendant, and installed it at its branch in Choma. Further, Mr. Chibalabala submitted that at the material time, the 2<sup>nd</sup> defendant was not a party to the proceedings.

Notwithstanding, the plaintiff went ahead and removed the generator from the 2<sup>nd</sup> defendant when title had already passed to it. Mr. Chibalabala therefore contends that the plaintiff’s removal of the generator from the 2<sup>nd</sup> defendant’s branch in Choma, deprived it of its use and suffered damages.

And hence, the 2<sup>nd</sup> defendant's counterclaim against the plaintiff. Mr. Chibalabala observed that in its defence to the counterclaim, the plaintiff relied on the effect of a conditional sale. Mr. Chibalabala contends that the defence has no merit, and therefore the 2<sup>nd</sup> defendant's counterclaim should succeed.

The last issue addressed by Mr. Chibalabala's is whether or not the plaintiff had a reasonable cause of action against the 2<sup>nd</sup> defendant. Mr. Chibalabala argued that the plaintiff's claims in the statement of claim dated 8<sup>th</sup> August, 2002, are against the 1<sup>st</sup> defendant. In view of the foregoing, Mr. Chibalabala contends that the plaintiff has no cause of action against the 2<sup>nd</sup> defendant. In the end, Mr. Chibalabala urged that the plaintiff has not adduced sufficient evidence to prove its claims against the 2<sup>nd</sup> defendant. And therefore, the plaintiff's claim should be dismissed. He also urged me to uphold the 2<sup>nd</sup> defendant's counterclaim against the plaintiff.

## **CONTRACT OF SALE**

I am indebted to counsel for their spirited submissions and arguments in this matter. In order to appreciate fully the context in which this dispute arose, I will begin by addressing the concept or notion of the contract of sale itself. In terms of section 1 of the Sale of Goods Act 1893, a contract of sale of goods is defined as a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration called the price. A contract of sale may either be absolute, or conditional. (See ss. 1 (1) and (2) of the Sale of Goods Act 1893). However, where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale. But where the transfer of the property in goods takes place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell. An agreement to sell becomes a sale when the time elapses, or the conditions are fulfilled subject to which the

property in the goods is to be transferred. (See s. 1 (3) and (4) of the Sale of Goods Act 1893).

## **CONDITIONAL SALE AGREEMENT**

What then is a conditional sale agreement? The learned author of Benjamin's Sale of Goods Eighth Edition, (London, Thomson Reuters (Legal) Limited, 2010) explains a conditional sale in the following terms in paragraph 1 - 052, at page 46:

***“Conditional sale agreements\_\_\_ It may be a term of a contract of sale that the transfer of the property in the goods is subject to some condition to be fulfilled after the making of the contract. In particular, it may be agreed that the property shall not pass to the buyer until the price has been paid in full; and the expression “conditional sale” (and its variant “conditional purchase”) is regularly used to describe such a contract, at least in the common case where the price is payable by installments. (See Re Bond Worth Limited [1980] Ch 228, at 245).”***

In view of the foregoing, it may therefore be posited that a conditional sale agreement refers to a sale of goods or land under which the purchase price or part of it is payable by installments, and the property in the goods or land is to remain in the seller notwithstanding that the buyer is to be in possession of the goods or land until such conditions as to the payment of installments are fulfilled.

A question that may be asked is this: can a person who is not the owner of the goods pass good title in the property to a third party? Section 21 of the Sale of Goods Act 1893 in so far as is relevant provides the answer when it enacts that:

***“21 (1) Subject to the provisions of this Act, where goods are sold by a person who is not the owner thereof, and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title***

*to the goods than the seller had unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell.*

*(2) provided also nothing in this Act shall affect:*

*(a) the provisions of the Factors Act or any enactment enabling the apparent owner of goods to dispose of them as if he were the true owner thereof.*

*(b) The validity of any contract of sale under any special common law or statutory power of sale or under the order of a Court of competent jurisdiction."*

Thus, subject to the provisions of the Factors Act, it is not competent for a person who is not the owner, and without the authority of the owner to pass a good title to a third party.

