

IN THE HIGH COURT FOR ZAMBIA

2016/HPC/0211

A THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

Between:

RONALD MILASI

AND

TACE ZAMBIA LIMITED (T/A THE AUCTION CENTRE)

PLAINTIFF

DEFENDANT

Before: The Hon. Lady Justice Dr. W. S. Mwenda at Lusaka the 3<sup>rd</sup> day of April, 2018.

For the Plaintiff: Mr. G. Pindani of Messrs. Chonta Musaila Pindani Advocates.

For the Defendant: Mr. P. Muyatwa of Messrs Muyatwa Legal Practitioners.



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## JUDGMENT

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Cases referred to:

1. *The Rating Valuation Consortium and D. W. Zyambo and Associates (Suing as a Firm) v. The Lusaka City Council and Zambia National Tender Board (2004) Z.R. 109 (S.C.).*
2. *Payne v. Cave (1789) 3 TR 148.*
3. *McManus v Fortescue (1907) 2 KB 1 (C.A.).*
4. *John Munsanje v. Family Health Trust, Appeal No. 23/2012; S.C Z. Selected Judgment No. 27 of 2017.*
5. *Kitwe City Council v. William Ng'uni (2005) Z.R. 57 (S.C).*
6. *Paul Roland Harrison v. The Attorney General (1993-1994) Z.R. 68 (S.C.).*
7. *Simon Kapwepwe v. Zambia Publishing Company Limited (1978) Z.R. 15 (S.C.).*
8. *Patrick Chibulu v. Attorney General, CAZ Appeal No. 14/2016.*

Legislation referred to:

1. Section 58 (2) of the Sale of Goods Act, 1893.

**Works referred to:**

***Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 4, 2011 (Re-print RELX (UK), 2015, paragraph 50; Volume 9, paragraph 636.***

On 9<sup>th</sup> May, 2016, Ronald Milasi (hereinafter referred to as "the Plaintiff"), commenced this action against Tace Zambia Limited (T/A The Auction Centre) (hereinafter referred to as "the Defendant"), by way of Writ of Summons and Statement of Claim for the following relief:

- (i) An order for specific performance of the contract of sale of Motor Vehicle Toyota Hilux Single King Cab 2014 model registration No. 6028 made at the auction sale on 30<sup>th</sup> April, 2016 between the Plaintiff and the Defendant;
- (ii) General damages for breach of contract;
- (iii) Exemplary damages;
- (iv) An Order for Interim preservation of the motor vehicle Toyota Hilux Single King Cab 2014 model registration No. 6028 until final determination of the matter or until further order of the Court;
- (v) Interest on any amount found due;
- (vi) Costs of and incidental to this action;
- (vii) Any other relief the Court may deem fit.

According to the Statement of Claim, the Plaintiff, bought a motor vehicle Toyota Hilux Single King Cab 2014 model registration No. BAA 6028 which was sold at a public auction by the Defendant. That on or about 26<sup>th</sup> April, 2016, the Defendant on its own volition, request and instance, advertised in the Post Newspaper at Page 8, a sale by auction of various quality vehicles, furniture, appliances and general goods which was to take place on 30<sup>th</sup> April, 2016 at Stand No. 32020 Kafue Road, Lusaka.

The Plaintiff responded to the advertisement and went to the Defendant's premises where the auction sale was to be conducted and was made to pay a refundable deposit of K10,000.00 by the Defendant as a pre-condition to

participate in the bidding for motor vehicles. He was given a bidding number, 113. When the Defendant started inviting for bids from the attendees for the subject motor vehicle at K250,000.00, it did not announce that there was a reserve price and there was no response from any interested person, prompting the Defendant to keep reducing the price until it reached K180,000.00 when there was an offer by an interested buyer. The Plaintiff challenged the bid at K185,000.00 at which price the Defendant announced that the Plaintiff's bid had been accepted and that since it was a Saturday, the Plaintiff was required to come back on a Tuesday 3<sup>rd</sup> May, 2016 to pay as Monday 2<sup>nd</sup> May, 2016 was a public holiday. Before the Plaintiff could leave the auction centre, the Defendant informed him, after his bid had already been accepted, that it needed to confirm the accepted bid price with the seller and would inform the Plaintiff on Tuesday.

It was the Plaintiff's further averment in the Statement of Claim that when he went to pay for and collect the motor vehicle on Tuesday, the Defendant declined to receive his money and hand over the vehicle stating that the accepted price was too low but if he could increase the amount to K265,000.00, it would be acceptable. The Plaintiff disputed this since the vehicle was sold at a public and open auction which was not subject to any reserve price, and the Defendant did not start inviting for bids at K265,000.00. The Plaintiff contended that the Defendant's action of refusing to accept the money and handover the vehicle is a breach of contract which has caused severe mental stress and anguish to the Plaintiff and that by reason of the matters aforesaid, the Plaintiff has suffered loss and damage.

