

**THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA**
(Commercial Jurisdiction)

2016/HPC/0001



BETWEEN:

**DEMETER GROUP LIMITED
EXIMO AGRO LIMITED**

**1ST PLAINTIFF
2ND PLAINTIFF**

AND

CARGILL ZAMBIA (2009) LIMITED

DEFENDANT

**Delivered in Open Court before Hon. Mr. Justice Sunday B. Nkonde, SC at
Lusaka this 8th day of December, 2016**

For the Plaintiffs : Mr. A. K. Phiri of Messrs H.M Munsanje & Company
For the Defendant : Ms. L. Brown of Messrs Corpus Legal Practitioners

JUDGMENT

CASES REFERRED TO:

- 1) *Gideon Mundanda vs Timothy Mulwani and Others (1987) ZR 29*
- 2) *Golf Consultancy and Tourism Limited vs Chainama Hills Golf Club Limited
Selected Judgment No. 39 of 2015.*

LEGISLATION REFERRED TO:

- 1) *Bank of Zambia Currency Regulations, Statutory Instrument Number 33 of
2012.*

- 2) *Bank of Zambia (Monitoring Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013.*
- 3) *Bank of Zambia (Currency) (Amendment) Regulations Statutory Instrument Number 78 of 2012.*

The Plaintiffs commenced this action by way of Writ of Summons and accompanied by Statement of Claim on 6th January, 2016 claiming for:

- 1) *The sum of US\$21, 448 or K235, 020-00 being the Kwacha equivalent hereof of such Kwacha equivalent of the sum of US\$2, 448-00 converted at the Bank of Zambia exchange rate as shall be ruling at the date of payment, being balance of monies due from the Defendant to the 1st Plaintiff under a contract made in August 2013 for the supply by the 1st Plaintiff to the Defendant of 15, 000 litres of Agro-Prid Chemical (also known as Acetami-prid) which amount the Defendant has to date failed and/or willfully requested to pay.***
- 2) *Damages for breach of contract.***
- 3) *Interest.***
- 4) *Costs of the action.***

According to the Statement of Claim, the 1st Plaintiff is a body corporate carrying on Agro business in Mwanza district of, and elsewhere in the Republic of Tanzania and the 2nd Plaintiff is a limited liability company in Zambia and an associate company of the 1st Plaintiff.

The Plaintiff alleged that by Purchase Order Number P. 5692 dated 29th August, 2013, the Defendant ordered from the 1st Plaintiff 15,000 litres of an agriculture-use chemical known as Agro-Prid (also known as

Acetami-Prid) (the chemicals) at a total price of US\$167, 850-00 payable within 30 days of the date of the Invoice.

Between August, 2013 and January, 2014, the 1st Plaintiff shipped the chemicals to the 2nd Plaintiff, its agent, for delivery to the Defendant and the Defendant accepted and took delivery on 2nd January, 2014. The Plaintiff further alleged that on about 3rd January, 2014, the 2nd Plaintiff raised Tax invoice Number EALZ 3206 in the sum of K939, 960-00 being the kwacha equivalent of US\$167, 850-00 but the Defendant refused to pay on that invoice and returned the original invoice to the 2nd Plaintiff for cancellation and requested instead that the 1st Plaintiff issue the Tax Invoice in United States dollars.

Thus, on 2nd February, 2014, the 1st Plaintiff raised Commercial Invoice Number 14GLI24 in the sum of US\$ 167,850-00 but the Defendant refused to pay the amount to the 1st Plaintiff citing certain foreign exchange currency Regulations in force at the time in Zambia.

The Plaintiffs stated that in order to bring closure to the matter, the 1st Plaintiff authorized the 2nd Plaintiff to raise a Tax Invoice which the 2nd Plaintiff did. The same was Tax Invoice Number EALZ 3228 in the amount of K981, 922-00 being the Zambian kwacha equivalent at the date of that invoice. But the Defendant still refused to pay on this invoice. Instead, the Defendant paid on Tax Invoice No. EALZ 3206 which the 1st Plaintiff had allegedly already cancelled. The sum of K939,960-00 for the chemicals was paid to and received by the 2nd Plaintiff in the 2nd Plaintiff's Bank Account held at Stanbic Bank Zambia on 20th March, 2014.

