(2)

IN THE HIGH COURT FOR ZAMBIA **2018/HKC/0067**

AT THE DISTRICT REGISTRY

HOLDEN AT KITWE

(Commercial Division)

BETWEEN

AUBREY CHAMA	**1st PLAINTIFF**
BENARD BESA	**2nd PLAINTIFF**
MORDPRIS INVESTMENTS LIMITED	**1st DEFENDANT**
MORDECAI BWALYA	**2nd DEDENDANT**
BENJAMIN BWALYA	**3rd DEFENDANT**

Before Lady Justice B G Shonga this 4th day of December, 2020

For the Plaintiffs, Mr. N. Simwanza, Messrs. Noel Simwanza Legal Practitioners

For the Defendants, Mr. F. Tembo, Messrs. G.M. Legal Practitioners

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JUDGMENT

Cases referred to:

1. ***L'Estrange v. E. Graucob Limited (1934) 2 KB 394.***
2. ***TIJEM Enterprises Limited v. Children International Zambia Limited (2011) Z.R. Vol 1, 75.***
3. ***Holmes Limited v. Buildwell Construction Company Limited (1973) Z.R 97.***

4. ***National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo Appeal No. 79/2001.***
5. ***Jarvis v Moy, Davies, Smith, Vandervell & Co ([1936] 1 KB 399 at p 405.***
6. **Msanide Phiri v BHB Contractors Zambia Limited and others, Appeal 137/17.**
7. ***Hadley v Baxendale (1843 to1860) All E.R. Report 461.***
8. ***Union Bank Zambia Limited V Southern Province Co-Operative Marketing Union Limited (1995-1997) Z.R. 207.***
9. ***The Mediana [1900] A.C. 113.***

Legislation and Other Materials referred to:

1. ***Order XXI., Rule 5, High Court Rules, High Court Act, Chapter 27 of the Laws of Zambia.***
2. ***Treitel on the Law of Contract, 12th edition (London, Sweet & Maxwell)***

1.0. BACKGROUND

In this action, the plaintiffs claim the sum of K1, 277, 367.00 for monies borrowed by the defendants between 6th December, 2012 and 1st May, 2016. The plaintiffs also claim damages for breach of contract with respect to a Financing Agreement entered on 18th January, 2018, interest, and costs.

The defence, briefly summarised is that the defendants did not borrow money, but that the plaintiff funded the 1st defendant's company activities and purchase orders awarded to the 1st

defendant. In return the plaintiffs were to be paid back their principal investment plus 20% interest once the purchase orders were paid by the client. However, that the clients have either cancelled or not performed, resulting in the plaintiff's not being paid.

2.0 THE EVIDENCE

When the matter came up for trial, the plaintiffs, through the testimony of their only witness, the 1st plaintiff (PW1), adduced evidence in the form of a statement of account titled Mordpris Investment Limited Financial Statement for the period 6th December, 2012, to 31st March, 2016. It reflects a balance of K1,277, 367.00 as at 31stt March, 2016.

PW1 testified that the defendants admitted their indebtedness to the plaintiff's in a Financing Agreement dated 18th January, 2018 entered between the plaintiffs on the one part and the 1st defendant on the other. The Finance Agreement was admitted into Court as evidence. It opens with an introduction which reads as follows:

> *"The company and its directors collectively are indebted to the financiers to the extent of K1, 277, 367.00 one million two hundred and seventy-seven thousand three hundred and sixty-seven as of 16th January, 2018. This amount owing arises from the previously funded company activities and purchase orders and some private use by the company and directors respectively between 6th December, 2012 and 1st May, 2016."*

Paragraph 2 reads:

"The company now wishes to obtain from the financiers purchase order financing for purchase orders awarded to the company by Dangote Industries Limited and Mopani Mines Plc."

The terms of the Purchasing Agreement were that:

a) the shareholders of the 1st defendant would resolve to allocate shares to the plaintiffs or their agents giving them a majority controlling stake in the 1st defendant with respect to making decisions on fund management invested by the plaintiff into the defendant.
b) The directors should disclose in writing all bank accounts held by the 1st defendant to the plaintiffs and avail board resolutions and signing mandates for each bank account opened and operated by the 1st defendant. That a resolution be passed by the company to amend the signing mandates to include one of the plaintiffs or nominated agent as a signatory to all bank transactions.
c) The return on new capital investments shall attract 22.5% and that the financiers shall retain 50% of the realized profits as repayment to liquidate the admitted sum of K1,277,367.00.
d) The directors shall supply the plaintiffs the purchase orders, financing budgets, and where possible quotations for all purchase orders awarded.