In its Defence filed on 16<sup>th</sup> June, 2016, the Defendant denied that it had started inviting for bids from attendees for the subject motor vehicle at K250,000.00 and stated that bidding for the motor vehicle was opened at K270,000.00. Further, that the Plaintiff was informed that the acceptance of his bid was conditional and would only be confirmed subject to confirmation by the owner of the motor vehicle since it was way below the reserve price.

The Defendant further averred that the Plaintiff's bid was not confirmed and hence not accepted pursuant to the Auctioneers' Terms and Conditions following which the Plaintiff was asked to increase his bid to at least K265,000.00. The Plaintiff failed to increase his bid, whereupon he was informed that the motor vehicle in question would be put back on sale on an 'offer' basis. That in view of the foregoing, the Defendant denies that the Plaintiff is entitled to any of the relief he pleaded in his Statement of Claim.

In a Reply dated 22<sup>nd</sup> July, 2016, the Plaintiff asserted that the bid for the subject motor vehicle was commenced at K250,000.00 and the reserve price of K265,000.00 was only disclosed the following Tuesday when the Plaintiff went to pay the balance of the actual sale price of K185,000.00 being the price at which the bid was accepted, having earlier deposited a sum of K10,000.00. Further, that the Defendant, in breach of the motor vehicle sale agreement refused to accept the funds but introduced a different price of K265,000.00 which the Plaintiff refused as it was contrary to the concluded agreement of K185,000.00.

Two witnesses testified on behalf of the Plaintiff, namely, the Plaintiff himself, as PW1, and Peditor Shamwale Kunda, as PW2.

It was PW1's evidence under cross-examination that the auction of 30<sup>th</sup> April, 2016 was his first experience on an auction floor. That he attended it with a lady workmate by the name of Kunda (PW2), whom he shared the same office with. PW1 paid a deposit of K10,000.00 after an announcement was made that to participate in the auction one needed to pay the deposit. He was thereafter issued with a card bearing the number 113.

PW1 identified document 1 in the Plaintiff's Bundle of Documents as the auction sale advertisement in the Zambia Daily Mail of 25<sup>th</sup> April, 2016. He admitted that there was no statement in the advertisement about the auctioneers selling to the highest bidder. He also stated that the Post Newspaper advertisement was not in the Plaintiff's Bundle of Documents. PW1 read clauses 8 and 9 of the Conditions of Sale for Motor Vehicles and All Types

of Goods exhibited on page 3 of the Defendant's Bundle of Documents which stated "The Auctioneers' records are in all cases final, the Auctioneers will be the sole arbitrators in the event of a dispute", and "The Auctioneers reserve the right to accept or decline any bid/offer, withdraw any lot from the sale and to determine the progression of the bidding", respectively. PW1 agreed that he signed these conditions. He admitted in addition, that the general guidelines were read to the attendees. Further, that they were told that only people holding the cards were allowed to bid.

In further cross-examination, PW1 testified that the auction started with the vehicle he was interested in, namely BAA 6028 and the first figure floated was K250,000.00. When there was no response, the auctioneer started lowering the price until it reached K180,000.00 when the first person flagged his card.

The auctioneer did not accept the K180,000.00 and after PW1 flagged his offer at K185,000.00 the auctioneer said "113 takes it". According to PW1, there was a lot of noise and when the gong went for the third time, everyone was euphoric. He testified that because of the noise he could not hear what the auctioneer was saying. That upon enquiring after the auction of the motor vehicle, as to what was expected of him in terms of payment, he was told to go back on Tuesday to make the payment since Monday was a public holiday. According to PW1, when he went to make the payment on Tuesday, he was directed to the Manager's office where he was introduced to the Manager known as Richard who informed him that his offer had been rejected. When referred to paragraph 8 of his Witness Statement, PW1 said that he was told by the person calling for bids that it was subject to confirmation but that he should go there on Tuesday to pay; that he didn't quite understand that.

PW1 stated further, that after being told that his offer had been rejected, they negotiated the price of the vehicle and he asked to meet the owner of the vehicle, which request was turned down. He recalled talking about 'the boss' or the 'big man'. According to PW1 he was referring to his work colleague who

is his manager. He said he referred to him as such because he was his principal. He admitted that there was a 'big man' behind the payment of the vehicle.