Lastly, the Plaintiff averred that when converted at the exchange rate prevailing on 20th March, 2014 being the date of payment, the amount came to K939,900-00 translating to only US\$146,402-00 thereby leaving a shortfall of US\$21,448-00 due to the 1st Plaintiff on the US\$167, 850-00 price of the chemicals. The amount of US\$21,448-00 is what the Plaintiffs are claiming from the Defendant.

The Defendant denied the Plaintiff's claim. In the Defence entered on 25th January, 2016, the Defendant stated that the Purchase Order Number 5296 of 29th August, 2013 for the chemicals from the 1st Plaintiff was cancelled because the 1st Plaintiff could not comply with the **Bank of Zambia Currency Regulations, Statutory Instrument Number 33 of 2012** which at the time prohibited the quoting of foreign currency in transactions in Zambia. Instead, the Defendant had to enter into another contract with the 2nd Plaintiff for the supply of the chemicals and the Defendant subsequently paid the sum of K939,960-00 on the basis of invoice Number EALZ 3206 issued by the 2nd Plaintiff. The Defendant further stated that invoice Number EALZ 3206 issued by the 2nd Plaintiff was in kwacha in compliance with the law.

At trial, the Plaintiffs' sole witness was ASHOK CHAUHAN, a Director in the 2nd Plaintiff's company. His evidence in chief (the witness statement) was to recast the averments in the Statement of Claim and also made reference to documents in the Plaintiffs' Bundle of Documents, among them, namely; Purchase Order Number P5692 dated 29th August, 2013 issued by the Defendant at page 1, Invoice Number EALZ 3206 dated 3rd January, 2014 issued by the 2nd Plaintiff at page 3, Commercial Invoice Number 14D GL124 dated 2nd February, 2014 issued by the 1st Plaintiff

at page 4, e-mail dated 21st February, 2014 issued by PW requesting the Defendant to return the original Invoice Number EALZ 3206 to the 2nd Plaintiff for cancellation at page 6, the replying e-mail dated 25th February, 2014 from the Defendant at page 7, Purchase Order No. 6162 dated 27th February, 2014 issued by the Defendant at page 10, Invoice Number EALZ 3228 dated 28th February, 2014 issued by the 2nd Defendant and Invoice Number EALZ 3231 dated 21st March, 2014 issued by the 2nd Plaintiff at page 15.

Under cross-examination, PW confirmed that after the 1st Plaintiff failed to provide the Defendant with the Plaintiff's Bank details so that the Defendant could satisfy the prescribed requirements in the **Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013** which had introduced restrictions with respect to foreign currency transactions, the 1st Plaintiff asked the Defendant to change Purchase Order Number 5692 from the 1st Plaintiff to the 2nd Plaintiff. PW further confirmed that the 2nd Plaintiff was to issue the changed Invoice in Kwacha but he denied that it meant another agreement came into effect now between the 2nd Plaintiff and the Defendant.

When it was suggested to PW that the 1st Plaintiff never delivered any chemicals to the Defendant, PW answered that the 1st Plaintiff did but through the 2nd Plaintiff, a sister Company. According to PW, the 1st Plaintiff could not supply the chemicals directly to the Defendant because the 1st Plaintiff was not registered for such business by the Zambia Environmental Management Agency. PW, further confirmed that K939,960-00 was paid by the Defendant for the chemicals through the 2nd Plaintiff's account in March, 2014.

In re-examination, PW stated that the Invoice of 3rd January, 2014 in the sum of K939,960-00 issued by the 2nd Plaintiff was not in force at the time of the payment for the chemicals by the Defendant.

The Defendant's witness was LEDSON KAKWENDA (DW) who also stated that at the time of the agreement between the 1st Plaintiff and the Defendant in August, 2013, quotation of foreign currency transactions in Zambia was prohibited by the **Bank of Zambia Currency Regulations, Statutory Instrument Number 33 of 2012**. Additionally, the **Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013** also made it a requirement that whenever a transaction was entered into between a local entity and a foreign entity, the local entity was mandated to provide proof of the Supplier's Bank details including invoices in the name of the entity recipient of the funds. PW went on to state that when the 1st Plaintiff was requested to provide these details, the 1st Plaintiff failed to do so. Thus, the agreement between the 1st Plaintiff and the Defendant was cancelled and a subsequent agreement was entered into between the 2nd Plaintiff and the Defendant and that is when Invoice Number EALZ 3206 dated 3rd January, 2014 in the sum of K939,960-00 was issued for the supply of the chemicals. The witness further stated that an amount of K939,960-00 was paid to the 2nd Plaintiff for the chemicals around March, 2014. However, despite the payment, the Plaintiff received an invoice from the 2nd Plaintiff claiming US\$21,448-00 as outstanding on the chemicals supplied.

