

(44)

**IN THE SUPREME COURT OF ZAMBIA SCZ JUDGMENT NO. 3 OF 2013**

**HOLDEN AT LUSAKA  
(Civil Jurisdiction)**

**Appeal No.37/2009**

**B E T W E E N:**

**ESQUIRE ROSES FARM LIMITED**

**APPELLANT**

**AND**

**ZEGA LIMITED**

**RESPONDENT**

**Coram: Chibesakunda, Ag CJ, Chibomba, JS and Lisimba, Ag JS.**

**On 9<sup>th</sup> May, 2013 and on 29<sup>th</sup> May, 2013**

**For the Appellant: Mr. A. Tembo of Tembo Ngulube and Associates.**

**For the Respondent: Ms. L. Kasonde of Mulenga Mundashi and Company.**

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

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**Chibomba, JS, Delivered The Judgment Of The Court.**

**Cases and other Materials Referred to:**

- 1. Air France Vs Mwase Import and Export Company Ltd (2000)ZR 66**
- 2. J. Beatson's Anson's Law of Contract page 522**
- 3. Chitty on Contracts, Volume 1 page 1465, paragraph 22-032**

**Legislation Referred to:**

- 1. Air Services Act, Chapter 446 of the Laws of Zambia.**

The delay in the disposal of this appeal is deeply regretted. This was due to retirement of two members of the panel that heard

**(45)**

the appeal on 12<sup>th</sup> August, 2009. As a result, it had to be heard de-novo on 9<sup>th</sup> May, 2013.

The Appellant appeals against the Judgment of the High Court in which the Court below held that the Respondent was an agent of the Appellant and that as such, the Respondent was entitled to be paid by the Principal, the Appellant, in this case.

The facts leading to this appeal are that the Appellant and the Respondent entered into an oral agreement for the Respondent to provide some freight services, pallet handling and customs documentation for the Appellant. The Appellant was a Shipper involved in the business of export of flowers from Zambia to Europe and to other markets outside Zambia.

The arrangement was that after the Respondent provides services, the Respondent would then invoice the Appellant and the Appellant would then settle the claim. There was, however, an outstanding balance of US\$79,346.864 due to the Respondent. When the Respondent demanded for payment of this outstanding

**(46)**

sum, the Appellant refused to pay claiming that there was variation of the terms of the Contract to the effect that the consignee would directly pay the Respondent for the services rendered instead of the Appellant. This prompted the Respondent to commence an action in the High Court's Commercial List in which the following reliefs were sought:

- I. Payment of the sum of US\$79,346.86**
- II. General damages for breach of contract and interest thereon at current bank lending rates.**
- III. Interest on US79,346.86**
- IV. Any other relief that the court may deem fit**
- V. Costs."**

The Court below received evidence from the parties and submissions from both learned Counsel. After hearing and

considering the evidence and the submissions, the Court below came to the conclusions that the Respondent was entitled to the sum of US\$79,346.86 and entered Judgment in favour of the Respondent.

**(47)**

Dissatisfied with this decision, the Appellant appealed to this Court advancing two grounds of Appeal. These are:

- “1. The Learned Trial Judge misdirected himself both in law and in fact by failing to appreciate that the Plaintiff and the Defendant voluntarily varied the contract whereby the Plaintiff agreed to be paid directly by the Importer for freight charges.**
- 2. The learned Trial Judge misdirected himself in fact and in law when he failed to appreciate the effect of Article 4(7) of Regulation 2(2) in the Second Schedule of the Zambia Air Services Regulations of the Air Services Act, Chapter 446 of the Laws of Zambia.”**

The learned Counsel for the Appellant, Mr. Tembo, relied on the Appellant’s Heads of Arguments.

In support of the first Ground of Appeal, it was contended that as clearly stated by the trial Judge, the contractual relationship between the parties was that originally, freight and

other charges were being paid by the Appellant. That however, after sometime, the consignees started paying the charges directly to the Respondent. It was argued that this change in payment was preceded by an agreement between the parties. And that this later Agreement was not unilaterally done by the Appellant even though

**(48)**

it was first suggested by the Director of the Appellant. That the Respondent accepted the agreement and that over a long period of time, the Respondent received payments directly from the consignees. It was submitted that the Respondent also furnished its account details to the consignees and received payment directly for over a long period of time and in fact that the Respondent demanded payment from the consignee and threatened to withhold any further shipment if the consignee did not pay.