In further cross-examination, PW1 was referred to page 4 of the Defendant's Bundle of Documents and stated that the document was about Lot No. 159 and that the vehicle referred to on the document, namely 2014 Toyota Hilux Single King Cab 2014 model registration number BAA 6028 was the vehicle he bid for and his bidding number was 113. He also stated that there is a 'not confirmed' overwritten on the document and a 'STC'. That he had no idea what 'STC' means but would have no problem if it stood for "subject to confirmation".

PW1 stated in continued cross-examination that he bought some other goods and paid for the same from the deposit of K10,000.00 he had made. It was also his testimony that he was aware that the vehicle was later sold but did not know when it was sold. When shown page 5 of the Defendant's Bundle of Documents, PW1 said that the Tax Invoice on the page demonstrated that the motor vehicle was sold on 7<sup>th</sup> May, 2016 for K270,000.00. Under further cross-examination, PW1 said that he heard about the reserve price for the first time from the manager.

In re-examination, PW1 said that he was genuinely surprised that his offer was not accepted because it went against his expectations. He also said that he got to know the man seated in front of him (DW1) on Tuesday when he went to his office. He reiterated his earlier testimony that the auctioneer had said "113 takes it", after there was no counter offer and that's all he heard. PW1 said further, that the man who was calling for bids was the same man who told him to go and pay on Tuesday. PW1 also restated that the manager disclosed to them on Tuesday that there was a reserve price for the motor vehicle and that their offer was too low compared to the reserve price. Further, that the manager asked them to make another offer which was closer to the reserve price. He said that there was no mention of any reserve price on Saturday.

In respect of the document on page 4 of the Defendant's Bundle of Document, PW1 said that he first saw the document in the manager's office when he was showing him the reserve price. It was his evidence that Lot No. 159 was not shown to him and there was no explanation of the abbreviation 'STC' before the bidding. He said that he was informed by the auctioneer that the sale of the vehicle was subject to confirmation by the seller only after he made an enquiry on Saturday.

PW1 explained in further re-examination that the 'big man' was his consultant. That he was his boss and hence his reference to him as 'big man'. It was his evidence that he wanted the 'big man' to assist him with the additional amount which he was negotiating with the Defendant.

When referred to clause 1 of the document at page 3 of the Defendant's Bundle of Documents, PW1 said that his bid was the highest bid which the auctioneer recognised as such and announced that he had taken it when there was no counter-offer. According to PW1, that meant he had won the bid. He further stated that in view of clause 9 of the Conditions of Sale, when he lifted his card, his offer was accepted.

PW1 explained in further re-examination that he went with cash on Tuesday because he got the impression from condition No. 4 of the Conditions of Sale that the payment had to be done before 16.30 hours of the next working day. Further, that when his bid was accepted, he enquired on the modalities of payment and was advised by the auctioneer to come back on Tuesday with the money to make the payment. It was PW1's evidence that after his bid was accepted and people started congratulating him, the auctioneer did not say anything but moved to the next vehicle.

PW1 repeated his earlier evidence that he was not shown the records showing Lot No. 159. He further said that the document on page 4 of the Defendant's Bundle of Documents does not indicate anywhere that the highest bidder does not take the vehicle. PW1 described the scene at the auction as the announcer standing on a platform and speaking to the people gathered. He

clarified that there was no confusion or noise but just people congratulating him over the bid he had won.

PW2 testified in cross-examination that she accompanied PW1 to the auction and the other time she accompanied him again was on a Tuesday. Upon being questioned about the Tuesday events, PW2 said that they had K220,000.00 cash on them which she carried in her handbag. When they reached the place, they were directed to see the Operations Manager. She remained at the Reception and PW1 went in to see the Operations Manager.

After a while he came out and said they had refused to accept payment for the vehicle. PW2 stated that she was surprised to hear that there was a reserve price which she had not heard on Saturday. She was also surprised when she heard from PW1 that he was told that the vehicle belonged to an individual when the advertisement had indicated that the vehicle belonged to the American Embassy. According to PW2, what she knew was that the whole auction was for the American Embassy. She testified that they went to see the Operations Manager who explained that they could not offer them the vehicle at K185,000.00 because it had a reserve price unless the owner was agreeable.

According to PW2, she asked who the owner of the vehicle was because they wanted to see the owner but the Operations Manager said they could not see him because it was their arrangement. PW2 declined any suggestion that she had referred to a 'big man'. She also said that PW1 did not refer to a 'big man' in his conversation with the Operations Manager; that there was no mention of a 'big man' at all. When asked if that auction was her first one, PW2 said that she had attended one auction before and this was her second one. It was PW2's testimony that she came to learn on Tuesday that the man she talked to was the Operations Manager and according to her, he was not the one who conducted the auction.