Under cross-examination, DW conceded that after the Agreement with the 1st Plaintiff was cancelled, the chemicals supplied were not delivered to the 1st Plaintiff. However, DW stated that the same chemicals

supplied were now supplied by the 2nd Defendant by virtue of the new Invoice issued in February, 2014 but back-dated to 3rd January, 2014.

DW also denied that Invoice Number EALZ 3206 was ever cancelled.

From the evidence on record, it is not in dispute and I find as a fact that in August 2013, the 1st Plaintiff and the Defendant entered into an Agreement for the supply and delivery of 15,000 litres of chemicals at a total price of US\$167,850-00. Further that four Invoices were issued for the chemicals, the first was Invoice No. EALZ 3206 back-dated 3rd January, 2014 in the sum of K939,960-00 issued by the 2nd Plaintiff followed by Commercial Invoice Number 14DGL124 dated 2nd February, 2014 in the sum of US\$167,850-00 issued by the 1st Plaintiff, Invoice Number EALZ 3228 dated 28th February, 2014 in the sum of K981,922-50 issued by the 2nd Plaintiff and lastly Invoice Number EALZ 3231 in the sum of US\$21,448-00 dated 21st March, 2014 issued by the 2nd Plaintiff. It is also not in dispute that in March, 2014, the Defendant paid the 2nd Plaintiff the sum of K939,960-00 only for the chemicals.

The questions to be determined are;

1. ***Whether the August 2013 Contract for the supply of the chemicals by the 1st Plaintiff to the Defendant was a domestic or an international transaction (within the meaning of the law at the time).***

2. ***Whether the referred to Contract for the supply of chemicals by the 1st Plaintiff to the Defendant was enforceable.***

I start with **whether the August 2013 Contract for the supply of the chemicals by the 1st Plaintiff to the Defendant was a domestic or an international transaction.**

Initially, **Regulation 2 of the Bank of Zambia Currency Regulations, Statutory Instrument Number 33 of 2012** defined a “domestic transaction” as

“any transaction within the Republic that involves a Payment of a sum of money in or towards the Satisfaction of a debt due, or for the credit of, a person resident in the Republic.”

The **Bank of Zambia (Currency) (Amendment) Regulations, Statutory Instrument Number 78 of 2012** re-defined “domestic transaction” as

“ the buying or selling, offering to buy or sell goods or services between persons within the Republic.”

Further, Regulation 2 of the **Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013** defined an “international transaction” as

“The buying or selling of or offering to buy or sell, goods or services to or by a person who is not resident in the Republic.”

In this case, it is not in dispute between the parties that the 1st Plaintiff was at all material times a legal entity incorporated and carrying on business in the Republic of Tanzania, and not a resident of the Republic of Zambia. Further, that the US\$167,880-00 consideration for the supply of the chemicals on the August 2013 Contract was for the credit of the 1st Plaintiff. Consequently, there cannot be any dispute and I so find that the referred to Contract of August 2013 was not a domestic transaction as defined by **Regulation 2 of the Bank of Zambia Currency Regulations, Statutory Instrument Number 33 of 2012** which was in force at the time of formation and performance of the Contract but an international transaction within the meaning of **Regulation 2 of the Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument No. 55 of 2013** which was also in force at the time of formation and performance of the Contract.

The second question is **whether the August 2013 Contract for the supply of the chemicals by the 1st Plaintiff to the Defendant was enforceable.**

The **Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013** also provided in **Regulations 8(1) and (2)** as follows:

- “ (1) an importer shall, for any proposed import of goods or Services complete and submit to a Commercial Bank the Import Monitoring Form....*
- (2) an importer who remits foreign exchange through a Commercial Bank in accordance with sub-regulation (1)*

shall be way of acquittal, provide the Commercial Bank with Customs clearance of the imported goods or evidence of provision of the relevant services before the remittance of funds, within one hundred and twenty (120) days from the date of transfer of the funds.”

