

However, in November 2014, the Plaintiff called for a meeting with the Defendant in Lusaka from which the Defendant was given a Statement which is at page 6 of the Defendant's Bundle of Documents covering the period from 29th April 2014 to November, 2014 showing that the Defendant was owing the Plaintiff the sum of **US\$1,034,018-26**.

The Defendant outrightly denied owing the Plaintiff any monies in Cement sales as the Defendant was purchasing the Cement by cash. The Defendant also noticed from the Statement that the name on the Statement was **Sogracel** which was different from the Defendant.

Further, the Business Account No. of 949024 appearing on the Statement was different from the Business Account No. 8230 that the Defendant was using for all its transactions with the Plaintiff.

Noticeable also was that whereas the normal Loading Orders for Cement issued and collected by the Defendant was in the range of 5 to 6 trucks per day of total values in the range of US \$5,882-22 to US \$6,269-14 (with the space of about two days in between the uplifts), the Statement had abnormal Orders some even beyond the daily production capacity of the Applicant's Ndola plant where the Defendant used to collect Cement from. For instance, on 28th May, 2014 the Statement showed that the Defendant had ordered about 29 Trucks of Cement when the Defendant never placed such Orders or collected or received such Truck loads of Cement.

a property as security for payment, which assignment is rendered void upon payment of the money. Any Agreement bearing such intention is an Equitable Mortgage. The essential nature of a Mortgage is that it is a conveyance of a legal or equitable interest in property with a provision of a legal or equitable interest in property with a provision for redemption. That is upon payment of a loan or the performance of some other obligation, the conveyance shall become void and the interest shall be reconveyed."

As regards the Counter-Claim, the Plaintiff relied on the defence to Counter Claim and submitted that as allegedly conceded by **DW** in cross-examination, the amount of US\$300,000-00 was paid by the Defendant pursuant to the Settlement Agreement. It was maintained, therefore, that the Plaintiff, does not owe the Defendant any money and the Counter Claim should not be allowed.

In conclusion, the Plaintiff submitted that the Court should find for the Plaintiff on the ground that the Defendant did acknowledge owing the Plaintiff in the Settlement Agreement and pledged Stand NDO/5053 which is an Equitable Third Party Mortgage. The Plaintiff reminded the Court that **DW** conceded in cross-examination that he is the owner of Stand NDO/5053 and that he is in fact the one who executed the Settlement Agreement on behalf of the Defendant.

Thus, the Plaintiff prayed that it should be granted all the reliefs claimed and that the Counter Claim thrown out.

The Defendant submitted on the other hand that the Settlement Agreement that the Plaintiff is trying to rely on was cancelled before implementation and therefore it cannot be enforced and further that the Plaintiff has not denied or challenged the cancellation of the Contract or adduced any evidence to show that the cancellation of the Settlement Agreement was not accepted by the Plaintiff.

The Defendant also touched on the validity of the Settlement Agreement and submitted that although it may not be the main defence by the Defendant, Civil law on parties entering into a Contract the purpose or which would amount to a commissioning of an act legally objectionable is that the purported Contract is not enforceable at law.

As regards the creation of an Equitable Mortgage, it was submitted that an Equitable Mortgage cannot be created on a Stand No. 5053 of Certificate of Title No. 6297 for the following reasons; the Stand No. 5053 Ndola is not mentioned in the Settlement Agreement, Stand No. 5053 Ndola does not belong to the Defendant, there is no consent given by the owner of Stand No. 5053 Ndola for Stand No. 5053 Ndola to be used as Security for any debt and DW as the owner of Stand No. 5053 Ndola has no debt in any way with the Plaintiff.

The Defendant, therefore, maintained that the Plaintiff's claim for creation of Equitable Mortgage on Stand No. 5053 Ndola and for sale of Stand No. 5053 Ndola by the Plaintiff has no basis and should not be upheld.

Coming to the Counterclaim, it was submitted on behalf of the Defendant that PW admitted having received the said total amount of US\$ 300,000-00 through the same Account Number 8230 that the Plaintiff was using before May 2014; before the collapse of the Plaintiff's Accounting System. The payment was not made through the new Account Number 949024 and yet no Cement was given to the Defendant despite the payment of US\$ 300,000-00. There was, therefore, no justification for the Plaintiff to keep on holding on to the Defendant's sum of US\$ 300,000-00 after the Cancellation of the Settlement Agreement and it was necessary that the Plaintiff be ordered to pay back the sum of US\$ 300,000-00 to the Defendant with interest from the date the money was paid.

From the foregoing, it is not in dispute and I find as a fact that from about 2014, the Defendant was a Customer of the Plaintiff buying Cement for Export to the Democratic Republic of Congo on cash basis. In April 2014, however, the Plaintiff had a problem with its Computer System which went on for sometime. As a result, the Plaintiff and the Defendant had a meeting in November, 2014 in relation to the Defendant's Cement Statement of Account. The meeting ended in the Settlement Agreement dated 27th November, 2014 which was signed by DW on behalf of the Defendant. Although Clause 7 of the Settlement Agreement provided for Cement to be

"a contracting party's words or actions that indicate intention not to perform the Contract in the future; a threatened breach of Contract."

It is trite, however, that repudiation does not take away the rights and obligations accrued by parties under the repudiated Contract.

At law, the injured or innocent party may also recover damages against the defaulting party for the breach.