PW1 tendered, into Court, a document titled Mordpris Investment Limited 2018 Status Report which reflects an outstanding balance of

K1,631, 871 which includes the old debt of K1,277, 367.00. PW1's testimony was that the defendants breached all the terms and conditions of the Financing Agreement and failed and neglected to settle the original debt and to perform the Finance Agreement. PW1 also tendered documentary evidence in the form of Order Financing Details in respect of order financing obtained by the 1st defendant for purchase orders awarded to the 1st defendant by Mopani Copper Mines Plc and Dangote Industries Limited in 2018.

Defence counsel elected not to cross-examine the plaintiffs' only witness. As such, all the evidence before Court is uncontested.

Having failed to file a witness statement and skeleton arguments, defence counsel applied for an adjournment. The application was dismissed for non-compliance with the High Court Rules and want of compliance with the Order for Directions dated 20th March, 2019.

3.0 SUBMISSIONS

The plaintiffs submit that the defendants have breached all the terms and conditions of the Purchase Agreement and have failed or neglected to settle the original debt. Counsel for the plaintiffs filed skeleton arguments which called into aid the principles that were enunciated or affirmed in the cases of ***L'Estrange v. E. Graucob Limited***[1], ***TIJEM Enterprises Limited v. Children International Zambia***

***Limited*[2], *and Holmes Limited v. Buildwell Construction Company Limited*[3].**

4.0 DETERMINATION

I have examined the Finance Agreement presented before Court and have observed that the first page reflects that the parties are the plaintiffs, referred to as the Financiers, on the one part and the 1st defendant, referred to as the company, the 2nd defendant and 3rd defendant (collectively referred to as the directors) on the other part. However, my examination of the signature clause reveals that the agreement was executed by the 2nd defendant for and on behalf of the 1st defendant in his capacity as the Managing Director. The agreement was not signed by the 2nd and 3rd defendants in their individual capacities. Similarly, whereas the 1st plaintiff signed the agreement, the 2nd plaintiff merely appended his signature as a witness for the 1st plaintiff.

Given the absence of the signatures of the 1st plaintiff, 2nd defendant and 3rd defendant as parties to the agreement, I find that the Finance Agreement of 18th January, 2018 was entered between the 1st plaintiff and the 1st defendant.

Turning to the law, I accept the common law jurisprudence derived from the English case of ***L'Estrange v. E. Graucob Limited*** which

affirmed that the clauses of a written contract are binding on the signatories, even where a party is unaware of the contract's full contents, unless there is proof of fraud or misrepresentation. The principle is consistent with the determination in the case of ***National Drug Company Limited and Zambia Privatization Agency v. Mary Katongo***[4], where the Supreme Court held that:

> *"It is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound to abide by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract".*

In this case, there is no evidence before Court to suggest that the parties did not voluntarily and freely enter into the financing arrangements or the Finance Agreement. Consequently, there being no legal impediment, I hold that the Finance Agreement is binding as between the 1st plaintiff and the 1st defendant.

Moving on, I analysed the Finance Agreement and observed that it contains an express admission by the 1st defendant of indebtedness to the plaintiffs in the sum of K1,277,367.00 as at January, 2018 in respect of funding provided by the plaintiffs between 6th December, 2012 and 1st May, 2016.

In the terms of ***Order XXI., Rule 5 of the High Court Rules***:

> *"If any defendant shall sign a statement admitting the amount claimed in the summons or any part of such amount, the Court or a Judge, on being satisfied as to the genuineness of the signature of the person before whom*

such statement was signed, and unless it or he sees good reason to the contrary, shall, in case the whole amount is admitted, or in case the plaintiff consents to a judgment for the part admitted, enter judgment for the plaintiff for the whole amount or the part admitted, as the case may be..."

My interpretation of ***Order XXI., Rule 5*** is that the Court has jurisdiction to enter judgment on admission where it is satisfied of primarily three things: Firstly, that there is a statement of admission as to the amount claimed in the summons or any part thereof by the defendant; secondly, that the statement of admission is signed by the defendant; and thirdly, that the signature appended to the statement of admission is the genuine signature of the defendant.

Following my assessment of the Finance Agreement, I accept that it contains a statement of admission by the 1st defendant with respect to the sum of K1,277,367.00 claimed in the writ of summons. Secondly, I am satisfied that the Finance Agreement was executed for and on behalf of the 1st defendant. Thirdly, I do not doubt the veracity of the Managing Director's signature or question his authority to bind the company because there is no evidence before Court to suggest otherwise. That being the case, I am satisfied that I enjoy jurisdiction to enter judgment on admission of the admitted sum pursuant to ***Order XXI., Rule 5 of the High Court Rules*** because the three tenets required for the exercise of that jurisdiction exist.

