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**IN THE SUPREME COURT OF ZAMBIA** **APPEAL NO. 12/2013**

**HOLDEN AT NDOLA**

(Civil Jurisdiction)

**BETWEEN:**

**POWERFLEX (Z) LIMITED** **APPELLANT**

**AND**

**EFFICIENT FRIGHTERS (Z) LIMITED** **RESPONDENT**

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

**On the 3rd June, 2014 and 1st August, 2014**

**For the Appellant: Mr. D.Tambulukani, Messrs Ellis and Company.**

**For the Respondent: Mr. L. Mwanabo, Messrs L.M Chambers.**

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**JUDGMENT**

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**Wood, JS, delivered the Judgment of the Court.**

1. **Khalid Mohamed v The Attorney General (1982) Z.R. 49.**
2. **Development Bank of Zambia v Mangolo Farms Limited (1995/1997) Z.R.65.**
3. **Mususu Kalenga Building Limited, Winnie Kalenga and Richmans Money Lenders Enterprises (1999) Z.R.27.**

**LEGISLATION REFERRED TO:**

**The High Court Act, Chapter 27 of the Laws of Zambia.**

**OTHER WORKS REFERRED TO:**

1. **Halsbury's Laws of England, 4th Edition Reissue, Volume 28.**
2. **Steven's and Borries Mercantile Law, 15th Edition.**

This is an appeal against a decision of the High Court awarding the respondent escort and demurrage charges, the right to exercise a lien over a container, the right to enforce an invoice bearing two different figures and judgment in the sum of US$3,167.75. We shall, for convenience, refer to the appellant as the plaintiff and to the respondent as the defendant which is what they were in the court below.

The brief facts giving rise to this appeal are that sometime in February, 2011, through a series of emails, the plaintiff engaged the services of the defendant to clear and transport its consignment of spare parts in 12 containers from the port of Dar-es-Salaam via Nakonde to Kitwe. Problems started in Tanzania when the port authorities in that country declared that the containers were of an abnormal size attracting the statutory requirement of escort vehicles in that country. This led to delays giving rise to demurrage charges and additional charges for the escort vehicles. The plaintiff

paid a total sum of US$192,726.25 and disputed the sum of US$3,167.75 which the defendant counter-claimed. The sum of K16, 472,300.00 which was equivalent to US$3,167.75 was paid into court by the plaintiff on 14th March, 2012 and paid out to the defendant on 24th April, 2012.

In her Judgment, the learned trial Judge found that the plaintiff had caused the delay which consequently attracted demurrage charges. She also found that the plaintiff subsequently paid the demurrage charges because it anticipated that the charges would be incurred. The learned trial Judge further found that the escort charges were incurred as a result of the containers being declared abnormal by the Tanzanian port authorities and the plaintiff, as the owner of the goods, was therefore liable to pay. The learned trial Judge also dismissed the plaintiff's claim for loss of business as this was not specifically pleaded.

On appeal, the plaintiff filed four grounds of appeal. The plaintiff argued grounds two and four of the appeal together and we shall, therefore, deal with them as such.

The first ground of appeal was that the learned trial Judge erred in law and in fact when she held that the plaintiff was liable for escort charges and demurrage charges although there was no evidence before her that the said charges were incurred.

This is a rather startling argument in the light of the plaintiff's own email at page 143 of the record of appeal which is a request for a quotation **"...for two escort vehicles up to Nakonde..."** and its letter dated 4th April, 2011, to Stanbic Bank Zambia Limited, instructing the bank to remit the sum of US$36,820.00 to the defendant to cover the cost for transportation of containers, escort fees, storage charges and removal charges. Further, at pages 66 to 67 of the record of appeal, there is an abnormal load permit from the Ministry of Infrastructure Development of the United Republic of Tanzania which specifically states in clause (vi) of the Terms, Conditions and Restrictions that two vehicles must escort the abnormal load throughout the journey. The actual registration numbers of the motor vehicles that were to be used were specifically indicated in paragraph (vi) of the permit. The plaintiff's own witness Mr. Chansa Chipili, acknowledged in his evidence at pages 186 and

187 of the record of appeal that the consignment was an abnormal load and that two escort vehicles were required.

We agree with the learned trial Judge's finding that on the evidence on record, the plaintiff was liable for demurrage and escort charges. We however, do not agree with the learned trial Judge's finding that the failure to include the demurrage charges on the invoice was immaterial. A demurrage clause is normal in contracts of carriage such as this one. In the case at hand, although there was no demurrage clause in the beginning as between the plaintiff and the defendant, there was a variation to the contract later on and the plaintiff agreed to be responsible for demurrage charges. At page 56 of the record of appeal, the plaintiff gave a clear indication in its email dated 14th February, 2011, that it was aware that it may incur demurrage and storage costs and in fact settled the bill for demurrage when it was presented.

The plaintiff has gone to great lengths to argue that a litigant must prove his claim in order to succeed and has quite correctly cited the case of **Khalid Mohamed v The Attorney General of Zambia**[1] and two other unreported authorities on this point. It is

however, as was held in **Khalid Mohamed v The Attorney General of Zambia**[1], for the plaintiff to prove his case. What the plaintiff is seeking in its arguments is for the defendant to prove that the said charges were incurred. In our view, the plaintiff's argument collapses in the light of tax invoice No. A746941 at page 81 of the record of appeal from Tanzania International Container Terminal services, which lists the various charges payable which were in fact paid by the defendant on 23rd February, 2011, as indicated at pages 82 and 83 of the record of appeal. Our considered view is that the learned trial Judge quite correctly assessed and evaluated the evidence before her and did not fail to take into account any matter which she ought to have taken into account. We see no reason to disturb the findings of fact made by the learned trial Judge. This ground of appeal has no merit.