Another question that may be posed is whether or not a person in possession of goods or land under a conditional sale agreement can pass title to a third party. In answer to this question, it was held in *Lee v Butler [1893] 2 Q.B 318*, that a person who was in possession of goods under a conditional sale agreement had agreed to buy within the terms of section 9 of the Factors Act 1889, so that the buyer could pass good title to a third party under the provision. By the way section 9 of the Factors Act, 1889, which applies of course in this jurisdiction by virtue of section 2 of the British Act Extension Act, is in these words:

*"Where a person having bought or agreed to buy goods obtains with the consent of the seller possession of the goods or the documents of the title to the goods, the delivery or transfer by the person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of the goods or documents of the title with the consent of the owner."*

## **WHEN A TERM IS A CONDITION**

How then is it to be determined whether or not the parties intended to enter into an absolute or conditional contract of sale? Section 18 of the Sale of Goods Act 1893, provides that unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which property in the goods is to pass to the buyer: where there is an unconditional contract for sale of specific goods in the deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both be postponed. (See section 18, rule 1 of the Sale of Goods Act 1893). Alternatively, where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing be done and the buyer has notice of the same. (See section 18, Rule 2 of the Sale of Goods Act 1893). A contract of sale may stipulate expressly that the sale is conditional. In certain instances, it may not. In that case how is it to be determined whether or not a term is a condition. According to Kim Lewson, The Interpretation of Contracts, Fourth Edition, (London, Sweet and Maxwell, 2007), paragraph 15-12, at page 578, a term will be treated as a condition of a contract where the parties have provided for it to be so treated either expressly or by necessary implication. However, it is not necessary for the contract to use the word condition before a term will be held to be a condition of the contract.

To illustrate, in *Dawson's Limited v Bonnin* [1922] 2 A.C. 413, an insurance policy stated that the proposal was to be "the basis" of the contract. The House of Lords held (by a majority) that complete accuracy in the proposal was thereby made a condition of the policy. Conversely, the mere fact that a contract uses the word "condition" is not conclusive. Thus, in *Schuler (L) AG v Wickman Machine Tools Sales Limited* [1974] A.C. 235, a Sales Agency agreement required the agent to visit potential customers at least once a week to solicit orders. That term was part of a clause which began: "It shall



be condition of this agreement.” The House of Lords held that the term was not a condition of the agreement, and that consequently the agreement could not be terminated merely on account of one missed visit. In the course of the judgment Lord Reid said:

*“Schuler maintains that the use of the word “condition” is in itself enough to establish this intention. No doubt some words used by lawyers do have a rigid inflexible meaning. But we must remember that we are seeking to discover intention as disclosed by the contract as a whole. Use of the word condition is an indication\_\_\_ even a strong indication \_\_\_ of such an intention but it is by no means conclusive.”*

The learned author of The Interpretation of Contracts (supra), suggests at 579 that there is indeed in the modern cases a tendency against construing contractual terms as conditions. To this end, in *Cehave NV v Bremer Handelgesellschaft mbH* [1976] Q.B. 44 Roskel L.J said:

*“In my view a Court should not be over ready, unless required by statute or authority so to do to construe a term in a contract as a “condition any breach of which gives rise to a right to reject rather than as a term any breach of which sounds in damages... in principle, contracts are made to be performed and not to be avoided according to the whims of market fluctuation and where there is a free choice between two possible constructions, I think the Court should tend to prefer that construction which will ensure performance and not encourage avoidance of contractual obligations.”*

Accordingly, the Court rejected an argument that in the case of contract for the sale of goods, all contractual obligations must either be conditions or warranties since the Sale of Goods Act 1893, did not cater for intermediate terms. In *Tradax International SA v Goldschmidt SA* [1977] 2 Lloyds Rep 604 Slynn J observed lucidly that:

*“...In the absence of any clear agreement or prior decision that this was to be a condition, the Court should lean in favour of construing this provision as to impurities as an intermediate term, only a serious and substantial breach of which entitled rejection.”* And Lord Roskill returned to the theme in *Bunge Corp v Tradax Export SA* [1981] 1W.L.R. 711 in which he said:

