

**IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPLE REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)**

2014/HP/1171

BETWEEN:

SOUTHERN AFRICA TRADE LTD

ELITO INVESTMENT LTD

ELIAS TEMBO

AND

NORAH JOYCE SMALL VALLABH

1ST PLAINTIFF

2ND PLAINTIFF

3RD PLAINTIFF

DEFENDANT

**Before Hon Mrs. Justice S. M. Wanjelani this 5th day of April,
2018 in Chambers.**

For the Plaintiffs:

*Mr. M. Katolo, Messrs Milner and Paul
Practitioners*

For the Defendant:

Mr. C. Hamwela, Messrs Nchito and Nchito

JUDGMENT

Cases referred to:

1. *J. Spurling Limited V Bradshow (1956) Z ALLER, 121*
2. *Union Bank Ltd V Southern Province Cooperative Marketing Union (1995/97) ZR 207*
3. *National Milling Company Ltd V A. Vashee (suing as Chairman of Zambia National Farmers Union) (2000) ZR 98*
4. *Zambia State Insurance Corporation Limited V Zambia Bottlers Limited Pension Scheme and Others (Appeal No. 181/2009)*
5. *Khalid Mohamed V Attorney General(1982) Z.R. 66*

Legislation and other material referred to:

1. *The High Court Act, Chapter 27 of the Laws of Zambia*
2. *Sale of Goods Act of 1893*
3. *Black's Law Dictionary*

The Plaintiffs commenced this action against the Defendant by way of Writ of Summons and Statement of Claim on 29th July, 2014 and subsequently amended by consent on 22nd July 2015, seeking payment of K268,718.00, being balance of payment for the supply of assorted alcoholic and non-alcoholic beverages to the Defendant between 2009 and 2013.

The Defendant filed a Defence denying the claim and averred that she did not acknowledge or sign the invoice/delivery notes in question.

During trial, the Plaintiff's witness (PW) was **Elias Tembo**, the 3rd Plaintiff, who testified that he was in the import and distribution of alcoholic and non-alcoholic beverages and also the Managing Director of the 1st and 2nd Plaintiff Companies.

PW testified that he got to know the Defendant through her husband who used to work for Melissa Supermarkets and who had indicated that the Defendant also needed to be supplied the beverages. It was his testimony that the Defendant would place the orders verbally and the Plaintiffs would generate delivery notes and invoices for the amounts supplied and she would pay after two months.

In his further testimony, PW informed the Court that in 2013, the Defendant started experiencing some difficulties in settling the amounts due, by which time the Plaintiffs had supplied goods worth K700,000.00 and the Defendant paid but had a balance of K269,000. It was his testimony that the Defendant disputed 21 invoices alleging she had not seen them, while conceding that 5 invoices were outstanding that required reconciliation as per pages 85 to 87 of the Plaintiffs' Reconstituted Bundle of Documents. The witness added that he went to the Defendants' place to carry out the reconciliation but failed to conclude the process.

He contended that the invoices that the Defendant denied seeing were acknowledged by a Manager known as Wesley and a Ben Sinkala, whom PW dealt with personally.

He further contended that the Defendant used to run three Mini Marts in Roma/Kalundu, Jesmondine and Kabulonga while she was working full time at Southern National Wholesale and had Managers to run the Mimi marts. It was his evidence that the bulk of the invoices that the Defendant had paid for were not acknowledged by herself but her managers and that PW personally delivered and signed the invoices in relation to the goods supplied by the three Plaintiffs.

It was PW's further testimony that the Defendant bounced a total of nine (9) cheques while experiencing financial difficulties. These cheques are in the Reconstituted Bundle of Documents on pages

11, 65, 73, 74, 75, 78, 79 and 80. In concluding his testimony, PW informed the Court that the Defendant is indebted to the Plaintiffs in the sum of K268,718.00, as claimed and evidenced by the documents before Court.

In cross examination, PW informed the Court that the three companies were being run concurrently and that as Managing Director, he made the decisions on whether or not to supply to a client depending on that client's profile, and that he did most of the deliveries himself. He contended that the goods were listed on a delivery list upon an order being made and checked as the goods were being loaded on the van. He added most of the sales were on credit and he had intimate details of the signatures of the persons who received the goods as he interacted with them a lot, and despite in some instances the signatures looking different, he was present when the recipients were receiving the goods.