In light of the foregoing, judgment on admission is entered against the 1st defendant in the sum of K1, 277, 367.00 to be paid to the plaintiffs. The Judgment debt shall attract interest at the average of

the short-term deposit-rate per annum prevailing from the date of commencement of this action to date of Judgment and thereafter at 5% until date of full and final settlement.

Turning to the claim for breach of contract, I call to mind the dicta of Greer LJ in ***Jarvis v Moy, Davies, Smith, Vandervell & Co.***[5], where he stated:

> *"Breach of contract occurs where that which is complained of is a breach of duty arising out of the obligations undertaken by the contract."*

That dicta aligns with the erudition of the authors of ***Treitel on the Law of Contract, 12th edition (London, Sweet & Maxwell) para. 17-049 at p 832*** who edify as follows:

> *'A breach of contract is committed when a party without lawful excuse fails or neglects to perform what is due from him under the contract..."*

In this case, the unchallenged evidence before Court is that the defendants failed to perform all their obligations under the Finance Agreement, including the obligation to settle the original debt of K1,277.367.00 through the agreed 50% profit sharing on the new investments. This is demonstrated by the oral testimony of PW1 and the carried forward debt balance that is shown on the Status Report of 22nd June 2018. Considering that there is nothing before Court to move me to doubt the evidence before me and absent a lawful excuse

presented by the defendants through evidence, I find that the 1st defendant failed to perform its obligations under the Finance Agreement.

I have also given ear to the words of the Court of Appeal in the case of ***Msanide Phiri v BHB Contractors Zambia Limited and others***[6] where the Court stated:

> *"... we must state at once that any breach of contract commands damages."*

Having affirmed the infraction of the plaintiffs' rights under the contract by determining that the 1st defendant breached the Finance Agreement, I, on the strength of the principle articulated in the ***Msanide case***, hold that the plaintiffs are entitled to damages for breach of contract.

I now turn to contemplate the measure of damages. Firstly, I draw attention to the case of ***Union Bank Zambia Limited V Southern Province Co-Operative Marketing Union Limited***[7] where, in the words of the Supreme Court:

> *"...we would like to recall that the general rule where there has been non-payment of money by due date, in breach of agreement, is to compensate the party owed with an award of interest which serves the same purpose as general damages."*

The Court went on to state as follows:

> *"The rules of remoteness as formulated in the leading case - (such as **Hadley v Baxendale(1843 to1860) All E.R. Report 461**[8]...preclude recovery of special damages or losses which cannot have been within the contemplation of the parties or which cannot have been reasonably foreseeable at the time of entering into the transaction. Conversely, while interest is the normal compensation for failure to pay money buy due date, the award of damages cannot be ruled out completely if the loss suffered was within the contemplation of the parties; otherwise the consequences, i.e. the other damage suffered as a result of non-payment are as a rule too remote"*

In ***Hadley v Baxendale*** it was held that:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'*

The principle stated in ***Hadley v Baxendale*** remains the *fons et origo* of the modern law. Therefore, in the present case, the plaintiffs are entitled to general damages that can be said to arise naturally and logically from the 1st defendant's breach of contract, which are the immediate, direct, and proximate result of the breach of contract.

In light of the foregoing, the claim for damages succeeds. Damages are to be assessed by the Deputy Registrar. In summary, Judgment is awarded in favour of the plaintiffs as follows:

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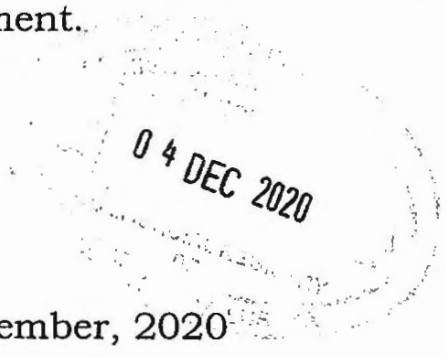
i. The 1st defendant shall pay the admitted sum of one million two hundred and seventy-seven thousand three hundred and sixty-seven Kwacha (K1, 277, 367.00) to the plaintiffs, plus interest at the average of the short-term deposit-rate per annum prevailing from the date of commencement of this action to date of Judgment and thereafter at 5% until date of full and final settlement.

ii. The 1st defendant shall pay the 1st plaintiff damages for breach of the Financing Agreement entered on 18th January, 2018. interest, and costs.

iii. The plaintiff is awarded costs, to be paid by the 1st defendant and to be taxed in default of agreement.



Dated this 4th day of December, 2020

B. G. SHONGA

JUDGE