*“In short, while recognizing the modern approach, and not being over ready to construe terms as conditions, unless the contract clearly requires the Court so to do, none the less the basic principles of construction for determining whether or not a particular term is a condition remain as before, always bearing in mind on the one hand the need for certainty and on the other the desirability of not, when legitimate, allowing rescission where the breach complained of is highly technical and where damages would clearly be an adequate remedy.”*

The net effect of this discussion as to when a term is a condition, may be summed up as follows:

- a) a term will be treated as a condition where the parties have provided for it expressly or by necessary implication;
- b) it is not necessary for the contract to use the term *“condition”* before a term will be held to be a condition of the contract;
- c) use of the word *“condition”* in a contract is an indication \_\_\_ even a strong indication of the parties. But it is by no means conclusive;
- d) a Court should not be over ready unless required by statute or authority so to do to construe a term in a contract as a *“condition”* any breach of which give rise to a right to reject rather than as a term any breach of which sounds in damages; and
- e) a Court should tend to prefer that construction which will ensure performance, and not encourage avoidance of contractual obligations.

### **CONTRA PROFERENTUM**

It is also noteworthy that where there is doubt about the meaning of a contract, the words in the contract will be construed against the person who put them forward. This is the effect of the Latin Maxim: *“verba cartarum fortius accipiuntur contra proferentum”*. And which is popularly known as the *contra proferentum* rule. A literal translation of the principle is: *“the words of documents are to be taken strongly against the one who puts forward”*. Sedley L.J. in *Association of British Travel Agents Limited v British Airways Plc*

[2002] 2 ALL E.R. 204, described the rule as “a principle not only of law, but of justice.”

According to the learned author of The Interpretation of Contracts (supra) at page 261, the origin and first purpose of the principle is to limit the power of a dominant contractor who is able to deal on his own take it or leave terms with others. In *Tam Wing Chuen v Bank of Credit and Commerce Hong Kong Limited* [1996] 2 B.C.L.C. 69 at 77 Lord Mustil explained the principle in the following terms:

*“...the basis of the contra proferentum principle is that a person who puts forward the wording of the proposed agreement may be assumed to have looked after his own interest, so that if the words leave room for doubt about whether he is intended to have a particular benefit there is reason to suppose that he is not.”*

According to Mark Adler in Clarity for Lawyers: Effective Legal Writing Second Edition, (London, Law Society, 2007), *contra proferentem*, is a commendable principle that lays down that any ambiguity will be construed against the interest of the party responsible for it. It is sometimes referred to as the “careless drafting” rule. As Lindley L.J. put it in *Cornish v Accident Insurance Company* [1889] 23 Q.B.D. 453 at page 456:

*“...In a case of real doubt, the policy ought to be construed most strongly against the insurers, they frame the policy and insert the exceptions. But this principle ought only to be applied for the purpose of removing a doubt. Not for the purpose of creating a doubt or magnifying an ambiguity when the circumstances of the case raise no real difficulty.”*

The *contra proferentem* rule was applied by the Supreme Court in *Indo-Zambia Bank Limited v Muhanga* (2009) Z.R. 266.

## **MARKET OVERT**

There is one other matter that I will address before I apply the law outlined above to the facts of this case. This relates to “*market overt*”. Section 22 (1) of the Sale of Goods Act 1893, provides as follows:

*“22 (1) Where goods are sold in market overt, according to the usage or the market, the buyer acquires a good title to the goods, provided the buyer buys them in good faith and without notice of any defect or want of title on the part of the seller.”*

The rule in section 22 (1) of the Sale of Goods Act 1893, apply to sales from any open, public, and legally constituted market. (See Benjamin’s sale of Goods, Eighth Edition, (supra) paragraph 7.020 at page 357.

