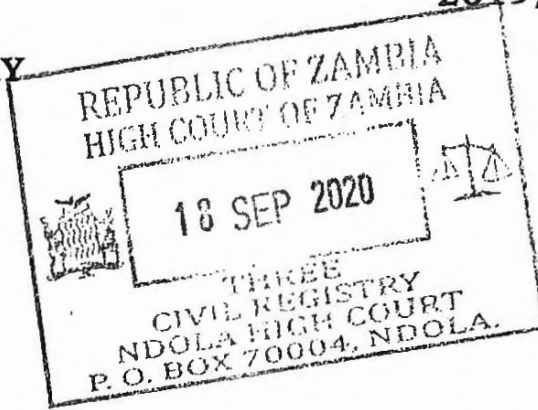


IN THE HIGH COURT FOR ZAMBIA  
AT THE NDOLA DISTRICT REGISTRY  
HOLDEN AT NDOLA  
(CIVIL JURISDICTION)

2019/HN/ 003



**BETWEEN:**

SOUTHERN CROSS TRUCK & CRANE HIRE LIMITED T/A COASTAL HIRE PLAINTIFF

**AND**

MUBENDE MINING SERVICES LIMITED DEFENDANT

**BEFORE HONOURABLE LADY JUSTICE M. CHANDA THIS 18<sup>TH</sup> DAY OF SEPTEMBER, 2020**

**APPEARANCES:**

For the Plaintiff : Mrs A.D Gray Kunda, of A.D Gray and Partners  
For the Defendant : Ms B Mapani appearing with Ms K Nalondwa and Mr J Hara of Muya and Company

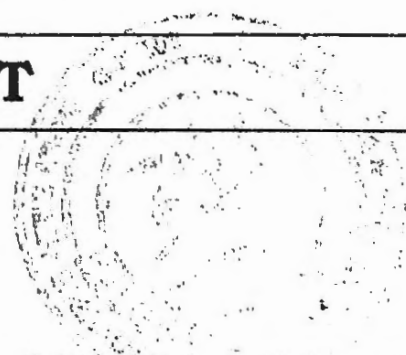
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**J U D G M E N T**

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**Authorities Referred to:**

1. *Chitty J and Beale H. G 2004 Chitty on Contracts (29<sup>th</sup> Edition) Volume 1 London, Sweet and Maxwell*
2. *T Comedy (UK) Limited v Easy Managed Transport Limited (2007) EWHC 611*
3. *Cowey v Liberian Operations Limited (1966) 2 Lloyd's Rep 45*



The plaintiff **Southern Cross Truck and Crane Hire Limited T/A Coastal Hire** commenced this action by way of writ of summons supported by a statement of claim on 11<sup>th</sup> January, 2019 against **Mubende Mining Services Limited**, the defendant herein. On 16<sup>th</sup> August, 2019, the plaintiff filed an amended writ of summons and statement of claim seeking the following reliefs:

- i. Damages for breach of contract.
- ii. Payment of the sum of K143,963.39 being the amount due and owing to the Plaintiff by the Defendant as at 16<sup>th</sup> January, 2019 in respect of the hire charges and or fees arising from the hire of the plaintiff's concrete mixers at the Defendant's own instance and request which sums of money the defendant has failed refused and/or neglected to pay the Plaintiff.
- iii. A Mandatory Injunction compelling the defendant whether by itself, servants and/or agents or otherwise ceases to using the Plaintiff's equipment being the concrete mixers and return the said Plaintiff's equipment to the Plaintiff.
- iv. Interest on the sums due.
- v. Any other or further relief the Court might deem fit.
- vi. Legal costs hereof and incidental hereto.

The plaintiff's amended statement of claim set out that the plaintiff was in the business of hiring out various equipment to the public. That by agreement made on or about the 26<sup>th</sup> October, 2017, the plaintiff hired out two (2) concrete mixers to the defendant at the defendant's own request and instance for an unspecified period at a special rate of K 677.00 for both per day. That pursuant to the

aforementioned agreement the defendant had possession and use of the said concrete mixers for a period of about fourteen (14) months. Contrary to the agreement, the defendant failed, refused and or neglected to pay daily fees or charges as agreed. That out of a total sum of K250, 448.7 from the date of hire of the equipment to 18<sup>th</sup> December 2018, the defendant only paid a total sum of K126, 474.25 only leaving a sum of K143, 963.39 outstanding and due to the plaintiff as at 16<sup>th</sup> January, 2019. The plaintiff stated that as a result of the defendant's willful failure or neglect to pay the said monies, it had suffered loss and damage.