It was submitted that therefore, the Respondent could not in one breath admit that it actually received payment directly from the consignees over a long period of time and even demand

payment from them and then deny that there was any agreement for direct payment from the consignees. Otherwise, why not demand payment from the Appellant?

It was further contended that even though there was no express agreement, the Respondent's conduct was consistent with the agreement being there by demanding for payment directly from the Consignees. Therefore, that under the principle of estoppel, the

**(49)**

Respondent is estopped from asserting otherwise. In summing up, it was contended that there is sufficient evidence to show that the Respondent agreed to collect charges directly from the consignees and that as such, the trial Judge erred by failing to appreciate this.

In support of the Second Ground of Appeal, it was contended that the Appellant agrees with the learned trial Judge's sentiments that the real issue in the present case is: **“does the change in payment points i.e., from the shipper to the consignee absolve the shipper of its contractual**

**obligations with the plaintiff who was acting as agent on its behalf?”**

It was submitted that the Appellant, totally disagrees with the learned trial Judge’s answer that “it does not”. The reason being that under the provisions of Article 4(7) of Regulation 2 (2) of the Second Schedule to the Zambia Air Services Regulations of the Air Services Act, (hereinafter referred to as the Act), a Shipper can be absolved from liability if he meets certain requirements stated in that Article. Article 4(7) of the Act provides that:

**(50)**

**“By taking delivery of the consignment or the air-way bill or by exercising any other right arising from the contract of carriage, the consignee agrees to be jointly and severally liable with the shipper for the aforementioned obligations. If it is agreed that rates, charges or expenses are to be collected from the consignee, the shipper remains liable for the payment of the same. However, his obligations with respect to such rates, charges or expenses shall cease upon delivery of the shipment by carrier to the consignee.”**

It was contended that although the authorities cited by the learned trial Judge were appreciated, **(Halsbury Laws of England)** and **(Air France Vs Mwase Import and Export Company Limited<sup>1</sup>,)** the Appellant’s contention is that the

conditions in the above provisions is that the shipper can be absolved of its obligations to pay rates, charges or expenses upon meeting the three conditions. These are:-

- “1. The consignee must take delivery of the consignment or the air-way bill or exercise any other right arising from the contract of carriage.**
- 2. There must be an agreement that rates, charges or expenses are to be collected from the consignee.**
- 3. There must be a delivery of the shipment by carrier to the consignee.”**

It was submitted that the Appellant met all the above conditions. Hence, that as Shipper, the Appellant was absolved

**(51)**

from paying rates, charges or expenses as the consignee had taken delivery of the goods, the Air-way bill and there was an agreement for the Respondent to collect the rates and charges from the consignees. Further, that it was not suggested that any of the shipment in respect of which the Respondent claimed for charges had not yet been shipped as the Respondent based its claim on the shipment that had been delivered to the consignees.



It was argued that the learned trial Judge, therefore, erred by failing to appreciate or contemplate that a Shipper can be absolved in accordance with the provisions of Article 4(7) of Regulations 2(2) of the Second Schedule of the Act. That as such, the learned trial Judge misdirected himself when he failed to appreciate the effect of Article 4(7), in that in accordance with him, the above provision was not applicable because the air-way bill that was prepared by the Respondent's agents inserted an amount of money under total "prepaid" instead of under total "collect" and hence, the learned Judge's reasoning that **"had the amount been inserted in the total collect column, the position would have been different and the**

**(52)**

**defendant's liability would have ceased upon delivery of the shipment by the carrier to the consignee."**

It was pointed out that there was however, no such condition under Article 4(7) of the said Regulation. Further that even assuming that the learned trial Judge was talking about the first condition that the consignee must take delivery of the

consignment or the air-way bill or exercise any other right arising from the contract of carriage, the contents of an air-way bill was not an issue as it is mere taking delivery of the air-way bill by the consignee. And that the same condition is expressed in the alternative as it states that apart from taking delivery of the air-way bill, the condition can be satisfied by the consignee taking delivery of the consignment or exercising any other right arising from a contract of carriage.