In continued cross examination, PW testified that although the documents were headed *delivery note/pro-forma* or *invoice*, what defined them were the contents, and while conceding that a "*pro-forma*" was not a final document.

He added that invoices normally have numbers in sequence unless there were cancellations but in this case, the invoices were from different books as on page 47 with invoice number 518 dated 25th February, 2011 while page 33 has an invoice number 573 dated 4th November, 2010. PW further stated that some invoices were issued

on the same day, but in some instances, the customer wanted small invoices to pay, hence the issuing of several invoices on the same day, or when an item was omitted and noted during delivery, an invoice would be issued in respect of that item. He added that the name on the various invoices was "*Southern African Trade Limited*".

In re-examination PW insisted that although some of the documents were titled "*pro-forma*", they were invoices as they conformed to how invoices would be and that the Defendant had paid on those documents.

The Defendant did not call any witnesses and both Parties filed written submissions.

The gist of the Plaintiffs' submissions are that the Defendant did not rebut the evidence that the goods were delivered and in terms of **Section 49 of the Sale of Goods Act 1893**, the seller had performed his part by giving possession of the goods to the Defendant and thus entitled to demand the price.

It was contended that the Defendant had been paying on the format of invoices issued since 2009 till when she had difficulties in 2013 and cannot complain now, in view of the fact that it was an established "*course of dealing*" as defined in the **Black's Law Dictionary** that the expression means:

"An established pattern of conduct between the parties in a sense of transactions (e.g. multiple sales of goods over a period of years). If dispute arises, the Parties' course of

dealing can be used as evidence of how they intended to carry out the transaction”.

Further, reference was made to the case of **J. Spurling Limited V Bradshaw⁽¹⁾** and **Union Bank Ltd V Southern Province Cooperative Marketing Union⁽²⁾**, for an illustration of the term “*course of dealing*” and that the Defendant is precluded from raising an issue on the format of the invoices.

In addition, it was submitted that the fact that Defendant did not bring any witnesses to respond to the averments in the Defence for cross-examination, means that the defence automatically falls off and the Plaintiffs have proved their case to the required standard.

In response, the Defendant submitted that the burden of proof lay on the party making the claim, regardless of the Defendant’s defence. It was contended that the documents upon which the Plaintiffs relied were variously headed “*Delivery Note/Tax Invoice*” and in relation to the 3rd Plaintiff, they could not be conclusively identified as *proforma, delivery note, invoice* or *cash sale*. It was argued that there was no evidence that the Defendant delegated authority to acknowledge receipt of the goods to third parties, as she was a sole proprietor.

It was further contended that the documents variously titled “*delivery note*”, “*pro-forma*”, “*invoice*”, or “*cash sale*” had different purposes hence inconclusive that the goods were delivered and that the Defendant took possession to entitle the Plaintiffs to the claim

It was also submitted that the alleged invoices did not have the word "*Limited*" and thus the 1st Plaintiff could not successfully litigate the claims on behalf of an "unincorporated" company. The Court was referred to the case of **National Company Ltd V A. Vashee**⁽³⁾.

I have carefully considered the evidence on record and submissions by both Counsel, for which I am grateful.

The **Sale of Goods Act** defines a "contract of sale" of goods in **Section 1(1)** as:

"a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price."

From the evidence and submissions on record, there is no dispute about the existence of a contract of sale or series of contracts of sale between the Parties regarding the supply of alcoholic and non alcoholic beverages, albeit that the orders were done verbally and I so find.

It has been argued that the Defendant did not acknowledged receipt of the goods and there was no evidence that she had delegated authority as she was a sole trader. Thus it is necessary to established whether or not the Defendant received the goods. It will be observed that in Paragraphs 2 and 3 of the Defence, the Defendant admits ordering some beverages from the Plaintiffs but

states that she paid in full, through cheques in the sum of K396,688.06 and K14, 660.00 cash. It is apparent from the documents on record and alluded to by PW, that it is the similar "*Tax invoices/delivery notes/ pro-forma/ cash sale*" receipts that were issued from 2009 to 2013 upon which the Defendant made various payments and there is nothing on record to show otherwise.

In addition, it has not been disputed that the Defendant was running the three Minimarts while in full time employment elsewhere and PW stated that it was the Managers in those shops that received those goods. PW further informed Court that he did most of the deliveries himself and saw the Managers of the shops acknowledge receipt by signing the delivery note/Invoices. It is my considered view that these Managers had apparent authority as agents of the Defendant and thus the goods were delivered and received, by them on her behalf. In relation to the allegations about the different signatures, I have no basis for not believing that the Managers whom PW said he witnessed sign were not the ones who signed. Further, the Defendant has not provided anything upon which to rebut the assertion that PW saw the Managers sign the invoices and the Court will not speculate.