The third ground of appeal related to the discrepancy in connection with invoice No.092. The plaintiff argued that the learned trial Judge erred in law and in fact when she held that invoice No.092 bearing two figures namely US$11,368.00 and US$5,820.00 was enforceable. We do not agree with the plaintiff's

arguments in respect of this ground of appeal. At page 193 of the record of appeal, the defendant's witness, Mr. Chiko Mulenga, conceded that two separate invoices bearing the number 092 were issued for separate amounts but clarified in re-examination that the balance of US$3,167.00 was not on a specific invoice arrived at after tabulation from the beginning of the transaction. His explanation, which the learned trial Judge accepted, was that the discrepancy in the figures arose out of a reconciliation of the account. He stated that the first invoice only indicated the charge for one escort vehicle, while the disputed invoice included the cost for two escort vehicles and demurrage charges. This cannot be said to amount to a vague contract as has been argued by the plaintiff because the figures were merely reconciled. Further, there can be no question of the parties failing to agree because the terms of the contract were agreed and what remained was essentially a reconciliation to arrive at the final figure due to the defendant. In any event, the plaintiff paid this money into court as an admission of what was due to the defendant. The notice of payment into court in the record of appeal does not state whether the money was being paid with an admission or denial of liability which is a requirement

under **Order 29 Rule 1 (3) of the High Court Rules Cap 27 of the Laws of Zambia** which reads as follows:

> **"The notice shall state whether liability is admitted or denied and receipt of the notice shall be acknowledged in writing by the plaintiff within three days."**

The notice simply states that the sum was being paid **"... as balance due to the defendant."** In our view, the words **"as balance due to the defendant"** is in effect an admission on the part of the plaintiff that the money was due to the defendant. The notice of payment out of court equally does not comply with **Order 29 Rule 2 (1) of the High Court Rules** which requires the party accepting the money paid into court to state whether or not it is in satisfaction of its counter-claim. On the evidence on record, the defendant properly justified how it arrived at the sum of US$3,167.75. This ground of appeal lacks merit and is accordingly dismissed.

As already stated, we will deal with grounds two and four of the appeal together. The second ground of appeal was that the learned trial Judge erred in law and in fact when she held that the defendant had the right to exercise a lien over the container. The

fourth ground of appeal was that the learned trial Judge erred in law and in fact when she held that the defendant was entitled to US$3,167.75

The learned trial Judge, in her judgment at page 22 of the record of appeal, came to the conclusion that the defendant was entitled to exercise a lien over the container because the plaintiff had refused to pay demurrage and escort charges. We see no difficulty with the approach taken by the learned trial Judge as there was evidence that the plaintiff had not settled its debt to the respondent. The following is stated at page 400 of **Steven's and Borries Mercantile Law, 15th Edition**, with regard to a possessory lien:

> **"A possessory lien is one which appertains to a person who has possession of goods which belong to another entitling him to retain them until the debt due has been paid. They are of two kinds:**
>
> **(i) Particular lien:**
>
> **(a) This is a right to retain the particular goods in connection with which the debt arose; e.g a carrier may retain goods given to him for carriage until payment of his charges for carriage."**
>
> **(b) .....**

Further, under paragraph 702 0f the **Halsbury's Laws of England, 4th Edition Reissue, Volume 28**, the following is stated of a lien:

> **"In its primary or legal sense 'lien' means a right at common law in one man to retain that which is rightfully and continuously in his possession belonging to another until the present and accrued claims of the person in possession are satisfied."**

This supports the view that the defendant had the right to exercise a possessory lien over the container until such time that the debt was settled by the plaintiff. A possessory lien does not amount to unjust enrichment as argued by the plaintiff because as **Steven's and Borries Mercantile Law** puts it, the defendant had the right to retain the particular goods in connection with which the debt arose until the balance of the debt was paid. In the circumstances, the case of **Development Bank of Zambia v Mangolo Farms Limited**[2] cited by the plaintiff should be distinguished from the case at hand, as a possessory lien is an established principle in common law and can be relied upon by a party in appropriate situations.

Further, under grounds two and four of the appeal, the plaintiff is now claiming the sum of US$14,399.00 of the money paid to the defendant as the payment amounted to unjust

enrichment by the defendant. Although the plaintiff has not set out its arguments specifically on this point, it has serious difficulties. The claim as originally pleaded was for damages for wrongful detention, damages for consequential loss of income at the rate of US$1,700.00 per day, delivery of the container and a declaration that invoice No. 092 was unenforceable. The payments made by the plaintiff were well documented. They arose out of *inter alia* demurrage, abnormal loads and escort charges. The learned trial Judge made findings of fact that the plaintiff contributed to the delay. The plaintiff was also aware of the abnormal load and the need for escort vehicles and we accept these findings of fact. These are all factors that contributed to an escalation in costs. There can therefore be no question of a refund in the sum of US$14,399.00 which was not claimed as an overpayment in the pleadings in the first place. This is a new claim which cannot, as we stated in **Mususu Kalenga Building Limited, Winnie Kalenga and Richman's Money Lenders Enterprises**[3], be canvassed at this stage. We have already stated that the sum of US$3,167.75 was arrived at after a reconciliation of the account and was admitted by the plaintiff when it paid the money into court. There is therefore no

merit in grounds two and four of the appeal. The appeal is dismissed with costs to the defendant to be taxed in default of agreement.

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L.P. CHIBESAKUNDA

**ACTING CHIEF JUSTICE**

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A.M.WOOD

**SUPREME COURT JUDGE**

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M.LISIMBA

**ACTING SUPREME COURT JUDGE**