It was argued that the consignees having taken delivery of the consignment, there was no further requirement that they should also take delivery of the air-way bill as the air-way bill can hardly be a determining factor. Therefore, that the learned trial Judge misdirected himself in fact and law when he failed to appreciate the

**(53)**

effect of Article 4(7). And that this Appeal should therefore, be allowed with costs.

On the other hand, in opposing this appeal, the learned Counsel for the Respondent, Ms. Kasonde also relied on the Respondent's Heads of Arguments.

In response to the first Ground of Appeal, it was contended that the single issue that was before the Trial Court for determination is **“who was liable to pay the expenses relating to freight?”** In response to the Appellant's contention that by accepting to be paid by the importers directly instead of the Appellant as Shipper, the Respondent had varied the contract and that as such, the Respondent cannot look to the Appellant for payment and the argument that the variation in payment mode was not unilaterally done by the Appellant; it was contended that the email at page 189 of the record should not be read in isolation but together with the email of 31<sup>st</sup> October, 2007. That in the earlier email, Mr. Limbada had asked Dinesh Kukreti of the Respondent Company to send an email to Peter of Flodac (one of the

Consignees) to confirm when the payment would be made. It was contended that the first email was sent after Mr. Kukreti was requested by Mr. Limbada to do so as confirmed by the Respondent's only witness, Titus Shamane, under Cross-examination. That Shamane told the Court below that based on the information from Mr. Shiraz, his boss, Dinesh Kukreti, communicated to Peter as requested by Mr. Limbada.

It was pointed out that this is reflected at page 305 of the Record of Appeal. That the Appellant's only witness, Boniface Mutambalika Phiri, equally in the email at page 190 of the record, stated that: **"sorry to put the ball in your court"**. That this means that Mr. Shiraz Limbada asked Dinesh Kukreti to request for payment on his behalf. Therefore, that the Respondent's contention is that the learned trial Judge was on firm ground as he appreciated the fact that the Appellant had sole responsibility to settle all the payments relating to freight.

It was further contended that it is trite law that in order to be enforceable, a variation must fulfil the requirements governing

formation of contract. This is inter alia, “offer, acceptance and consideration”. That **J. Beatson’s “Anson’s Law of Contract”**<sup>2</sup> states that:

**“A variation involves a definite alteration, as a matter of contract of Consensual obligations by the mutual agreement of both parties. It must be supported by consideration. In most cases, consideration for the variation can be found in a mutual abandonment of existing or the Conferment of new benefits by each party on the other.”**

In response to the Appellant’s contention that the arrangement for direct payment from the Importers was beneficial to the Respondent and the argument that the Respondent, having freely varied the term for direct payment, the Appellant was no longer required to pay the same to the Respondent; it was argued that this however, is contrary to the above quotation. It was pointed out that the fact that the Respondent was receiving payment directly from the importers did not qualify as a conferment of a new benefit to the Respondent as it was necessary for the Respondent to receive the payment for the services it rendered to the Appellants. That what was cardinal to the Respondent was the receipt of payment for the services rendered. And that the fact that the

**(56)**

Appellant made arrangements with third parties (the consignees), to pay freight directly to the Respondent did not qualify as a variation of the terms of the agreement. And that as rightly observed by the learned trial Judge, the question is: **“Does the change in payment points i.e. from the shipper to the Consignee absolve the Shipper of its contractual obligations with the Plaintiff who was acting as agent on its behalf?”**

Therefore, that the learned Trial Judge did not err in law or in fact as he fully addressed and appreciated that there was no variation of the contract between the parties.

In response to the second Ground of Appeal, it was contended that the learned trial Judge did consider Article 4(7) of the Act when the Appellant applied to review the Judgment as shown in his Ruling at page 25 of the Record of Appeal. That the learned Judge did infact quote Article 4(7) of the Act when he stated that:

**“By taking delivery of the consignment or the Airway Bill or by exercising any other right arising from the contract of carriage, the consignee agrees to be jointly and severally liable with the Shipper for the aforementioned obligations. If it is agreed that rates, charges or expenses are to be collected from the Consignee, the**

**(57)**

**Shipper remains liable for the payment of the same. However, his obligations with respect to such rates, charges or expenses shall cease upon delivery of the shipment by the carrier to the consignee.”**

It was contended that in considering the effect of the above provision, the learned trial Judge, quoted verbatim, the testimony of the Appellant’s only witness, Boniface Phiri, as regards the effect of the phrase: **“Total Prepaid”** and **“Total Collect”**. And that in accordance with this witness, if the amount relating to freight is inserted in the **“Total Collect”** column, the importer is liable to pay freight.

