THE HIGH COURT OF ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA

2003/HPC/0298

BETWEEN:

INDUSTRIAL CREDIT COMPANY LIMITED **PLAINTIFF**

AND

PLAVMARK ZAMBIA LIMITED **DEFENDANT**

BEFORE THE HON MR. JUSTICE C. KAJIMANGA AT LUSAKA THIS 9TH DAY OF JANUARY, 2006

For the Plaintiff: Mr. K. Mwiche, Sharpe & Howard
For the Defendant: Mr. P. Chibundi, Ranchhod & Chibundi

JUDGMENT

Authorities referred to:

1. On Demand Information Plc (In administrative receivership) and another v Michael Gerson (Finance) Plc and another [1999] 2 ALL ER 811
2. Chitty on Contracts (27th edn, 1994) Vol II, paragraphs 32 – 056

The Court regrets the delay in delivering its Judgment in this matter. On 18th May, 2004 the Plaintiff issued out of the Commercial Registry a Writ of Summons endorsed with a claim for,

1. The sum of US$112,726.69 being the balance due to the Plaintiff from the Defendant in respect of the principal amount and interest as at 31st May, 2003.

2. Further interest on the amounts found to be due in 1 above from 31st May, 2003 to date of payment.

3. Damages for breach of contract.

4. Further or other relief as the Court may deem fit.

5. Costs of and incidental to the action.

It is common cause that on 4th December, 2001 the Plaintiff and the Defendant entered into an Equipment Lease Hire Agreement No. USD/CV/371/04, whereby the Plaintiff agreed to lease to the Defendant one Iveco Truck Engine No. 821022U825470719, one Compressor Chassis No. RH 658-L and one Crusher at the lease rental cost of US$79,369.55 plus VAT to be paid in seventeen monthly instalments as follows:

(a)	**Grace Period**	**Payments Due Dates**
	US$793.70	4th December, 2001
	US$793.70	4th January, 2002
	US$793.70	4th February, 2002
(b)	**Primary Period**	**Payments Due Dates**
	12 monthly instalments US$7,075.80	4th March 2002 to February 2003
(c)	**Secondary Period**	**Payments Due Dates**
	Two consecutive payments of US$1,000.00	4th February 2003 to March 2003

It is also not in dispute that on 13th February, 2002 the Plaintiff and the Defendant entered into a further Equipment Lease Hire Agreement No. US$/CV/388/13, whereby the Plaintiff agreed to lease to the Defendant one Mitsubishi L200 Vanette 4 x 2 S/Cab Engine No.4M40-DQ9792 and one Front-end Loader at the lease rental cost of

US$22,260.00 to be paid in twenty-nine monthly instalments as follows:

(a)	**Grace Period**	**Payments Due Date**
	US$223.00	13th February, 2002

	US$223.00	13th March, 2002
	US$223.00	13th April, 2002
(b)	**Primary Period**	**Payments Due dates**
	24 monthly instalments of US$1,985.00	13th of each month from May 2002 to April 2004
(c)	**Secondary Period**	**Payments Due Dates**
	Two consecutive payments of US$223.00	13th April and 13th May 2004

In consideration of the Equipment Lease Hire Agreement and as security, the Defendant paid the Plaintiff the sum of US$30,000.00 cash collateral. On 1st October, 2002 the Plaintiff terminated the agreements alleging breach on the part of the Defendant, which termination has given rise to this action.

The Plaintiff called two witnesses. PW1 was Musonda Chiteba, the Plaintiff's Credit Analyst. His witness statement discloses that on or before 20th November, 2001 the Defendant applied to the Plaintiff for a lease facility in the sum of US$100,000.00 for the lease of a Compressor, Tipper truck and Crusher. On 4th December, 2001 the Plaintiff and Defendant executed a Lease Agreement at the lease rental of US$79,369.55 plus VAT. On 15th January, 2002 the Plaintiff granted the Defendant a further facility of US$22,260.00 for the lease of a Mitsubishi Pick-up Van and a Front-end Loader which was formalized into a Lease Equipment Agreement on 13th February, 2002. The Defendant had initially agreed to provide security by paying US$30,000.00 cash collateral but the same was changed at the Defendant's request to US$15,000.00 and a Third Party Legal Mortgage on Stand No. 208 Kabulonga, Lusaka in favour of the Plaintiff but the mortgage deed was not executed.