It is also settled law that as a general rule, Courts do not enforce Contracts which are illegal or permit the recovery of any benefit conferred under such Contracts. This was re-affirmed by the Supreme Court in the case of **Mohammed S. Itowala v Variety Bureau De-Change**³ where it was held:-

"A Party cannot sue upon a Contract if both knew that the purpose the manner of performance and participation in the performance of the Contract necessarily involved the commission of an act which to their knowledge is legally objectionable."

In this case, the Plaintiff asserts that the Parties are bound by the terms of the Settlement Agreement as the Defendant did not provide the particulars of illegality and in its evidence failed to prove that the Settlement Agreement was invalid for repudiation to be sustained.

I do not agree.

By virtue of the 31st March, 2015 letter, the Settlement Agreement was expressly repudiated by the Defendant regardless of the reasons given for the repudiation being right or wrong, genuine or not.

Further, although in the Defendant's defence it was alleged that the Settlement Agreement was tainted with illegality, as correctly submitted by the Plaintiff, no particulars of illegality were provided and no cogent evidence of illegality was adduced by the Defendant at trial. In short, there was nothing illegal about the Settlement Agreement. It is, therefore, not also surprising that in the submissions, the Defendant emphasized that **"the main defence by the Defendant is that the Settlement Agreement was cancelled before it was implemented and acted upon by the Parties"** and that illegality may not be the main defence.

PW's evidence was that US\$ 300,000-00 paid on 2nd November, 2014 was initial cash payment out of the US\$ 736,347-61 agreed in Clause 2 of the Settlement Agreement as the amount for Cement already collected but unpaid for and further that the US\$ 300,000-00 was paid pursuant to Clause 4 of the Settlement Agreement while DW's evidence was that the US\$ 300,000-00 was for the Defendant's normal purchase of Cement. From the two versions presented by PW and DW, it is a question of who to believe between them and I find PW's version as more believable than that of DW as to what transpired in relation to the dispute in this matter for the

to be paid by June, 2015. The Plaintiff also had an accrued right to recover the same amount as a debt at the time of repudiation.

In any event, Clause 4 of the Settlement Agreement is clear and unambiguous on the US\$ 300,000-00 being an agreed amount to be paid by the Defendant to the Plaintiff by 3rd December, 2014 which amount was on 2nd December, 2014 in fact paid before the 3rd December, 2014 date. It cannot be a coincidence that the US\$ 300,000-00 was paid a day before the agreed deadline for the payment.

The answer to the question whether the Plaintiff can recover any money pursuant to the Settlement Agreement is, therefore, in the affirmative.

Whether the Plaintiff has any recourse to Stand Number 5053, Ndola.

PW's evidence is that an Equitable Mortgage was created when the Defendant pledged Stand number NDO/5053, Certificate of Title Number 89747 as Security for the debt.

The Defendant on the other hand contended that Stand Number 5053 does not belong to the Defendant but to DW and further that Stand No. NDO/5053, Ndola was not the same as Stand Number 89747, Ndola whose owner the Defendant did not know.

The immediate above notwithstanding and at the expense of repetition, Clause 7 reads as follows:-

The Plaintiff to sell Cement to the Defendant on credit and the Defendant agreed to secure the credit through a legal Mortgage over Stand Number 89747 Ndola. To this effect, the Customer undertakes to procure the signed Mortgage within 14 days of Signature hereof.

This Clause is clear and unambiguous. The purported Stand Number 89747 Ndola which the Plaintiff contends is Stand NDO/5053 was pledged to secure the Cement sold to the Defendant on credit and not to secure the Defendant's debt with the Plaintiff. I have already made a finding, and it is also common between the Parties, that no Cement was uplifted on credit by the Defendant from the Plaintiff after the signing of the Settlement Agreement on 27th November, 2014. The effect of this is that there is no basis for the Plaintiff to have recourse to Stand NDO/5053 or Stand Number 89747 Ndola.

Before I depart, I must mention here that although the Plaintiff alleged that Stand NDO/5053 was the same as Stand Number 89747 Ndola, it was not shown that this was so. From the evidence, of course, the Defendant may have intended to defraud the Plaintiff by pledging a non existent property as Security but it was up to the Plaintiff to, for instance, plead fraud and provide particulars which the Plaintiff did not.

In a nutshell and for clarity, the Plaintiff has proved its case on a balance of probabilities to the extent outlined and, thus, succeeds on its claim for an

Order that the Defendant pays the Plaintiff the balance on the amount of US\$ 736,347-61 after the US\$ 300,000-00 payment; the balance being US\$ 436,374-61 (and not the US\$576,786-00 endorsed on the Writ of Summons). The sum of US\$ 436,374-61 shall attract interest at 3% from the date of the action until the date of this Judgment and thereafter at 10% until full and final payment.

Turning to the Defendant's Counterclaim, having already found and held that the US\$ 300,000-00 was paid by the Defendant to the Plaintiff on 2nd December, 2014 pursuant to the Settlement Agreement of 27th November, 2014 as a performed obligation by the Defendant at the time of repudiation, it follows that the Defendant's claim for a refund on account that the Plaintiff retained the US\$ 300,000-00 unlawfully, unjustifiably or illegally is unsustainable and the same is dismissed.

Costs of the Plaintiff's action against the Defendant and the Counterclaim shall be for the Plaintiff, same to be taxed in default of agreement.

Dated at Lusaka this 11th day of February, 2019.



HON. JUSTICE SUNDAY B. NKONDE, SC
HIGH COURT JUDGE