PW2 testified in further cross-examination that she took it that everything that was sold was from the American Embassy because of the advertisement but admitted that she could not see a Toyota Hilux Single Cab on the list of items



to be auctioned at page 1 of the Plaintiff's Bundle of Documents. She also stated that there was no printer on the advertisement by the American Embassy but that a printer was one of the items bought by PW1 as per the Tax Invoice at page 4 of the Plaintiff's Bundle of Documents. When referred to the second page of the advertisement, exhibited on page 2 of the Plaintiff's Bundle of Documents, PW2 conceded that the advertisement did not indicate that it was by the American Embassy.

It was PW2's evidence that the auctioneer started the bidding of the subject motor vehicle at K250,000.00 but went down gradually when no one was responding. She said she stood next to PW1 all the time and did not separate from him at any point. She said she was of the view that all the vehicles were for the American Embassy. She testified that the auctioneer went down to K180,000.00 but raised it to K185,000.00, at which point PW1 flagged his number. As there was no one to challenge him, the auctioneer said "113 won. Put it on record."

It was PW2's testimony that if anyone said something else about what the auctioneer said, that would not be correct. PW2 stated that the auctioneer never went up to K190,000.00. She said that the auctioneer was speaking very fast and conceded that he could have reached K190,000.00. She however, said that the price settled for was K185,000.00. She admitted that there were a lot of people and that she was not in the front row but said that she was not very far from the auctioneer.

In re-examination, PW2 stated that she took it that all the goods that were being auctioned came from the American Embassy. When referred to page 1 of the Plaintiff's Bundle of Documents, PW2 said that the advertisement read "American Embassy Sale", therefore, the auction was for the American Embassy. She said that there were lot of vehicles at the auction which were not listed on the advertisement.

PW2 stated in further re-examination that when they went to the Operations Manager, she requested to meet the owner of the vehicle to explore the

possibility of buying it at the bid price but she was denied that opportunity. She stated that she was concerned that she was at the auction on Saturday until around 16.30 hours but there was no announcement that the vehicle had a reserve price or that it belonged to an individual.

She restated that she came to know the Operations Manager on Tuesday and it was the first and last time to meet him. She reiterated that the auctioneer began the bidding at K250,000.00 and that the issue of 'big man' did not arise in their conversation.

This marked the close of the Plaintiff's case.

The Defendant also called two witnesses. The first was Richard Patrick Chefu (DW1) and the second one was Bernard Laban Zulu (DW2).

DW1 stated in cross-examination that he has a Diploma in Real Estates from the Zambia Institute of Real Estates which he acquired in 2010 and that the principal business of the Defendant, a company in which he owns seventy-five percent shares, is auctioneering and real estates. He also testified that he has not undergone any legal training. In further cross-examination, he stated that he was not aware that the auction floor, which he agreed was a market, has special rules.

It was his evidence that although he oversees the operations of the company, he is not in charge of marketing. He agreed that the company places advertisements when goods are brought for auction but that not all the sellers are mentioned in the advertisements. He stated that he was not aware that members of the public can be enticed to participate in an auction depending on the advertisement. When referred to the advertisement on page 1 of the Plaintiff's Bundle of Documents, DW1 admitted that the advertisement indicated the American Embassy as the entity having an auction sale on 30<sup>th</sup> April, 2016 but stated that it did not indicate that the goods were coming from the American Embassy.

When pressed further, DW1 stated that he is not learned as far as the law is concerned so he does not know the rules of an auction but admitted that participants are made to sign some documents and that it is the company that comes up with these rules. He further admitted that all rules that a company comes up with must abide by the law. DW1 stated that he knows who an arbitrator is but stated that he was not aware that you cannot be a judge in a matter you are interested in.

In further cross-examination, DW1 said that the offers at auction come from the buyers. He stated that he is the one who conducted the auction on the material day but he stepped down after a certain period. According to DW1, he stepped down after auctioning seven cars but he was the one who auctioned the car in contention. He did not accept the argument that acceptance of an offer is by fall of the hammer. He admitted that the auctioneer has to announce the status of the auction but said that the agreement is made on the final announcement. It was DW1's testimony that the other auctioneer was Joseph Mbunda who was in Zimbabwe at the time of trial. DW1 further stated that there was a sizeable crowd of over 50 people at the auction. That they used a public address (P.A.) system but it was possible that someone could have misunderstood the instructions.

DW1 stated that the sale of the motor vehicle in question was subject to a reserve price but admitted that they did not display the reserve price of the vehicle. He said he is aware that the auctioneer has a discretion to decline an offer which does not meet the reserve price. He said that the usual practice is that he makes an announcement if the price is not accepted; that in this case they accepted Mr. Milasi's offer with a condition. It was his testimony that there are rules that allow an auctioneer to accept an offer subject to confirmation. He said that in this case he announced that he was knocking down Mr. Milasi subject to confirmation. He declined that he opened the bidding at K250,000.00 for the motor vehicle in issue. When asked who the owner of the motor vehicle was, he stated that the owner was Mohammed Essa.