### **WHO HAS THE BETTER CLAIM OF RIGHT**

The crucial question that falls to be determined in this action is this: who has the better claim of right to the generator; is it the plaintiff or the 2<sup>nd</sup> defendant? In resolving this question, there is equally another crucial sub-issue that falls to be considered and determined. Namely, was the contract of sale in issue a conditional sale agreement or not? I will address the latter question first. I have already noted above that a conditional sale agreement, is a contract of sale where the transfer of property in the goods is subject to some condition to be fulfilled after the making of the contract. Most commonly, it may be agreed that the property shall not pass to the buyer until the price has been paid in full. On one hand the plaintiff contends that following the conditional sale agreement between the plaintiff and the 1<sup>st</sup> defendant, title in the generator remained in the plaintiff until such time that the condition was satisfied. On the other, the 2<sup>nd</sup> defendant contends that the contract of sale in issue was not a conditional sale agreement. In so contending, the 2<sup>nd</sup> defendant relies on the following premises. First, that the expression conditional sale agreement is not contained in the documents forming the contract between the plaintiff and the 1<sup>st</sup> defendant. That is, the delivery note dated 12<sup>th</sup> February, 1998. And the letter of demand for

payment of the outstanding balance in the sum of USD 15 140=00, dated 17<sup>th</sup> April, 1998. Second, the expression “*conditional sale agreement*” first appeared during the trial, on 27<sup>th</sup> October, 2010. And was most likely than not an afterthought. Third, under pain of cross-examination, PW1 conceded that the term “conditional sale agreement” was not incorporated into the contract of sale between the plaintiff and the 1<sup>st</sup> defendant; it was merely a verbal term of the contract. Fourth, that a “conditional sale agreement” must in any event fulfill the following:

- a) it must be an express or implied term that a contract of sale is made subject to prescribed condition(s); and
- b) it must be expressly stated or implied that the property in the goods will not pass to the buyer until the prescribed condition(s) are satisfied;

I accept the submissions by Mr. Chibalabala that: the expression “*conditional sale agreement*” is not contained in the documents forming the contract of sale between the plaintiff and the 1<sup>st</sup> defendant; the expression first appeared during the trial on 27<sup>th</sup> October, 2010; PW1 conceded during cross-examination that the expression “*conditional sale agreement*” was not incorporated in the contract between the plaintiff and the 1<sup>st</sup> defendant. And lastly to be valid, the term “*conditional sale agreement*” must be expressly stated or implied in the agreement. Thus the plaintiff has not adduced any evidence whatsoever to prove that the contract of sale between the plaintiff and the 1<sup>st</sup> defendant was a conditional sale agreement. In any case, even assuming that there was any doubt entertained whether or not the contract of sale was conditional, I would still have resolved that doubt in favour of the 1<sup>st</sup> defendant on the basis of the *contra proferentem* rule

As *sequitur*, the property in the generator passed from the plaintiff to the 1<sup>st</sup> defendant when the contract was made because where there is an

unconditional contract of sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery or both are postponed. Thus the 1<sup>st</sup> defendant had a right to sell, and pass the title in the generator to the 2<sup>nd</sup> defendant. In view of the foregoing, I reject the argument by Mr. Nzonzo that because there was a total failure of consideration, title in the generator could not pass from the plaintiff to the 1<sup>st</sup> defendant. I equally reject the argument by Mr. Nzonzo that title under a conditional sale agreement does not pass until the condition is satisfied. Further, the arguments relating to effect of condition precedent and the *maxim nemo dat quod non habet* are otiose.

Having concluded that under the contract of sale between the plaintiff, and the 1<sup>st</sup> defendant, the 1<sup>st</sup> defendant had the right to pass the title to a third party; a collateral question that falls to be determined is whether or not the 2<sup>nd</sup> defendant acquired good title in the generator from the 1<sup>st</sup> defendant. Mr. Nzonzo, relying on s. 21 (1) of the Sale of Goods Act 1893, maintained that a person who is not the owner and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. Conversely, Mr. Chibalabala submitted that the 2<sup>nd</sup> defendant acquired good title to the generator because it bought the generator in a market overt, and therefore in compliance with section 22 (1) of the Sale of Goods Act 1893. To recapitulate, section 22 enacts that:

*“Where goods are sold in market overt according to the usage of the market the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of any defect or want of title on the part of the seller.”*

I accept the submission by Chibalabala that the 2<sup>nd</sup> defendant having bought the generator from an open, public, and legally constituted market, it was

entitled to enjoy the protection afforded by section 22 of the Sale of Goods Act 1893.