As per the Defendant's request the Plaintiff disbursed funds for the purchase of a Compressor in the sum of US$39,369.00 payable to Atlas Corpco. Another amount in

the sum of US$40,000.00 was disbursed to Hua Jiang Investments Limited for the purchase of an Iveco truck and the Defendant took possession. A further sum of US$14,260.00 was disbursed by the Plaintiff to Marunouchi Motors Limited for the purchase of a Mitsubishi L200 Vanette and US$8,000.00 to a Mr. Steve Chungu for the purchase of a Front-end Loader. Contrary to the lease agreements, the Defendant only made periodic payments totaling US$24,780.00 and by July, 2003 the Defendant was in rental arrears with interest in the sum of US$40,712.03. Notwithstanding the considerable efforts of the Plaintiff to assist the Defendant, the Defendant failed or neglected to settle even part of the arrears. On 1st October, 2002 the Defendant was given notice of termination of the lease agreements and informed of the Plaintiff's intention to repossess the leased assets in accordance with the terms of the agreements. After numerous promises by the Defendant the Plaintiff finally took possession of the leased assets except the Front-end Loader which the Defendant had sold to Component Centre Limited for K25,705,000.00 without the Plaintiff's knowledge or consent. Inspite of taking possession of most of the assets, the amount still outstanding from the Defendant is US$112,957.40. This amount represents the total lease transaction value, finance charges, VAT totalling US$127,757.28 less US$24,780.00 paid by the Defendant.

In cross-examination PW1 testified that financial assistance could not have been given to the Defendant in the absence of a feasibility study. The US$100,000.00 lease transaction value was for one Compressor, one Tipper truck and one Crusher but the Crusher was not leased to the Defendant. The rentals for the leased equipment would not accrue before the machinery was given to the Defendant. It was also his evidence that the Plaintiff financed the equipment for the production of silicon. The absolute ownership of the equipment vested in the Plaintiff. The witness could not recall when the Mitsubishi Vanette was leased to the Defendant and the date the rentals started accruing. The lease agreements were terminated on 1st October, 2002 and the rent stopped accruing. PW1 informed the Court that the sum of US$42,454.80 was

outstanding as accrued rentals up to 1st October, 2002 while the accrued principal amount on the first lease was US$44,835.90. The second lease was for the Mitsubishi Vanette and Front-end Loader which had not been delivered as at mid-January 2002 and the witness could not recall when the delivery was made to the Defendant.

PW1 further testified that the total rentals due on the second lease agreement as at the date of termination was US$10,594.00. If this amount is added to US$44,835.90 the total principal due to the Plaintiff at termination of the lease would be US$55,429.90. The Plaintiff received the sum of US$24,780.00 before termination of the lease agreements. When this amount is subtracted from US$55,429.90 the amount due to the Plaintiff is US$30,649.00 and deducting US$30,000.00 cash collateral deposit from this amount, the balance due to the Plaintiff is US$15,649.00. The witness informed the Court that if it was true that a Mr. Valentine Chitalu had paid US$15,000.00 to discharge the security on Stand No. 208 Kabulonga the balance on the principal would be US$649.00. According to the witness, if the US$1,000.00 monthly grace rental in advance was part of the US$24,780.00 rentals paid by the Defendant, the negative US$351.00 is due to the Defendant's credit. PW1, however, testified that the Plaintiff is claiming US$112,726.69 which should have been paid by the Defendant during the lease period as rentals.

In re-examination PW1 testified that project viability is not one of the lending criteria but a company's viability and that the Plaintiff was not financing the Defendant's project but the leased assets. The amount claimed by the Plaintiff was arrived at by adding US$101,629.55 for the leased assets, financial charges of US$7,100.05 and VAT in the sum of US$19,027.68 totalling US$127,757.28 which the Plaintiff should have recovered for leasing the assets in respect of both agreements.

According to PW1, the amount realized from the sale of repossessed assets was K127,757.28. He also informed the Court that the Plaintiff wants recovery of the

balance due to it being the total value o the lease period as its opportunity costs and capacity to finance other clients were impaired as a result of the Defendant's default.