In its defence filed on 26<sup>th</sup> April, 2019 the defendant essentially admitted that on 26<sup>th</sup> October, 2017 the plaintiff hired out two concrete mixers to the defendant for an unspecified period at a rate of K677.00 for both mixers per day. The defendant further admitted taking possession of the concrete mixers in question but asserted that the equipment was accordingly returned to the plaintiff. The defendant asserted that the plaintiff's entire claim of K250, 448.7 was duly settled prior to the commencement of this action. The defendant further stated that it bought the equipment it hired from the plaintiff being two ladders, one genset, one water pump, two concrete mixers, two extension cables and one drilling machine with drill bits. The defendant insisted that the plaintiff was not entitled to any of the reliefs sought.

The matter was heard on 21<sup>st</sup> November, 2019 and both parties were before Court. To buttress their respective positions, each party called one witness.

**Mwansa Pikiti Lombe** the accounts assistant testified as the first plaintiff's witness (**PW1**). It was his testimony that in October, 2017, the plaintiff entered into a verbal contract with the defendant to hire concrete mixers at the rate of K677.00 per day. According to PW1, the defendant hired one concrete mixer and was given an extra one in case of a break down. The witness further testified that the parties agreed that the defendant would make monthly upfront payments. The witness said that, in the genesis, the defendant fulfilled its contractual obligations with regard to upfront payments without any reminders but later, invoices had to be sent to remind the defendant of its indebtedness to the plaintiff. The witness went on to say that, the defendant made an upfront payment of K 8624 on 26<sup>th</sup> October, 2017 as exhibited at page 5 of the plaintiff's bundle of documents.

The witness asserted that page 6 of the plaintiff's bundle of documents showed that the defendant had a balance of K110, 822.08 and page 8 showed the opening balance of K26, 123.22. The witness further asserted that on 31<sup>st</sup> July, 2018, the defendant made a payment of K 50,000.00 through their lawyers which was reflected in the credit column as shown on page 10 of the plaintiff's bundle of documents bringing the closing balance to K78,438.44.

PW1 explained that as at 24<sup>th</sup> February, 2018 the closing balance was K26,123.22 as exhibited at page 15 of the plaintiff's bundle of documents. It was his testimony that from that date, the defendant made no payments prompting the plaintiff to issue new invoices bringing the closing balance as at 12<sup>th</sup> July, 2018 to K 110,822.08. As at 6<sup>th</sup> September, 2018 the closing balance was K 91,991.26.

PW1 explained that the K 50,000.00 paid by the defendant was used to cover invoices that were not paid for previously. It was his evidence that on 27<sup>th</sup> September, 2018, the defendant made a payment of \$3000.00 equivalent to K36, 000.00. The amount was also allocated to unpaid invoices bringing the total balance to K86,000.00 as at 22<sup>nd</sup> October, 2018. The witness further explained that the statement at page 17 of the plaintiff's bundle of documents captured the period from 1<sup>st</sup> March, 2018 to 13<sup>th</sup> November, 2018 and the closing balance was K96, 646.72. PW1 stated that page 20 of the plaintiff's bundle of documents showed a closing balance of K26, 123.22. The witness also stated that on 14<sup>th</sup> December, 2018 the last invoice was issued bringing the closing balance to K116,974.45. According to the witness, page 22 indicated an upfront payment of K8,624 made on 26<sup>th</sup> October, 2018. The witness narrated that according to page 23, the last invoice was issued on 14<sup>th</sup> December, 2018 with a closing balance of K123,974.45. PW1 narrated that according to page 24 and 25 the last invoice was issued on 7<sup>th</sup> February, 2019 and the closing balance was K137,526.27. The witness asserted that page 26

showed that another invoice was issued on 16<sup>th</sup> January, 2019 bringing the final and closing balance to K143,963.39. The defendant returned the equipment on 16<sup>th</sup> January, 2019 after the plaintiff commenced Court action against it. The witness clarified that the only payments the plaintiff received from the defendant were K 50,000.00 and K 36,000.00. No further payments were made.