It was submitted that the learned trial Judge was therefore on firm ground when he held that had the amount relating to freight been inserted in the **“collect column”**, the position would have been different and that the Appellant’s liability could have ceased upon delivery of the shipment by the carrier to the Consignee.

We have seriously considered this appeal together with the grounds of Appeal, the arguments in the Heads of Arguments filed and the authorities cited and the Judgment by the learned Judge in the Court below. It is our considered view that this appeal raises

**(58)**

only one major question. This is whether in the circumstances of this case, the Respondent was entitled to payment from the Appellant there being no dispute that the Respondent was an agent of the Appellant.

To ably determine this question, the facts of this case must be borne in mind at all times. These are that the Appellant was a grower and exporter of flowers from Zambia to Europe. The Appellant engaged the Respondent to handle the export of the flowers by air. The Respondent used to prepare airway bills. At first, the Appellant used to pay the handling charges to the Respondent. Later, the Consignees started paying the Respondent directly. A dispute arose when one of the importers was put in liquidation as the importer failed to pay the handling



fees to the Respondent. The Respondent demanded payment from the Appellant who refused to pay claiming that there was a variation of the contract on the point of payment such that the Respondent was to be directly paid by the Consignees. The Respondent then filed an

**(59)**

action in the High Court which resulted into this appeal claiming for the handling charges.

The question before the Court below was: **Did the change of the payment points i.e., from the shipper to the consignees absolve the shipper of its contractual obligations to its agents to pay the agent's charges? The learned trial Judge came to the conclusion that this did not.**

The learned trial Judge agreed that the Respondent was an agent of the Appellant and that the consignees were parties to the contract between the Appellant and themselves and that

since the consignees had failed to pay the agent, the Appellant, as Principal, was liable for the freight charges as all exports were "C and F" (Cost and Freight), meaning that the consignees paid for the cost and freight to the Appellant who should in turn pay its agents for the handling charges.

The first Ground of Appeal raises the question whether there was a valid variation of the contract between the Appellant and the

**(60)**

Respondent to the effect that the Respondent would now receive direct payment from the importers for handling charges. In support of the argument that there was a valid variation, the Appellant relied on the email at page 189 of the Record of Appeal and on the fact that the Respondent was later receiving payments directly from the Consignees for a long time and that the Respondent had even demanded to be paid by the Consignees. We have perused the email on page 189 and the rest of the emails on record. This brings us to the question as to what amounts to a variation.

**Chitty on Contracts<sup>3</sup>**, states that:-

**“The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement. In *Berry v Berry* a husband and wife entered into a separation deed whereby the husband covenanted to pay to the wife a certain sum each year for her support. His earnings proved insufficient to meet this obligation, so they agreed in writing to vary the financial provisions. It was held that this variation was valid and enforceable, and that it could be set up by the husband as a defence to an action against him on the original deed. A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of a contract.”**

The learned authors go on to state that:-

**(61)**

**“The agreement which varies the terms of an existing contract must be supported by consideration. In many cases, consideration can be found in the mutual abandonment of existing rights or the conferment of new benefits by each party on the other.”**

And that:-

**“A mere forbearance or concession afforded by one party to the other for the latter’s convenience and at his request does not constitute a variation, although it may be effective as a waiver**

As can be seen from the above quotations, in order for a variation to be a valid defence at law, it must be by mutual agreement of the parties to the contract. The variation must also be supported by consideration. Such consideration can also be

found in the mutual abandonment of existing rights or in the conferment of new benefits by each party to the other.

This authority goes further to state that a mere forbearance or concession given by one party to the other for the latter party's convenience does not constitute a variation.

In the current case, the e-mail at page 189 of the Record of Appeal cannot by any imagination be stretched to amount to a variation of the agreement between the Appellant and the

**(62)**

Respondent. We agree with the learned trial Judge that the e-mail at page 189 did not constitute a valid variation. The learned Judge also gave reasons why he believed that the Respondent was entitled to payment by the Appellant as Shipper and Principal. There was also no dispute that the Respondent was the Appellant's agent. We can not fault the learned Judge for coming to these findings. The Appellant in this matter had direct contractual relationship(s) with the Consignees to which the Respondent was not party.