PW2 was Maxwell Honde, the Plaintiff's General Manager and Chief Executive Officer. His witness statement discloses the same facts as those disclosed in that of PW1. In cross-examination, PW2 testified that the Plaintiff was willing to finance the Defendant's ferro silicon manufacturing project as a feasibility study was conducted confirming the viability of the project. The document at page 6 of the Defendant's bundle of documents is a sanction letter of offer advising the Defendant what the Plaintiff's Credit Facility Committee had approved. Albeit signed by both parties it is not a lease agreement. PW2 informed the Court that the assets to be leased in the offer were one Compressor, one Tipper Truck and one Crusher and the payment period are stated in the lease agreement at page 18 of the Plaintiff's bundle of documents. If the Defendant defaulted in paying rent within five days of the due date, the Plaintiff was entitled to repossess the leased equipment. He further stated that the lease transaction value of US$79,369.55 was for an Iveco truck, Compressor and Crusher but the latter equipment was not financed and the security was the assets financed by the Plaintiff. It was his evidence that as far back as July 2002 the rentals were overdue and the Plaintiff waived the right to terminate the lease after five days of default. Between December 2001 and 1st October, 2002 the Plaintiff did not receive any payment apart from the US$15,000.00 cash deposit. PW2 testified that the owner of Stand No. 208 Kabulonga paid US$15,000.00 and the Plaintiff released the title deeds relating to the property. When the total sum of US$30,000.00 is subtracted from US$44,835.90 which the Plaintiff could have received if the Defendant had been paying excluding VAT which is stated in the sanction letter of offer, the balance would be US$14,835.90. According to paragraph 13 of the witness statement of PW2, the Defendant made a down payment of US$3,500.00 which, when subtracted from US$14,835.90 leaves a balance of US$11,335.90. The Defendant also made periodic payments totaling US$24,780.00. When this amount is deducted there is a credit balance of US$13,444.10.

PW2 also testified that there was a second lease agreement with a transaction value of US$22,260.00 for a new Mitsubishi pick-up and a Front-end Loader for which a lease agreement was also entered into between the Plaintiff and the Defendant. This agreement and the first one were both terminated on 1st October, 2002. As at the date of termination of the second lease agreement, the Plaintiff should have received the sum of US$8,609.90 in rentals. When this amount is subtracted from US$15,000 security cash deposit, there is a credit of US$6,391.00 and when this is added to US$13,444.10 it gives a total credit of US$19,835.10.

PW2 further testified that the Plaintiff was the absolute owner and lessor of the leased equipment and that if the lease period ran its entire duration the lessee could be allowed to buy it off the lessor. It was also his evidence that the Plaintiff was entitled to take possession of the equipment on termination of the lease which were subsequently sold. Had the leases run their full duration, the transaction values should have been US$101,629.55 (US$22,260.00 + US$79,369.55). He further testified that the Plaintiff's justification for claiming the full value is because when the equipment was sold, the full amount was not realized. PW2 stated that the equipment was sold after an advertisement in the press.

The only witness for the Defendant was Boston White Chisenga, a Consultant to the Defendant on the project in issue. His witness statement discloses that the Defendant identified a business project for the mining of silicon in Luanshya and applied to the Plaintiff for a loan to finance its operation. The Plaintiff agreed to finance the project subject to a feasibility study being undertaken and this was done by a Mr. Boniface Muibeya, an exploration geologist. On the basis of the feasibility study, the Plaintiff by letter dated 20th January, 2001 agreed to lease to the Defendant the equipment for the project and offered the Defendant an equipment lease of US$100,000.00 initially for the hire of one Iveco truck, one Compressor and one Crusher. The agreed rentals were US$793.70 for January, February and March 2002, US$7,075.80 per month from 4th

April, 2002 to 4th April, 2003 and thereafter two payments of US$1,000.00 per annum bringing the total rentals to US$89,290.70. The Defendant provided quotations to the Plaintiff for the Compressor and Iveco truck but the Crusher was not availed to the Defendant.

