

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
AT LUSAKA
(Civil Jurisdiction)

2015/HPC/0557

BETWEEN:

LAFARGE ZAMBIA PLC

AND

SOGRACE LIMITED



PLAINTIFF

DEFENDANT

Delivered in Open Court before the Honourable Mr. Justice Sunday B. Nkonde, SC at Lusaka this 11th day of February, 2019.

*For the Plaintiff : Mrs. S. M. Kateka of Nchito & Nchito
For the Defendant : Mr. C. Mukonka of Caristo Mukonka Legal Practitioners*

J U D G M E N T

CASES REFERRED TO:

- 1) *Selly Yoat asset Management Limited vs Remotesite Solutions Zambia Limited (2010) Z. R Volume 2.*
- 2) *Luke Phiri v David Tembo (2011) Z.R. 189.*
- 3) *Mohammed S. Itowala v Variety Bureau de-Change(SCZ Judgment No. 15 of 2001).*

OTHER WORKS REFERRED TO:

- 1) *Black's Law Dictionary, Eighth Edition.*

By Amended Writ of Summons and Statement of Claim, the Plaintiff claimed from the Defendant the following reliefs:-

1. *An Order that the Defendant pays the Plaintiff the outstanding balance of US\$ 576,786.00.*
2. *An Order for foreclosure on Stand No. NDO/5053, Ndola*
3. *An Order that the Respondent do deliver vacant possession of Stand No. NDO/5053, Ndola to the Plaintiff.*
4. *An Order for the sale of the said Stand ND 5053.*
5. *Any other relief the Court may deem fit.*
6. *Interest.*
7. *Costs.*

In the Statement of Claim, the Plaintiff alleged that in or around 2014, the Defendant registered with the Plaintiff for the supply of Cement upon certain conditions including agreeing in writing that all the Defendant's Cement Orders would be paid for in advance by telegraphic transfer into the Plaintiff's nominated Bank Account and that thereafter the Defendant would collect the Cement from the Plaintiff's Ndola Plant or Kasumbalesa Depot.

The Defendant collected Cement amounting to US\$1,034,038.26 which it did not pay for in the manner agreed. And in November 2014 upon discovery of the situation the parties entered into a Settlement Agreement which provided that the Defendant would only pay the sum of USD 736,347.61 due to the fact that the sum of US\$ 297,690.65 was not

any money and contended that there was no equitable Mortgage created as the Settlement Agreement was tainted with illegality and was repudiated and cancelled by the Defendant before it was implemented. Thus, the Defendant denied that the Plaintiff was entitled to any of the reliefs sought and instead counter claimed against the Plaintiff.

In the Counter claim, the Defendant alleged that it used to buy Cement on cash basis for export to the Democratic Republic of Congo and that at no point did the Defendant get any Cement from the Plaintiff on credit. Further, that all the Cement purchased from the Plaintiff was paid for in advance and was always accompanied with the Loading Order signed by the Defendant and all the Cement collected from the Plaintiff was weighed and signed for by the Defendant.

Thus, it was alleged by the Defendant that on 2nd December, 2014, the Defendant deposited the sum of US\$ 200,000 = 00 in the Plaintiffs' Account Number **0240075497301** under the Defendant's Customer Reference Account Number 8230 whereas the sum of \$100,000=00 was paid through Bank Transfer from the Defendant's Barclays Bank Account Number **0011037011** to the Plaintiff's Account Number **0011005098** for its normal purchase of Cement. Upon the repudiation and cancellation of the Settlement Agreement, the Plaintiff unilaterally retained and treated the said amount as part payment for credit sales of Cement, which Cement was never purchased or collected by the Defendant.

Thus, the Defendant alleged that the said act by the Plaintiff of retaining the Defendant's money was unlawfully unjustified and illegal and the Defendant therefore **counter claimed**

- a) *Refund of the sum of US \$ 300,000=00*
- b) *Interest on the Refunded amount at Commercial bank Lending Rates.*
- c) *Costs*
- d) *Any other relief the Court may grant.*

In the defence to the Counterclaim, the Plaintiff admitted that the Defendant was not a Credit Customer but also stated that the Defendant received and accepted Cement for which it did not make any prior payment. The Plaintiff further stated that the Defendant willingly signed the Settlement Agreement after reconciling amounts with the Plaintiff.

During trial, PW was PAUL KANGWA LUO, the Plaintiff's Security Manager. His evidence in-chief went as follows. The Defendant was a Cash customer of the Plaintiff meaning that they procured Cement via deposits made to Lafarge Bank Accounts and thereafter presented proof of deposit to Lafarge. The internal Customer Account for Defendant would be adjusted with a Receipt after receipt of proof of payment. The Plaintiff would then await instructions on any Orders that the Defendant wanted to make.