It is also trite law that in an agent and principal relationship (as it was in the current case), the agent is entitled to remuneration for the services rendered to the principal. This is a cardinal principle of the law of agency. Of course, there are exceptions to this rule and one such exception is where the agent has contracted to receive payment from a third party instead of the principal. In such a case, the agent has to look to that third party for payment.

In the current case, however, we are not satisfied that there was such a contract or agreement between the Respondent and the Consignees. We also note that this was a “C and F” contract

**(63)**

concerning carriage of goods by air, meaning that the importer was expected to have been paying directly to the shipper, the “Cost and Freight”.

Further, perusal of the emails on record especially the one relied upon by the Appellant do not support the Appellant’s claim that there was a valid variation. There is also no tangible evidence that proves that the alleged variation was consented or

acquiesced to by the Respondent as to alter their contractual obligations to each other. As the authors of **Anson's Law of Contract**<sup>2</sup>, put it, a variation involves a definite alteration and must be agreed by both parties to the agreement and it must also be supported by consideration. We are not able to see any of these here.

We are also of the firm view that the fact that the Respondent did receive some payments directly from the importer did not qualify as a conferment of a new benefit or new rights to the Respondent as has been suggested by the Appellant. What the Respondent contracted was to receive payment for the services rendered to its Principal, the Appellant. We therefore, agree with the

**(64)**

submission that what was cardinal to the Respondent was to receive payment for the services rendered. The fact that the Appellant may have made an arrangement with third parties to pay charges directly to the Respondent did not amount to a variation of the contract with the Respondent so as to absolve the

Appellant from its contractual obligation to the Respondent to pay for the services rendered. We have quoted above what the Learned authors of **Chitty on Contracts**<sup>3</sup> have stated on variation. We repeat here that a mere forbearance or concession afforded by one party to the other party for the latter's convenience and at his request does not amount to a variation.

Our conclusion is that the learned trial Judge was on firm ground when he ruled that the change in payment points from the Shipper to the Consignees did not absolve the Shipper of its contractual obligations to its agent to pay for the services rendered. Ground one of this appeal therefore, fails on ground of want of merit. The same is dismissed.

**(65)**

Ground 2 of this Appeal attacks the learned trial Judge's holding that **Article 4(7) of the Regulation 2 (2) of the Second Schedule to the Act** can absolve the shipper of his obligation to pay charges to his agent where the Consignee has

taken delivery of the consignment and the airway bill or where there is an agreement for the agent to collect the charges from the Consignee.

The major argument by the Appellant is that the learned Judge ought not to have held as he did even though the authorities that the learned Judge relied upon were agreed. The Appellant's position is that the Appellant met all the conditions under Article 4 (7). Hence, as Shipper, the Appellant was absolved from paying the charges as the Consignee had taken delivery of the goods and the airway bills and there was also this agreement for the Respondent to collect the charges directly from the Consignees. It was argued that the learned trial Judge therefore, failed to appreciate the effect of Article 4 (7) when he ruled that the provision of Article 4 (7) of the Act did not apply because the amount on the airway bill is inserted under "**total prepaid**" instead of under "**total collect**" and that,

**(66)**



had the amount been inserted in the **“total collect”** column, the position could have been different as the Appellant’s liability could have ceased upon delivery by the carrier to the Consignee.

We have considered the above arguments and paid particular attention to the provisions of Article 4 (7) of the Act. It is our considered view that the learned trial Judge was on firm ground when he held that Article 4 (7) of the Act did not apply in this case. In this case, the amount is not inserted in the **“total collect”** column. Had it been inserted in the **“total collect”** column, then the position could have been different as the Appellant’s liability could have ceased upon delivery of the shipment by the Carrier to the Consignees. We find no merit in the Ground 2 of this Appeal. The same is dismissed.

Both Grounds 1 and 2 of this Appeal having failed, this appeal has failed on ground that it has no merit. The same is dismissed with costs to the Respondent to be agreed and in default thereof, to be taxed.

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L. P. CHIBESAKUNDA  
**ACTING CHIEF JUSTICE**

.....  
H. CHIBOMBA  
**SUPREME COURT JUDGE**

.....  
M. LISIMBA  
**ACTING SUPREME COURT JUDGE**