Upon being cross-examined further, DW1 stated that the advertisement did not state that the American Embassy was the source of the goods indicated therein. He, however, said that the American Embassy was the major seller. It was DW1's further testimony that Mohammed Essa told him the price he wanted for his motor vehicle and therefore, they accepted the Plaintiff's offer with a condition that they would confirm the acceptance later. He declined the suggestion that an announcement was made that "113 has taken it". He asserted that after knocking down the price, he moved on to the next vehicle.

He further stated that the people who bid using card 113 did not ask him how they were going to bring the payment to him. He declined having spoken to them. When referred to clauses 1 and 15 of the Conditions of Sale exhibited on page 3 of the Defendant's Bundle of Documents, which provide as follows:

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- 1) *The highest accepted bidder will be the purchaser, in all cases at the discretion of THE AUCTION CENTRE.*
  - 2) ...
  - 3) ...
  - 4) ...
  - 5) *Responsibility for all the goods and safe keeping thereof, passes to the purchaser at the fall of the hammer."*

DW1 said that an auctioneer exercises discretion before the hammer falls. When referred to clause 9, DW1 admitted that as an auctioneer, you can accept or decline any bid/offer during the bidding process and the bidding process ends once you accept or decline an offer.

In re-examination DW1 stated that he announced that "I am knocking down subject to confirmation, buyer No. 113", then the hammer came down. He further stated that their payments are on a cash basis. That when someone wants a car and pays for it, the invoice is stamped 'paid' to confirm that the money has been received. DW1 stated that he did not see any money on Mr. Milasi. Further, that he told him that the owner of the car did not accept his

bid and that he should increase his offer if he still wanted the vehicle, then the lady he was with said the boss would not accept that. According to DW1, from that discussion he got the impression that they needed permission from their boss for whatever they were discussing. He reiterated that he only announced "subject to confirmation" when he knocked it down. He also reiterated that he called Mr. Milasi and told him that his offer had not been accepted and Mr. Milasi indicated that he would be coming to the office.

DW1 stated in further re-examination that when they receive a new vehicle, it goes through the auction and if it is not sold, that is when they put a price on it, in other words, they display the price. It was his evidence that they do not announce the reserve price because the whole essence of an auction is to get the highest possible price from the market; that sometimes they end up getting more than the reserve price.

DW1 further stated that when the auctioneer is knocking down an item, he has to announce that the item has been sold or not sold or will be knocked down subject to confirmation. He said he was shocked to hear the Plaintiff say that he was not the one who sold him the vehicle. It was his evidence that where an auctioneer feels that a seller might confirm acceptance of the price which has been bid, the auctioneer uses his discretion in such an instance and knocks the hammer down subject to confirmation.

The Defendant's second witness, DW2, testified under cross-examination, that he did not go with Mr. Chitate to the auction. However, when referred to paragraph 2 of his Witness Statement where he stated that he recalled being requested by his friend, Mr. Crynos Chitate to accompany him to Tace Centre (Z) Limited, also known as Auction Centre, he said that he knew what to accompany someone means; that it means going together with someone. He stated that he went alone to the auction but obtained a card from Mr. Chitate on 30<sup>th</sup> April, 2016 which was a Saturday. It was his evidence that Mr. Chitate signed for the conditions but that he did not have any written authority from Mr. Chitate. He denied having any relationship with the auctioneer.

DW2 testified in further cross-examination that there was only one company representative from the Defendant company during the bidding and that was Mr. Chefu whom he knew on that same day. He said he wouldn't know if there was another person calling out for bids other than Mr. Chefu. He denied being promised anything to testify on behalf of the Defendant but that he was doing it with good will. He stated that he did not know anyone by the name of Joseph Mbunda. When asked if he knew how an auction agreement is made, DW2 said that he knew how it is made; that the auctioneer makes the offer. He said that No. 113 bid the highest and his bid was accepted. He did not recall congratulating the successful bidder and agreed that as soon as the bid was accepted, the auctioneer moved to another vehicle.

DW2 testified that he had attended several auctions before and had an idea how auctions operate. He said he has heard about reserve prices. That to his knowledge, a reserve price is from the owner of the property. He said he was aware that the auctioneer cannot sell something if it is below the reserve price. It was DW2's evidence that the identity of the bidder during the bidding process was the card.

DW2 admitted in further cross-examination that the details on the form at page 1 of the Defendant's Bundle of Documents were not his. He stated that he was not given any other document except card No. 107 which Mr. Chitate gave him together with a sheet containing conditions. He admitted that once the bid is accepted, then the one with the highest bid must pay for it. He admitted that there is nowhere in the conditions where it says that the auctioneers can accept subject to confirmation.