## **FUTURE GOODS**

This matter does not however end here. Mr. Nzonzo also argued as follows: First, that it is clear from the evidence that the generator which was the subject of the proceedings between the plaintiff and the 1<sup>st</sup> defendant is not what the 2<sup>nd</sup> defendant contracted to buy. Second, that an agreement as to future contracts cannot be sustained because it was term of the agreement that the generator was available ex stock. In response, Mr. Chibalabala argued that; first, the 2<sup>nd</sup> defendant by accepting a different generator set and installing it at its Choma branch waived its right to repudiate the contract. And in any case, the variation in the description of the generator was a mere warranty which did not go to the root of the contract. second, that nothing turns on the amount of time it took for the 1<sup>st</sup> defendant to deliver the generator set to the 2<sup>nd</sup> defendant after it paid the purchase price on 24<sup>th</sup> December, 1997. In aid of the preceding submission, my attention was drawn to section 5(1) of the Sale of Goods Act 1893, which in these words:

*“The goods which form the subject of the contract of sale may be either existing goods, owned, or possessed by the seller or goods to be manufactured or acquired by the seller after the making of the contract of sale in this Act called future goods.”*

Thus, Mr. Chibalabala argued that the variation in the description of the generator and the dates of delivery did not invalidate the contract of sale between the 1<sup>st</sup> and 2<sup>nd</sup> defendants.

It is common ground that the 1<sup>st</sup> defendant agreed to supply a 950 KVA 3 phase generator with no specific serial number. Instead of delivering a 950

KVA 3 phase generator, the 1<sup>st</sup> defendant delivered a 930-60 KVA generator with a serial number 64888/002, which the 2<sup>nd</sup> defendant accepted delivery and installed it at its Choma Branch. In the circumstance, I accept the submissions by Mr. Chibalabala that the acceptance of a different generator amounted to a variation and waiver of the contract between 1<sup>st</sup> and 2<sup>nd</sup> defendants. In any event, according to the learned authors of Chitty on Contracts, Volume 1, General Principles, (Thomson Reuters (Legal) Limited, 2008) paragraph 22-032, at page 1465: *“The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement.”* In this case by their conduct the parties modified or altered the terms of the agreement.

Furthermore, the learned authors of Chitty on Contracts Volume1, General Principles (supra), state in paragraph 22 - 040, at page 1469 that:

*“Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the Court may hold that he has waived his right to require that the contract be performed in this respect according to its original tenor....”*

Again, in this case the 2<sup>nd</sup> defendant by accepting the 930-60 KVA generator, waived its right to insist on the delivery of the 950 KVA 3 phase generator.

I also accept the submission by Mr. Chibalabala that section 5(1) of the Sale of Goods Act is a complete answer to the contention by Mr. Nzozzo that an agreement as to future contracts cannot be sustained because it was a term of the agreement that the generator was available ex stock.

Overall, I accept the submission by Mr. Chibalabala that the plaintiff had no legal right to remove and take possession of the generator in question from the 2<sup>nd</sup> defendant who at the material time was the legal owner. I further



endorse the submission by Mr. Chibalabala that instead, the plaintiff was entitled to bring an action against the 1<sup>st</sup> defendant because where under a contract of sale the property in the goods has passed to the buyer, and he wrongfully neglects or refuses to pay for the goods according to the terms of the contract of sale, the seller may maintain an action against him for the price of goods.

In the end, I have upheld the counterclaim of the 2<sup>nd</sup> defendant against the plaintiff, that the generator in question should be surrendered to the 2<sup>nd</sup> defendant. In default thereof, the plaintiff should refund the 2<sup>nd</sup> defendant the sum of US 26, 450=00, together with interest at the average short-term bank deposit rate from the date of the writ to date of judgment. Thereafter, at the current bank standing rate as determined by Bank of Zambia, till date of payment. Costs follows the event.

Leave to appeal is hereby granted.

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**Dr. P. Matibini, SC.**  
**HIGH COURT JUDGE**