The Defendant has further asserted that the 1st Plaintiff cannot litigate on behalf of an unincorporated entity, "*Southern African Trade*" whose documents are in the Reconstituted Bundle of Documents. The Defendant has not denied having dealt with the same "*Southern African Trade*" and paid on those invoices, albeit

that she is now stating that she does not owe as she had paid in full. I do agree with the Plaintiff's submission that there was an established pattern of conduct to qualify to be termed "*course of dealing*" between the Parties from 2009 to 2013. I am further fortified by the Supreme Court in the **Zambia State Insurance Corporation Limited V Zambia Bottlers Limited Pension Scheme and Others**⁽⁴⁾ wherein it was stated inter alia that:

"to form a 'course of dealing', there must be a series of events and not one event."

Thus, there were a series of transactions between 2009 and 2013 and the Defendant cannot claim that the invoices which were titled "*Southern Africa Trade*" without the words '*limited*' were from an unincorporated entity whose claim cannot be litigated upon by "*Southern African Trade Limited*". I therefore find that "*Southern African Trade*" and "*Southern African Trade Limited*" are one and the same Limited Company.

I have also considered whether the "*defect*", if any, as asserted by the Defendant, in the 1st Plaintiff being the claimant goes to the root of claim and whether the Defendant would suffer any injustice if the matter was determined as it is. PW testified that he is the Managing Director of the 1st Plaintiff and the 2nd Plaintiff and gave evidence on behalf of all the three Plaintiffs and referred to the invoices issued under the name of "*Southern Africa Trade*". In my view, the Defendant would not suffer any injustice because if the argument were to be sustained that the 1st Plaintiff in its current

form cannot claim on the receipts headed "*Southern Africa Trade*", it does not defeat the matter as in line with the provisions of **Order 14 Rule 5(3)** of the **High Court Rules**, all that would be required would be to amend the Plaintiff but the claim would remain the same in substance. This has been the position in a number of cases including the case of **National Milling Company Limited V. A. Vashee**⁽³⁾ where the Supreme Court stated that the Rule "***specifically prohibits the defeasance of suits for misjoinder or non-joinder***".

As regards the burden of proof in view of the Defendant not calling any witnesses, thus showing that she has no defence to the claim, as alleged by the Plaintiffs, there are a plethora of authorities where has been held that the failure of the Defendant's case does not automatically entitle the Plaintiff to Judgment if he fails to prove his claim, including **Khalid Muhamed V Attorney General**⁽⁵⁾, where it was stated by the then Deputy Chief Justice Ngulube, that:

"An unqualified proposition that a Plaintiff should succeed automatically wherever a defence has failed is unacceptable to me. A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgment..."

Thus the Plaintiffs still need to prove their case on a balance of probabilities. The Plaintiffs have produced several documents differently titled *delivery notes/tax invoices, proforma, cash sales*

which had provision for signing on "*received by*". In my view, these documents, despite having the different headings were understood by the Parties as being delivery notes upon which receipt of the goods was acknowledged and payments made. I have no basis for believing otherwise as there has been no other version of documents produced before me to show that the payments that were made by the Defendant were based documents different from the ones before me.

I, therefore find that the documents produced by the Plaintiffs were intended and acknowledged by both Parties as evidence of delivery of the goods, some of which were received by the Defendants' Managers. This is further evidenced by acknowledgment by the Defendant of the Reconciliation Statement on pages 85-87 where at page 87 she states that there was need for the Parties to sit and reconcile the figures and I note that serial numbers of the documents relate to all the three Plaintiffs and to the documents in the Reconstituted Bundle of Documents.

In the premise, I find that the Plaintiffs' delivered the goods to the Defendant and these were duly acknowledged as received by the Defendant and her agents who were manning the shops. I consequently find that the Plaintiffs have on a balance of probabilities proved their case against the Defendant and are entitled to the reliefs claimed, in terms of **Section 49(1) of the Sale of Goods Act** which provides:

"Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods."

Costs are for the Plaintiffs to be taxed in default of agreement.

Leave to appeal is granted.

Delivered at Lusaka this 5th day of April, 2018.



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S.M. WANJELANI
JUDGE