In re-examination, DW2 said that Mr. Chefu got his telephone number from Mr. Chitate. He also said that Mr. Chitate handed over everything to him because he had a commitment elsewhere. It was DW2's testimony that he was at the motor vehicle section of the auction.

This marked the close of the Defendant's case.

I have meticulously examined the Writ of Summons and Statement of Claim; Bundle of Documents, Witness Statements and Submissions in support of the Plaintiff's case. I have equally perused the Defendant's Defence, Bundle of Documents, Witness Statements and Submissions. I am indebted to Counsel on both sides for enthusiastically applying themselves to their respective client's cases.

The undisputed facts of this case, in my view, are that on 24<sup>th</sup> April, 2016, the Defendant advertised in the Zambia Daily Mail, a sale by auction to be held on 30<sup>th</sup> April, 2016 at Stand No. 32020, Kafue Road, Lusaka. The advertisement was headed "American Embassy Auction Sale".

On the 30<sup>th</sup> April, 2016 the Plaintiff attended the auction, duly filled in a document entitled "Conditions of Sale for Vehicles and All Types of Goods" which he acknowledged as having read by signing the document and paid a deposit of K10,000.00, whereupon he was given No.113 as his bidding number.

A motor vehicle Toyota Hilux Single King Cab 2014 model registration number BAA 6028 was one of the vehicles for auction. The Plaintiff was interested in the said motor vehicle and participated in bidding for the same.

Having identified the undisputed facts, the next step in this odyssey of discovery is to establish the issues for determination. It is my considered view that the issues for determination in this case are the following: -

1. Whether or not there was a contract of Sale for Motor Vehicle Toyota Hilux Single King Cab 2014 model registration number BAA 6028 between the Plaintiff and the Defendant;
2. If so, whether the said contract was breached by the Defendant;
3. If the contract is found to have been breached by the Defendant, whether or not the Plaintiff is entitled to damages for breach of contract;
4. Whether or not the Plaintiff is entitled to exemplary damages;

5. Whether or not an order for specific performance of the contract can be given by the Court;
6. Whether or not an order for interim preservation of the motor vehicle can be granted as prayed for by the Plaintiff.

In order to address the questions posed above, there is need to recapitulate the events of Saturday 30<sup>th</sup> April, 2016 that culminated in this action. From the evidence adduced, it has been established that Toyota Hilux Single King Cab 2014 model registration number BAA 6028 was the first vehicle to be auctioned. There is a disagreement between the Plaintiff and the Defendant as to who between Richard Patrick Chefu (DW1) and Joseph Mbunda acted as auctioneer on the material day. The Plaintiff claims that it was Joseph Mbunda and not Richard Patrick Chefu who was the auctioneer while the Defendant's evidence is that both acted as auctioneers; that Richard Patrick Chefu performed the role of auctioneer for seven vehicles, including the vehicle in issue and then stepped down for Joseph Mbunda.

In my view, whether the auction was conducted by DW1 or Joseph Mbunda does not affect the outcome of these proceedings. What is important is that one of the two men auctioned the motor vehicle in issue on behalf of the Defendant. It is also uncontroverted that the vehicle in question was the first to be auctioned and that two interested parties bid for the same; namely the holder of card number 107 and the Plaintiff, holder of card number 113.

The evidence on the opening price for bidding is contradictory. While DW1 says the opening price was K270,000.00. PW1 and PW2 testified that the auctioneer opened the bidding at K250,000.00. However, what is agreed is that there were no bids for the opening price and the auctioneer started reducing the amount until it reached K180,000.00 whereupon there was a bid from 107. The auctioneer then raised the bid by K5,000.00 to K185,000.00 and got a bid from 113 (the Plaintiff). Thereafter, there were no further bids, meaning the highest bidder was 113.



As indicated above, the first issue for determination is whether or not there was a contract of sale of the motor vehicle in issue between the Plaintiff and the Defendant. As submitted by the Defendant's Counsel, an auction is indeed a form of contract governed by the principles relating to the law of contracts. Therefore, in order for a binding and enforceable contract to exist, there must be, *inter alia*, an offer by one party and an acceptance of the offer by the other party.

It is trite law that for a binding agreement to be created, there must be a definite offer which must be accompanied by an unequivocal acceptance by the offeree. Our Supreme Court, in the case of *The Rating Valuation Consortium and D. W. Zyambo and Associates (Suing as a Firm) v. The Lusaka City Council and Zambia National Tender Board*<sup>1</sup>, held that to bring out binding conditions to both sides, an acceptance of an offer must be an unqualified expression of assent to all conditions and terms made by the offeror and presented to the offeree.