A Company incorporated in Zambia and having it registered at Farm 1880, Kafue Road, P.O. Box

*32639 Lusaka, Zambia
(hereinafter called the "Supplier")*

WHEREAS

- 1. The supplier is claiming a sum of US\$736,347.61 relating to unsettled Invoices for Cement supplied to the Customer during the period May 1, 2014 and November 30, 2014.*
- 2. The Customer has agreed to settle the outstanding sum of US\$736,347.61 by making payment to the Supplier under the following terms and conditions.*

NOW this Agreement witness as the follows:

- 1. The total amount pending on the Account that the Customer holds with the Supplier as at the date of signature of this Agreement is US\$1,034,038.26.*
- 2. The amount supported by documentation as validated by both Parties to be paid by the Customer to the Supplier is US\$736,347.61.*
- 3. Transactions relating to US\$297,690.65 are not supported by Physical documents and have been excluded from this final settlement.*
- 4. The Customer has agreed to pay the Supplier a sum of US\$300,000.00 as an initial cash payment by December 3, 2014.*
- 5. The Customer will settle the balance of US\$436,347.61 through the*

Supplier charging the Customer US\$27 per ton over and above the normal list price for each purchase made by June 30, 2015.

6. *The Supplier will facilitate and ensure that the Customer uplifts at least 3 loads of Cement a day which translates to 2,340 Mt tons per month starting December 1, 2014*
 - a. *Based on recovery rate and Cement quantity projected to be uplifted by the Customer on a monthly basis, the expected repayment is US\$62,335.37 per month.*
 - b. *Where the Customer uplifts less than the agreed quantity for whatever reason, the Customer shall pay in cash to the Supplier the difference.*
7. *The Supplier shall sell Cement to the Customer on credit and the Customer hereby agrees to secure the credit through a legal Mortgage in favour of the Supplier on property under Title No. 89747 in Ndola. To this effect, the Customer undertakes to procure the signed Mortgage within 14 days of Signature hereof.*
8. *Sograce has agreed to convey the full value of the Rebate due to them for the second half of 2014 and first half of 2015 towards the settlement of the outstanding amount.*
9. *This Agreement shall be governed and construed in accordance with the Laws of Zambia and the language of the Agreement shall be English language.*

with regard to this and other cases, some employees of the Plaintiff were even suspended and dismissed.

The Defendant's only witness (DW) was SYLVESTER MATALE, the Local Manager for the Defendant who said that he was the one handling the Cement business on behalf of the Defendant with the Plaintiff. DW's further evidence was that the Defendant opened a Business Account with the Plaintiff at the Plaintiff's Ndola plant and was allocated Business Account No. 8230 and this is the Account the Defendant and the Plaintiff were using for all the Cement transactions. The transactions for purchase of the said Cement was always on cash basis.

The Defendant was given Bank Account No. 0240075497301 which the Plaintiff held at Stanbic Bank and Bank Account No. 0011005098 which the Plaintiff held at Barclays Bank as the Account through which all payments for Cement were to be made.

In terms of procedure, DW stated that the first step was for the Plaintiff to deposit in the Plaintiff's Bank Account some amount equivalent to the price of Cement that the Defendant wanted to purchase from the Plaintiff. DW referred the Court to the document on page 1 which is a copy of the Bank deposit bearing the Defendant's Business Account No. 8230 and the Plaintiff's Bank Account No. 0240075497301.

Upon confirmation of receipt of the deposited amount, the Defendant's Head Office in Lusaka would issue a receipt which the Defendant used to collect from the Plaintiff's office at the Plaintiff's Ndola plant.

After collection of the receipt for the deposited amount, the Defendant would issue to the Plaintiff the Loading Order which would have the following details, that is, the Defendant's Business Account No. 8230; the Receipt Number as indicated on the Receipt received from the Plaintiff's Head Office; the Registration Number of the Defendant's Truck that will uplift the Cement; the full names of Defendant's Truck Driver; the tonnage of Cement ordered; the destination for the Cement; the Exit Border Post; and the Defendant's signature. The Court was referred to page 3 of the Defendant's Bundle of Documents which is a copy of the Loading Order.

DW's further testimony was that before authorization for loading of Cement could be given, the Plaintiff's Ndola Sales Department would confirm with its Account's Department on the availability of sufficient funds on the Customer's Account. Upon positive confirmation, the Plaintiff's Ndola Sales Department would issue Sales Invoice and give instruction for the truck to proceed to the Weigh Bridge and, thereafter, load Cement.

The Court was referred to the document at page 4 of the Defendant's Bundle of Documents which is a copy of the Invoice.

The Defendant's Driver would then go with the Invoice to weigh the Truck and thereafter load Cement. After loading the Cement, the Truck Driver would go back to the Weigh Bridge and have the loaded Truck re-weighed to confirm the tonnage of Cement uplifted from the plant. After re-weighing of the Truck with Cement, the Truck Driver would sign for the Cement collected in the Plaintiff's books and would be issued with export documents. Before leaving the Plaintiff's premises, the Plaintiff's Security Officers would check, reconfirm the tonnage of the Cement collected and the documentation and request the Truck Driver to sign in the Security Book before allowing the Truck to pass through the final exit check point.

What followed was that the Plaintiff at the end of the month would issue monthly Reconciliation Statements showing, *inter-alia*, the amounts paid for the Cement and the values of Cement collected by the against the amount paid. Some of the copies of the Reconciliation Statement which the Defendant used to receive from the Plaintiff were shown at page 5 of the Defendant's Bundle of Documents.

DW stated that the Plaintiff used to send these Reconciliation Statements to the Defendant monthly until April, 2014. From May 2014 to November, 2014 there were no Reconciliation Statements received and when the Defendant inquired about the Statements, the Defendant was informed that the Plaintiff was changing its computerized procedures for buying Cement.