During cross-examination, the witness asserted that there were only two payments made by the defendant to the plaintiff in the sum of K50,000.00 and \$3000.00 on 15<sup>th</sup> August, 2018 and 27<sup>th</sup> September, 2018 respectively. The witness clarified that at page 20, the amount of K50,000.00 was not appearing but that did not imply that the defendant was overcharged. The witness affirmed that whatever was received should have been included in the statement. When referred to page 15 of the plaintiff's bundle of documents, the witness explained that there was no acknowledgment of the amount of K50,000.00 in the statement for the month of August 2018. Similarly, the amount of K50,000.00 was not reflected in the statement for the month of August, 2018 at page 8 of the plaintiff's bundle of documents. At page 26, the amount of K50,000.00 was not appearing implying there was an outstanding payment of K50,000.00 by the defendant.

When asked about the mixers in issue, the witness stated that he did not deal with the officers for the mixers but he confirmed that

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witness asserted that it was both a verbal and written agreement that the parties made.

When referred to the closing balance as at 14<sup>th</sup> December, 2018, the witness asserted that it was K123, 974.45 as shown on page 23 of the plaintiff's bundle of documents. With regard to page 20 of the plaintiff's bundle of document, the witness stated that the closing balance was K116, 974.45 as at 14<sup>th</sup> December, 2018 and there was a difference of K7000.00. The witness went on to state that the difference did not entail that the defendant was overcharged. He clarified that he was directly involved in receiving the payments.

In re-examination, the witness stated that page 5 of the plaintiff's bundle of documents showed that there were two payments made. The first being a cheque payment of K 7000.00 which bounced on 21<sup>st</sup> February, 2018 and on 24<sup>th</sup> February, 2018 the defendant took cash payment of K7000.00 to the plaintiff. The witness clarified that the statement at page 20 of the plaintiff's bundle of document was generated on 14<sup>th</sup> February, 2018 which included the bounced cheque while the statement at page 22 of the same document was generated on 18<sup>th</sup> February, 2018 without the K7000.00 bounced cheque. The K7000.00 was reversed.

The above marked the close of the plaintiff's case.



**Zachariah Muya**, the Director of the defendant company, testified as the sole witness (**DW1**). DW1 testified that he knew that a concrete mixer had been hired to be taken to Luwingu but he didn't know at what rate per day. He explained that the parties agreed that the mixer was only to be paid for the days it was in use. According to the witness the equipment was not in use for close to a year, a fact which was brought to the attention of the plaintiff. It was also his evidence that a Mr Wade and a Manager by the name of Jericho allowed the defendant to keep the concrete mixer. He testified that while he admitted that there were days when the machine worked and were to be paid for, the defendant's position was that the days the mixer was not in use were to be hived off of the claims. It was his further testimony that the machines in issue were bought from the plaintiff in 2018 and not 2019 as alleged. According to the witness, Mr Wade and Jericho got the payment directly from him. The money was in respect of a water pump, parker machine and concrete mixer. The witness explained that, while the agreement to buy off the equipment was made much earlier, he paid the money on behalf of the company in the first week of December, 2018. He further explained that all the contracts to buy and set off the debt were done verbally and the money he paid was acknowledged.

With regard to the payments in issue, DW1 asserted that on 15<sup>th</sup> August, 2018, Mrs Kunda counsel for the plaintiff reminded him at Court that the defendant had outstanding amounts to be paid to

the plaintiff. He stated that a sum of K50,000 was accordingly paid to the plaintiff's lawyer outside Alliance Bank. DW1 asserted that due to misunderstandings which later arose, the plaintiff's counsel acknowledged receipt of the payment of K50,000.00 as exhibited at page 28 of the plaintiff's bundle of documents. DW1 explained that prior to that, another sum of K50,000.00 had been paid to the plaintiff which was collected by Mr Jericho and Mr Wade on behalf of the plaintiff. The witness indicated that the said payment was made two days after the plaintiff's lawyer issued a letter of demand. He said Mr Wade advised that the payment would be acknowledged by the plaintiff's lawyer which was done.

The witness went on to say that the days on which the machines were hired were always described in an invoice and not a statement. The statements produced before Court were documents generated by an officer of the plaintiff who never met or dealt with the defendant's employers. The invoices should have been the basis of the claim and would have been helpful to lay to rest the dispute in issue. The witness emphasized that the documents before Court did not reflect what was obtaining at site. DW1 narrated that all in all they were payments of K50,000.00, \$3000.00, K50,000.00 and \$5000.00 made by the defendant to the plaintiff. The witness asserted that he could not recall the date the \$5000.00 was paid but he was sure it was collected from his office by the plaintiff.

With regard to payment for the equipment listed in their defence, the witness stated that the defendant settled all the outstanding amounts plus the purchase price of the equipment. However, he had a challenge to prove payment of \$ 5000.00 before Court.