In other words, the acceptance must be absolute, unqualified and unconditional or what is otherwise known as an unequivocal acceptance. The old English contract law case of *Payne v. Cave*<sup>2</sup>, stands for the proposition that an auctioneer's request for bids is not an offer but an invitation to treat. The bidder makes the offer which can be accepted by the auctioneer.

It is the Plaintiff's argument that his offer was unconditionally accepted by the Defendant as signified by the fall of the hammer, thus creating a binding contract of sale of the subject motor vehicle between the Plaintiff and the Defendant. The question is, is the Plaintiff's contention the correct position at law?

It is my considered view that the Plaintiff's contention is indeed the correct position as evidenced by Section 58(2) of the Sale of Goods Act, 1893 which provides that "a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner."

It is a long-established rule at auction sales, that *prima facie*, the auctioneer's request for bids is a mere invitation to treat, and that each bid constitutes an offer which is accepted on behalf of the seller by the auctioneer when he signifies his acceptance in the usual manner. According to the learned authors of Halsbury's Laws of England, 5<sup>th</sup> Edition, Volume 4, 2011 (Re-print), in paragraph 50, a sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner.

It is clear from the above provisions that there is no contract between the auctioneer and the bidder, until the fall of the hammer.

It is the Defendant's contention that the auctioneer accepted the Plaintiff's offer to purchase the subject motor vehicle at a price of K185,000.00 subject to confirmation by the owner of the vehicle since the vehicle had a reserve price, and therefore, the offer was conditional. That as such, no contract was formed between the Plaintiff and the Defendant. However, as the learned authors of Halsbury's Laws of England, Volume 9, paragraph 636 state, "a sale by auction may be expressly subject to a reserve price...Unless so notified, the sale is presumed to be without reserve...However, if the auctioneer accepts a bona fide bid below a secret reserve, it is likely that the auctioneer has apparent authority to conclude a contract of sale." In the case of *McManus v Fortescue*<sup>3</sup>, it was held that where a reserve price is fixed by the seller and the sale or lot is expressed to be subject to a reserve, the auctioneer has no authority to sell below it. If he purports to do so, no contract is concluded between the seller and the buyer as all bids amount only to conditional offers and any acceptance is similarly conditional on the reserve being reached or exceeded. (Underlining by the Court for emphasis only).

It is clear from the above quotation that there is no obligation to indicate the reserve price, the issue being optional. However, where there is no notification that the sale is subject to a reserve price, the sale is presumed to be without reserve. In line with the holding in the *McManus v. Fortescue* case above, had the sale of motor vehicle registration number BAA 6028 been expressly stated

to be subject to a reserve price, then no contract would have been concluded between the seller and the Plaintiff as the Plaintiff's bid could have only amounted to a conditional offer and the Defendant's acceptance would similarly have been conditional on the reserve being reached or exceeded. However, that was not the case in the case in *casu*, where the reserve price was kept secret by the Defendant. It is uncontroverted that the auctioneer did not announce or indicate that there was a reserve price before the start of the auction or indeed during the auction.

It was DW1's testimony that the practice is not to reveal a reserve price and so it was that the reserve price was kept a secret even in this instance. Since the reserve price was not communicated to the bidders, going by the above authorities, which I find highly persuasive, the sale is presumed to have been without reserve. Further, in accordance with the general rule of auctions, the auctioneer offered the motor vehicle to the bidders on behalf of the seller and accepted the highest bona fide bid of K185,000.00, which was the Plaintiff's.

Additionally, since the auctioneer accepted the bid of K185,000.00 which was lower than the secret reserve price, it is assumed that the auctioneer had the apparent authority to conclude the contract of sale as agent, on behalf of the principal, the seller. Therefore, the Defendant's contention that the auctioneer accepted the offer subject to confirmation by the seller is untenable, more so, that nowhere in the conditions and terms of auction was it stated that the bid was subject to acceptance by the seller.

In light of DW1's evidence that the Defendant's practice is not to reveal the reserve price to bidders before the auction in order to get the highest bids possible, I am inclined to believe the Plaintiff's evidence that he was only shown document number 4 in the Defendant's Bundle of Documents, being a document for Lot No. 159 showing a reserve price of K265,000.00 for 2014 Toyota Hilux King Cab Reg No. BAA 6028; Buyer No. 113's offer of K185,000.00 and the abbreviation 'STC', with the words "Not Confirmed" over-written across the document, on Tuesday in the manager's office while being shown

the reserve price. In view of DW1's evidence, it is highly unlikely that the auctioneer could have shown PW1 document 4 which has the reserve price of K265,00.00 written on it, prior to the auction on Saturday.