The witness statement of DW1 also discloses that the Plaintiff offered the Defendant a second equipment lease facility for the hire of one Mitsubishi L200 Vanette 4 x 2 single cab and one Front-end Loader by a letter dated 15th January, 2002 for the hire of the said equipment. The agreed rentals were US$223.00 for February, March and April, 2002, US$1,985.00 per month for 24 months and thereafter two payments of US$223.00 per annum totaling US$48,755.00. The Plaintiff purchased the Front-end Loader at US$8,000.00 and the Mitsubishi Vanatte at US$14,600.00. For the two equipment lease agreements, the Defendant was required to provide a cash collateral security of US$30,000.00 by the Plaintiff. The Defendant's business failed due to numerous problems, primarily the non-availability of the Crusher and on 1st October, 2002 the Plaintiff gave notice to the Defendant terminating the lease agreement for the reason that the later had defaulted to remit the lease rentals as agreed and subsequently, the Plaintiff repossessed the lease equipment. At the time the Plaintiff collected the equipment, the Defendant had the equipment in its possession for 9 months and 8 months in respect of the first and second agreements respectively, and therefore owed the Plaintiff rentals of US$44,835.00 on the first agreement and US$10,594.00 on the second agreement bringing the total rentals due to US$55,429.000. The Defendant had, however, made payments of US$24,780.00 towards the rentals leaving a balance of US$30,649.00. The Plaintiff applied the Defendant's cash collateral of US$30,000.00 plus interest towards the balance leaving an outstanding sum of US$649.00 less interest earned on the sum of US$30,000.00. According to the witness statement of DW1, the outstanding balance of US$649.00 also reflects rentals charged for the Crusher that was never availed to the Defendant and if this is removed from the lease on pro rata basis, the amount due would be reduced to

less than US$649.00. The claim by the Plaintiff is unjustified since the project embarked on together did not materialize.

In cross-examination, DW1 testified that he was neither a shareholder nor a director in the Defendant company but that he was providing advice on the equipment required for the project and in the marketing of the products to be produced. He informed the Court that he was alive to the terms and conditions of the lease agreements whose main salient feature was the lease of the equipment from the Plaintiff by the Defendant. According to DW1, a lease agreement is a contract whereby one party lets property, land, equipment or services to another for a specified period in return for payment. It was his evidence that clause 21.1 of the lease agreement required the Defendant to punctually pay the money without fail but it fell short of this requirement. He testified that the Defendant is indebted to the Plaintiff up to the date of cancellation of the contract.

DW1 also testified that the facility letter on page 1 of the Plaintiff's bundle of documents talks of US$100,000.00 which was for procuring a Compressor, Tipper truck and a Crusher but the actual lease was for US$79,369.55. The Crusher was sourced by the Defendant but the Plaintiff did not pay for it. He informed the Court that the leases did not run through their duration because they were terminated by the Plaintiff and denied that the Defendant defaulted from the beginning. According to the witness, the Plaintiff would have recovered US$79,369.55 for the first lease agreement and US$20,000.00 plus for the second one if the lease agreements had run their full duration. DW1 doubted if the Plaintiff would have recovered a total of US$147,000.00 from the lease agreements if both parties honoured their part of obligations. He maintained that the Plaintiff is unable to recover the amount because it terminated the lease agreements and repossessed the equipment which was to be used for generating money by the Defendant.

I have considered the evidence on record, the written submissions made on behalf of the parties and cited authorities. It is not in dispute that the parties entered into two equipment lease agreements. It is also incontrovertible that the Defendant defaulted in the payment of the lease rentals in respect of both agreements, a default which triggered their termination by the Plaintiff and repossession of the leased assets. What I see as the main dispute between the parties is whether the Defendant is liable to the Plaintiff in the sum of US$112,726.69 and the related costs claimed by the Plaintiff in its amended writ of summons and statement of claim.

PW1 testified that an equipment lease agreement does not operate in the same manner as a house rental agreement in that the former does not stop once the agreement is terminated. This argument suggests one thing, namely, that the Defendant's obligation to pay rentals continued even after the lease agreements had been terminated by the Plaintiff. I recognize the ingenuity of such a proposition but I am not persuaded by it. First, the Plaintiff has not provided an authority for this statling proposition and I am yet to come across any such authority supportive of this view. It is legally inconceivable that obligations of a party to the terminated contract can continue to subsist after termination as this event ***ipso jure*** terminates the parties' obligations under the contract. Second, this proposition flies in the teeth of the lease agreements which provide for specific remedies in the event of default by a lessee. To start with, clause 15.0 provides in relevant part as follows:

> ***"As between the lessor and the lessee the equipment hereby leased shall remain personal or movable property and shall continue in the ownership of the lessor notwithstanding that the same may have been affixed to any land or building..."***

And according to clause 11.0:

> ***"The lessee shall return the equipment to the lessor at the lessee's expense on the expiry or sooner determination of this lease..."*** (underlining my emphasis)

Further, clause 12.0 provides, inter alia, under (i) that the lease shall end if the lessee defaults paying rent within five days of becoming due. The sum and substance of these provisions is this: the legal ownership of the leased equipment lies in the lessor; a lessee's default in payment rentals terminates the lease agreement; and the leased equipment is returned to the lessor upon termination. In my considered opinion, once the lease agreement has been terminated and the leased equipment is repossessed by the lessor, the lessee is absolved of his obligation to continue paying rent. In other words, rent cannot continue to accrue after the lease has been terminated.