During cross-examination, the witness stated that he had no proof of the set off but he dealt with Jericho. The witness further stated that the agreement with regard to set off was verbal between the plaintiff and defendant. When referred to paragraph 5 of the statement of claim, the witness asserted that it was not in dispute. When asked about payments for the use of the mixer, the witness testified that it was to be paid for on the days it was in use and the agreement was also verbal. The witness averred that he could not recall the period they agreed the mixers would not be paid for. But he recalled it was the period the contract was suspended by the World Bank and during the rainy season. He narrated that he did not query the invoices they received for the period of time and that they were not supposed to be charged for that period. He didn't know whether the invoices were sent to him or not.

When further referred to page 9 of the plaintiff's bundle of documents, the witness stated that it was an acknowledgment of payment of the sum of K50,000.00 and the balance as at 10<sup>th</sup> August, 2018 was K78,439.44. He clarified that the document on page 8 was sent under cover of the letter produced on page 9 alluded to earlier. When queried about the payments, the witness

revealed that he made a payment of K50,000.00 soon after receiving the letter of demand dated 12<sup>th</sup> August, 2018. The witness asserted that acknowledgment of payment made to Mr Wade came from the plaintiff's lawyer on 15<sup>th</sup> August, 2018. The witness also asserted that the payment of US\$5000.00 to the plaintiff's lawyer Mrs Kunda was made in the presence of Mrs Chifuwe. When asked about the credit reflected at page 20 of the plaintiff's bundle of documents, it was his response that they represented the K50,000.00 paid. When asked to clarify the alleged payment of \$5000.00, the witness stated that he had no record for the same. When questioned what steps he took with regard to the discrepancies in the payments, the witness testified that he queried over the same including the person he gave the money. To buttress his argument, the witness stated that the letter at page 28 of the plaintiff's bundle of documents was written after he queried on the payment made. When directed to go through the letter at page 28 of the plaintiff's bundle of documents he conceded that it only referred to the two payments he made. DW1 also conceded that there was no other documentary evidence to show that he paid the other monies he talked about. When reminded of paragraph 6 of the plaintiff's bundle of documents, the witness stated that they denied all the plaintiff's claims because they settled all that was owed to the plaintiff before commencement of this Court action.

At the close of the case, only counsel for the defendant filed in written submissions for which I am indebted. I shall not reproduce the same but shall only refer to them as may be necessary.

From the evidence adduced on record it is common cause that on 26<sup>th</sup> October, 2017 the plaintiff hired out two concrete mixers to the defendant for an unspecified period at the rate of K677.00 per day.

It is common ground that the parties terms and conditions for the hire were governed by the coastal hire application for and conditions of account/hire facilities exhibited on pages 1 and 2 of the plaintiff's bundle of documents.

It is my finding that for a period of 30 days the defendant used to accrue a sum of K20,310 in hire charges.

It is also common cause that the defendant was in possession of the two concrete mixers from the date of hire up to 16<sup>th</sup> January, 2019 when they were returned to the plaintiff.

Upon considering the evidence in this case and the defendant's submissions I find that two issues have fallen for determination namely: - *whether there was a valid variation of contract allowing the defendant to pay hire charges only when the equipment was in use and whether the hire charges for the concrete mixers were fully liquidated by the defendant.*

The position of the law with regard to any contractual relationship is that parties are free to negotiate such terms and conditions as they wish and once having done so, these will bind them until there is a mutually agreed variation. The learned Authors of **Chitty on Contract Volume 1 General Principles**<sup>1</sup> rightly observes, on page 820 paragraph 1489 on variation that:

**The parties to a contract may effect a variation of the contract by modifying or altering its terms by mutual agreement.**

**A mere unilateral notification by one party to the other, in the absence of any agreement, cannot constitute a variation of contract.**

Further, in the case of **T Comedy (UK) Limited v Easy Managed Transport Limited**<sup>2</sup> wherein the case of **Cowey v Liberian Operations Limited**<sup>3</sup> was reaffirmed it was stated that:

**“For a variation to be effected there needs to be a mutual agreement between the parties.”**

The plaintiff's witness in his evidence has categorically stated that the hire agreement executed by the parties was to the effect that the defendant was to pay K677 per day for the entire period of the hire. The defendant's witness, on the other hand has contended that the parties had further agreed that the hire charges were only to be paid for the days the mixer was in use. In addition, the evidence of

the defendant established that there were some variations in the course of the agreement when the plaintiff's representatives namely Mr Wade and Jericho permitted the defendant to retain the equipment during the period they were not in use.