For the above reasons, the answer to the question whether or not there was a contract of Sale for Motor Vehicle Toyota Hilux Single King Cab 2014 model registration number BAA 6028 between the Plaintiff and the Defendant, is in the affirmative.

Having determined that there was a valid contract between the Plaintiff and the Defendant, it now remains for me to decide whether the said contract was breached by the Defendant and whether the Plaintiff is entitled to damages. It is a foregone conclusion that having accepted the offer of K185,000.00 for the subject motor vehicle and having failed to deliver the said motor vehicle at the agreed price, the Defendant did not honour the said contract and was therefore, in breach of the same.

With regards to damages, the Supreme Court held in the case of *John Munsanje v. Family Health Trust*<sup>4</sup>, at pages J11 – J12 that:

*"...damages are the sum of money which will put the party who has been injured or suffered in the same position as he would have been in if he had not sustained the wrong for which he is now getting his computation or reparation."*

It was submitted by the Plaintiff that as a result of the Defendant's breach of the agreement to sell the vehicle, he has been deprived of the benefits of use of the motor vehicle in issue which he had agreed to buy at K185,000.00. The Court was therefore, urged to order the Defendant to pay K185,000.00 to the Plaintiff as damages in the event that the vehicle is not available to be sold or any amount the Court may find due to the Plaintiff.

On the other hand, it is the Defendant's contention that the Plaintiff has not suffered any loss due to the alleged breach because he did not part with any money the entire time he interacted with the Defendant. The Defendant asked the Court to take note that the Plaintiff did not have a Toyota Hilux King Cab

before he attended the auction sale and he still does not have one. That therefore, the Plaintiff is in the exact position he was in right before the alleged breach of contract and urged the Court not to order that the Plaintiff be paid the sum of K185,000.00 or any other amount as this would result in unjust enrichment of the Plaintiff, which Courts frown upon as was stated in the case of *Kitwe City Council v. William Ng'uni*<sup>5</sup>.

I am of the view that in the circumstances of this case, the Plaintiff is only entitled to nominal damages for the breach of contract by the Defendant because, as the Defendant rightly submitted, the Plaintiff has not suffered any loss or damage from the breach and going to the place of auction. The Plaintiff's claim of being deprived of the use of a motor vehicle which was never his in the first place is unfounded. It is not for this Court to order an amount of damages that would unjustly enrich the Plaintiff.

The Plaintiff has claimed for exemplary damages. In the case of *Paul Roland Harrison v. The Attorney General*<sup>6</sup>, it was held that:

"...a claim for exemplary damages must be specifically pleaded together with facts relied upon for such damages to be awarded..."

In the case of *Simon Kapwepwe v. Zambia Publishing Company Limited*<sup>7</sup>, it was held that exemplary damages may be awarded in any case where the defendant has acted in contumelious disregard of the plaintiff's rights. This holding was recently upheld in the Court of Appeal case of *Patrick Chibulu v. Attorney General*<sup>8</sup>, where the court refused to award exemplary damages because the appellant failed to prove contumelious conduct in disregard of the appellant.

Contrary to the Plaintiff's submission, I do not see anything in the conduct of the Defendant which is akin to acting with impunity and with no regard whatsoever to the rights of the Plaintiff as a buyer. The Plaintiff has not adduced any evidence which would point to a contumelious disregard of the Plaintiff's right. I am therefore, not satisfied that the Plaintiff has made out a

case for exemplary damages against the Defendant, therefore, this claim fails and is dismissed.

The Plaintiff's application for an order for interim preservation of the motor vehicle is now moot since it has transpired from the evidence adduced that the said motor vehicle was sold to another buyer in May, 2016. The application has therefore, been overtaken by events and is accordingly dismissed. The Plaintiff's claim for an order of specific performance of the contract of sale of the motor vehicle is similarly untenable as the said motor vehicle has already been disposed of to another buy. Therefore, this claim fails too.

In sum, the Plaintiff's action is successful to the extent that the Defendant has been found in breach of the contract of sale of the motor vehicle Toyota Hilux Single King Cab 204 model registration number BAA 6028. However, no loss was occasioned to the Plaintiff by the said breach save for inconvenience. For this reason, I award nominal damages to the Plaintiff in the sum of Kwacha One Thousand (K1,000.00) plus interest at current lending rate as determined by the Bank of Zambia from the date of judgment until full payment.

Costs of and incidental to this action are awarded to the Plaintiff, to be agreed or taxed in default of agreement.

**Delivered at Lusaka the 3<sup>rd</sup> day of April, 2018**



**W. S. Mwenda (Dr.)  
HIGH COURT JUDGE**