The type of contracts between the parties must be understood in their correct perspectives. They fall in the category of leases which may either be an **operating lease** or a **finance lease**. An **operating lease** is where the lessee pays rent for the hire of an asset for a period of time which is normally less than its useful economic life. Most of the risks and rewards of ownership of the asset are retained by the lessor. On the other hand, a **finance lease** involves the payment of the full cost of the asset by the lessee to the lessor together with a return on the finance provided by the lessor. Other than title, all the risks and rewards associated with the ownership of the assets lie with the lessee.

In the instant case, there is no dispute about the type of leases that the parties entered into; they were all **finance leases**. The learned authors of **Chitty on Contracts**

(27th edn, 1994) Vol. II state at paragraphs 32-056 as follows:

> ***"Finance leasing. In the light of the various tax advantages, a form of long-term financing has developed, which is known as finance leasing. In a finance leasing, the lessee selects the equipment to be supplied by a manufacturer or dealer, but the lessor (a finance company) provides the funds, acquires title to the equipment and allows the lessee to use it for all (or most) of its expected useful life. During the period of the lease the usual risks and rewards of ownership are substantially transferred to the lessee, who bears the risks of loss, destruction and depreciation of the leased equipment (fair wear and tear only excepted) and of its obsolescence or malfunctioning. The lessee also bears the costs of maintenance, repairs and insurance. The regular rental payments during the primary period of the lease are calculated to enable the lessor to amortize its capital outlay and to make a profit from its finance charges. At the end of the primary leasing period, there will frequently be a secondary leasing period during which the lessee may opt to continue the lease at a nominal rental, or equipment may be sold and a proportion of the sale of proceeds returned to the lessee as a rebate of rentals. The lessee thus acquires any residual value in the equipment, after the lessor has recouped its investment and charges. If the lease is terminated prematurely, the lessor is entitled to recoup its capital investment (less the realizable value of the equipment at the time) and its expected finance charges (less an allowance to reflect the accelerated return of the capital). The bailment which underlies finance leasing is therefore only a device to provide the finance company with a security interest (its reversionary right); a finance***

lease is similar in function to outright purchase or hire purchase."

This passage from **Chitty** was also discussed in the English case of **On Demand Information plc (in administrative receivership) and another v Michael Gerson (finance) plc and another**, where the facts were similar to this one.

The passage from **Chitty** is in fact consistent with clause 11.0 of the lease agreements which reads:

> ***"The lessee shall return the equipment at the lessee's expenses on the expiry or sooner determination of this lease in a condition consistent with the performance of the lessee's obligations hereunder... Upon termination of the lease by reason of default, the lessor shall be entitled to recover from the lessee the amount of any financial loss incurred by the lessor and the recovery disposal of the equipment to the extent of the difference between the amount outstanding to ICC as on the date of disposal and any sale proceeds, after payment of all expenses incurred in such disposal..."***

From the passage quoted earlier and clause 11.0 of the lease agreements, it is quite clear that when a finance lease is terminated before its expiry date, the lessor is not entitled to further rentals but only to recoup its capital investment as well as finance charges.

The legal principles governing finance leases having been settled, I now turn to the Plaintiff's claims. I conclude that the Plaintiff is entitled US$101,629.55 being the total capital costs in respect of the two leases, US$7,100.05 being finance charges and US$19,027.68 being VAT, totalling US$127,757.28. From this amount, the sum of

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The upshot of my conclusion is that the Plaintiff has proved its case on the balance of probabilities and I grant Judgment in its favour. Costs follow the event and shall be taxed in default of agreement.

Leave to appeal is granted.

DELIVERED THIS 9TH DAY OF JANUARY, 2006

C. KAJIMANGA
JUDGE