I must expressly state from the outset that I found the defendant's evidence unreliable and not helpful to the Court. This is firstly so because the averments in the defence were replete with contradictions. While in paragraph 5 of the defence, the defendant asserted that the hired concrete mixers were returned to the plaintiff, in paragraph 7 they prevaricated that the two concrete mixers were bought off from the plaintiff. Secondly, it is unbelievable that the defendant's witness who executed the contract in issue on behalf of his company did not know the agreed daily rate for the hire of the equipment. In view of the highlighted inconsistencies in resolving the issues in dispute I have therefore paid particular attention to the contemporary documents filed on record.

I have already found as a fact that the document produced at page 2 of the plaintiff's bundle set out the parties terms and conditions of the hire of the equipment. In determining the genuineness of defendant's asseveration of being allowed to retain the concrete mixers for almost a year and not to pay the hire charges when the equipment was allegedly not in use, I have looked at *Clause 6 of the*

coastal hire standards terms and conditions of hire. For ease of reference the said Clause 6 is reproduced hereunder.

*"No amount may be deducted from any invoices without Coastal Hire's authorization should any deduction be agreed to by Coastal Hire, a credit note issued for such amount and will be proof that Coastal Hire has agreed to same. In particular, the customer may not deduct any amount due by reason or fact that it contends it has a counter claim of any nature whatsoever against Coastal Hire.*

It is apparent from the above stated clause that any authorised exemption relating to the payment of hire charges ought to be evinced by a credit note. In my judgment without the credit note it cannot be inferred that the defendant was indeed granted relief from settling the hire charges for close to a year as purported. Furthermore, the email communication dated 27<sup>th</sup> June, 2018 between Wade Seymour and Mr Muya produced at page 3 and 4 of the plaintiff's bundle of documents shows that the defendant's accrued hire charges stood at K104,046.16. The email also reveals that the visit by DW1 to Wade Seymour's office was merely to request for a discount if he managed to make full payment by 28<sup>th</sup> June, 2018. The email signifies that no issues arose whatsoever regarding the deduction or release from payment of hire fees for non-use of the equipment. On this score it is my holding that there was no valid mutual agreement between the parties allowing the defendant not to pay hire charges for a period of close to a year when the concrete mixers were not in use.

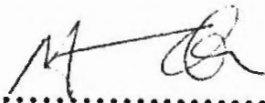


I now turn to resolve the question as to whether the hire fees were paid in full by the defendant. It is clear from the letter of demand exhibited on page 7 of the plaintiff's bundle of documents that as at 12<sup>th</sup> July, 2018 the defendant had continued to retain the hired equipment and was indebted to the plaintiff in the sum of K110, 8822.08.

Page 9 of the plaintiff's bundle of documents establishes that on 15<sup>th</sup> August, 2018 the defendant made a payment of K50, 000 towards the sums due through the plaintiff's advocates and an official receipt was issued to that effect. As at 27<sup>th</sup> September, 2018, page 12 of the plaintiff's bundle of documents sets out that a further sum of US\$3000 of kwacha equivalent of K36, 000 was paid by the defendant. It is also apparent from the documents produced on record that the defendant was consistently appraised of its indebtedness to the plaintiff from 12<sup>th</sup> July, 2018 up to the time of commencement of this action. Hence, I find the defendant's submission regarding the invoices being the only basis of determining the plaintiff's dues, to be a deliberate ploy to mislead the Court. It is my observation that from the time the demand notice was issued all the monies paid by the defendant were duly receipted and accounted for by the plaintiff's lawyer. I am also satisfied that the statement of account produced before Court reflected all the payments made by the defendant. I therefore find the claim by the defendant's witness regarding the addition

payments of K50, 000 and US\$5000 towards the liquidation of the amount owing to be a mischievous allegation for which there is not a shred of evidence. Thus, I am of the firm view that the plaintiff has proved its case on a balance of probability. For this reason, it is hereby adjudged that the hire fees in the sum of K143, 963.39 owed to the plaintiff as at 16<sup>th</sup> January, 2019 be paid by the defendant, with interest thereon at the current bank lending rate from the date of the writ to the date of final settlement. Costs are awarded to the plaintiff to be taxed in default of agreement.

Dated at Ndola this 18<sup>th</sup> day of *September*, 2020



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**M.CHANDA**  
**JUDGE**