IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 921 OF 2005

BETWEEN:

CITY MOTORS LIMITED …….PLAINTIFF

and

UNILEVER SOUTH EAST AFRICA (PVT) LTD…….DEFENDANT

CORAM: HON. JUSTICE F.E.KAPANDA

Nampota of Counsel for the Plaintiff

Katundu of Counsel for the Defendant

Rhodani, Court Clerk

Place and date of hearing : Blantyre 28th July, 2005

Date of Ruling : 14th December 2005

Editorial Note

The parties have disagreed on a commercial transaction concerning the sale of a brand new motor vehicle. As it were, on one hand, the Plaintiff contends that the Defendant has not honoured its promise to buy a vehicle from it. On the other hand, the Defendant alleges that there was no contract concluded for the sale of the vehicle to it. Thus, the Defendant contends, there can not be any talk of a breach of contract.

Accordingly, as put by the Plaintiff, the court is being called upon to decide on two issues *viz*.

(a) whether or not at the time the plaintiff cancelled an alleged order to buy a motor vehicle there was a valid and/binding contract between it and the Defendant

(b) If the answer to question (a) above is in the affirmative, whether the Defendants are liable to specifically perform a contract for the sale of the motor vehicle that was allegedly entered into between the Plaintiff and the Defendant.

The Defendant does not dispute that there are indeed two issues that require adjudication. Indeed, the Defendant's view is that the said issues are as follows:

(a) whether there was a concluded contract between the parties for the supply of a motor vehicle

(b) If there was any concluded contract between it and the Plaintiff, what were the terms of the alleged contract and who was in breach of its terms.

I wish to observe that there is a third question *viz*. if there was any breach of any of the terms of any contract by any of the parties what remedy is available to the wronged party. Further, as I see it, the issues before this court have been ably put by the Defendant with the addition of the fact in issue identified by this court.

RULING

Kapanda, J.:

Introduction

The Plaintiff, City Motors Limited, is in the business of selling vehicles. The Defendant had wanted to buy a motor vehicle from the Plaintiff. The purported agreement between two has fallen through with either party blaming the other for breach of the said agreement. As it were, the Plaintiff is alleging that the Defendant failed to honour a contract that was entered into between it and the Defendant. On the other hand, the Defendant is denying that there was any contract concluded between it and the Plaintiff for the sale of the said motor vehicle.

The Plaintiff is now seeking the intervention of this Court on the dispute between it and the Defendant. Accordingly, it has instituted these proceedings

where it is seeking a number of remedies from this Court. The relief that the Plaintiff wants are in the Originating Summons it caused to be issued on 23rdMarch 2005.

The Originating Summons

It is observed that the party that took out the Originating Summons has been described as the Applicant while the other party is described as a Respondent. This is against the Rules of procedure regarding the general form of an Originating Summons[1]. Learned counsel for the party taking out the Originating Summons did not have this rule of procedure in mind when drafting the Originating Summons herein. Fortunately for him, it is observed, the other party has not taken issue with this irregularity. Actually, counsel for Unilever took further steps to show that he did not mind the presence of this irregularity. So I will not dwell so much on it suffice to put it here that this irregularity does not in any way nullify the proceedings[2]. Indeed, for the purposes of this Ruling, I will describe the parties as "the Plaintiff" and "the Defendant" notwithstanding the problems that have been observed above.

There has been enough discussion on the anomalies as regards the form of the Originating Summons. I must now set out the orders that are being sought by the aggrieved party. In this application, the Plaintiff seeks the following orders from this court:-

---

[1] Order 7 Rule 7/2 of Rules of Supreme Court which states that "(2) the party taking out an Originating summons (other than an exparte summons)shall be described as a plaintiff and the other parties shall be described as defendants"

[2] Order 2 of Rules of the Supreme Court.

(a) THAT the Defendant be ordered to specifically perform its part of the contract entered into between the Plaintiff and the Defendant for the purchase by the Defendant of a Land Rover new Freelander 2.0 diesel from the Plaintiff; or alternatively

(b) THAT the Defendant be ordered to pay damages for the repudiation of the aforesaid agreement

(c) THAT the Defendant pays the sum of US$32,570.50 being a 50% non-refundable deposit pursuant to the said contract.

The Plaintiff is also claiming costs of these proceedings.

The application by the Plaintiff is supported by several affidavits filed with the court on diverse dates. The Defendant has taken so many issues with the Plaintiff on the application. To this end the Defendant has filed its own affidavits. I shall revert to the matters in the affidavits later but for now I wish to set out the issues that arise and fall to be decided in the application herein.

Issues for Consideration

As stated earlier, the Defendant has joined issues with the Plaintiff on the latter's application. Accordingly, there are facts in issue that this court must determine. As I understand it, the following are the issues for consideration in this matter:-

(a) Whether or not there was a contract between the Plaintiff and the Defendant for the sale of a motor vehicle by the Plaintiff to the Defendant.

(b) If there was such a contract, what were the terms of the alleged contract and whether or not the Defendant was in breach of the said contract.

(c) Whether or not the Defendant is liable to specifically perform the so – called Contract.