The answer to the second question, therefore, is “YES,” the above referred to Contract was enforceable provided, inter-alia, the requirements of the **Bank of Zambia (Monitoring of Balance of Payments) Regulations, Statutory Instrument Number 55 of 2013** were met. I say so because, as already found, this was an international transaction regulated accordingly by the Bank of Zambia under these Regulations.

It, however, appears convincing to me that on the Contract between the 1st Plaintiff and the Defendant for the supply of the chemicals, the 1st Plaintiff faced two obstacles. The first obstacle was that because this was an international transaction, the 1st Plaintiff was required to provide its Bank details and the necessary Invoice in compliance with Bank of Zambia Regulations for payments in foreign currency to be effected by the Defendant. The 1st Plaintiff failed to do so. The second obstacle was because, as revealed by PW in his evidence during cross-examination, the 1st Plaintiff did not also have the necessary Licence issued by the Zambia Environmental Management Agency for the business it was transacting. Due to these two legal obstacles, the 1st Plaintiff asked the Defendant to re-name the Purchase Order raised from the 1st Plaintiff to the 2nd Plaintiff. The request was made because the 2nd Plaintiff was an associate

Company to the 1st Plaintiff and registered in Zambia. That is how Invoice Number EALZ 3206 back-dated to 3rd January, 2014 in the sum of K939,960 – 00 was issued by the 2nd Plaintiff to the Defendant. The Defendant also raised Purchase Order Number P6162 dated 27th February, 2014 to the 2nd Plaintiff in the sum of K939,900-00. There is no proof that Invoice Number EALZ 3206 was ever cancelled and I agree with DW and also find that this Invoice was valid at the time of payment of K936,960-00.

It would appear to me that in going through the processes I have described above, the parties intended the transaction for the supply of the chemicals in Zambia not to be tainted with illegality but instead to be in compliance with the law. In that event, this Court must also be seen to be encouraging such compliance.

In the case of **Gideon Mundanda vs Timothy Mulwani and Others**¹, our Supreme Court stated as follows:

“As to the question of the possible illegality of the Contract we respectively agree with the principle set out in Kulamma v Manadam(1) that parties to a Contract should be presumed to contemplate a legal rather than an illegal course of proceedings.... It must be made quite clear that the Courts will never in any circumstances condone the flouting of the law; but we approach this matter by considering whether it was possible for the parties to comply

with their Contract legally, in which event we must encourage such compliance.”

The above passage was also cited with approval by our Supreme Court in the case of **Golf Consultancy and Tourism Limited vs Chainama Hills Golf Club Limited²**.

This case before me is not different. To surmount the legal obstacles referred to, the 1st Plaintiff authorized the 2nd Plaintiff, a Company resident in Zambia, to issue Invoice Number EALZ 3206 in the sum of K939,960-00 for the chemicals and the Defendant changed the Purchase Order to be in the name of the 2nd Plaintiff. This was effectively a domestic transaction as defined between the 2nd Plaintiff and the Defendant whose quote, demand or payment could not be done in foreign currency as it was prohibited by **Regulation 4(1)(a) and (b) of the Bank of Zambia (Currency) (Amendment) Regulations, Statutory Instrument Number 78 of 2012** in force at the time which provided that:

“ A person shall not –

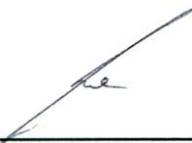
- (a) quote, demand, pay or receive foreign currency as legal tender for a domestic transaction; or**
- (b) engage in any pricing mechanism intended to circumvent these regulations which would have the effect of causing any quoted price to fluctuate from day- to-day by reason of any indexation to a foreign currency.**

In the same vein, the 2nd Plaintiff's demand for payment of US\$ 21,448-00 on Invoice Number EALZ 3231 dated 21st March, 2014 as balance on the price of the chemicals for what was a domestic transaction in the circumstance of this case was contrary to these Regulations and cannot be given effect to by this Court.

In conclusion, based on the foregoing, the Plaintiffs have failed to sustain their claims endorsed on the Writ of Summons and the Plaintiffs' action is, therefore, dismissed.

The Defendant shall have its costs which shall be taxed in default of agreement.

Dated at Lusaka this 8th day of December, 2016



Hon. Mr. Justice Sunday B. Nkonde, SC
HIGH COURT JUDGE