Factual Background

Having set out the issues that require the court's determination this is now an opportune moment to set out the facts of this case. The facts are those which appear in the affidavits mentioned above. The pertinent facts of this case, in a summary form and chronological order, are as follows:

offer to supply motor vehicle

It is common cause that the Defendant sought to purchase a motor vehicle, Land Rover Freelander 2.0TDi, from the Plaintiff. Accordingly, on 25th November 2004 the Plaintiff issued a quotation in respect of the said Land Rover Freelander. The said quotation stipulated, *inter alia*, that if the Plaintiff was to supply the vehicle:

"…Delivery period: 6-8 weeks from date of confirmed order

Payment : 50% Non-refundable deposit in Malawi Kwacha **with** confirmed order. Balance on delivery…" (emphasis and underlining supplied by me)

There is no denying of the fact that the Defendant responded to the

Plaintiff's offer. As shall be seen later, in response to the offer, the Defendant did issue an Engineering Buying Order but no deposit accompanied the said Order. I will later on in this ruling comment upon the non-payment of the deposit by the defendant.

Issuance of a Purchase Order/Engineering Buying Order.

As mentioned above, the Defendant was expected, among other things, to signify acceptance of the offer by paying a 50% non-refundable deposit with a confirmed order. This is not what the defendant did. Indeed, on 8th December 2004 the Defendant issued an Engineering Buying Order (Purchase Order No. 2370) to purchase a green Land Rover Freelander. The order's validity was for 30 days from the date of issue i.e. 08th December2004. Further, the Defendant put forward to the Plaintiff, *inter alia*, some terms when placing the said purchasing order. Actually, the Defendant put it to the Defendant that acceptance of the purchase order of 8th December2004 would be deemed to be acceptance of the conditions that were in use valid order. Some of the conditions appearing {at the back side} of the Purchase Order were as follows:

(a) The vehicle was required on 30th January 2005.

(b) Payment for the vehicle would be made on or about the 25th day of the month following that in which delivery is made. It is well to remember that the Plaintiff wanted the Defendant to pay a deposit when placing the order.

(c) As regards delivery, the Defendant clearly spelt it out that time was of

essence as regards the delivery of the vehicle. Thus, in terms of the purchase order, the Defendant wanted vehicle delivered on 30th January 2005 and that if the vehicle was not delivered on or before this date it would proceed, *inter alia*, to cancel the order.

(d) Moreover, as a condition of the purchase the Defendant jointed in the purchase order that all disputes which may arise, relating to or arising out of its order would be submitted to arbitration.

It is well to remember that the Plaintiff wanted the Defendant to pay a deposit when placing the Order but it was not paid. Further, the court has noted that the parties have decided not to offer any evidence or arguments on the question of arbitration. Indeed, the question still remains as to what became of the agreement to refer matter to arbitration.

Issuance of Invoice by Plaintiff and Supplier's Quotation

On 10th December 2004 the Plaintiff issued an Invoice No. 3130 in respect of the said Land Rover, the subject matter of these proceedings. The total value of the invoice was in the sum of US$65,141.00. Apparently, the invoice of 10th December 2004 was issued purportedly pursuant to the said Engineering Buying Order of 8th December 2004. The invoice has no details on, or makes no reference to, delivery period of the vehicle and the payment period as indicated in the said Engineering Buying Order (purchase order) of 8th December 2004. However, it is observed that the Plaintiff's supplier issued a quotation on the same date when the invoice was issued by the Plaintiff indicating, *inter alia*, that the

vehicle would be delivered within 3-4 weeks from date of confirmed order. It is safe to presume that the confirmed order being referred to is the one from the defendant. Moreover, the court has noted that the quotation was valid for 30 days.

Issuance of suppliers Pro-forma Invoice

The Plaintiff's supplier issued a Pro-Forma invoice on 12th January 2005. Again the validity of the said invoice was 30 days. It is well to remember that as at this date, i.e. on 12th January 2005, there were only 18 days to go before the date the Defendant wanted the vehicle delivered. Moreover, as at this date, the Plaintiff had not even applied or caused to be issued an irrevocable letter of credit in favour of the supplier.

Request for Deposit

The Plaintiff wrote the Defendant asking for a deposit in respect of the purchase of the motor vehicle in issue. The deposit being requested was in the sum of US$32,570.50 being what it termed as 50% of the total quoted price. The request for the said deposit was made on 26th January 2005.

The Defendant, on 8th February 2005, responded to the request for the said deposit. It categorically refused to pay the deposit and advised the Plaintiff on the Defendant's Policy regarding payment for goods. The letter was in the following terms:-

8th February 2005

The Managing Director
City Motors Limited
P O Box 30012
Chichiri
Blantyre 3

Dear Sir

RE: DEPOSIT FOR NEW LAND ROVER FREELANDER 5 DOOR

In reference to your letter dated 26 January 2005, I would like to inform you that it is the policy of Unilever that payment is only done after goods or services have been received. On this issue, we cannot therefore make payment for a vehicle that is not even in the country, to say the least.

As a franchise holder, we were believing that you stock some units for sale hence our approach to you. If we paid for the said some $32,570.50, it would mean as good as we have imported ourselves directly from the UK which we are happy to do without your involvement.

Please advise if you cannot supply our order or we will consider you have failed if we do not hear anything from you in the next 10 working days.

It is pity that you are failing to perform at a point in time when Unilever Malawi decided that Land Rover be a standard car for the local Board members.

Waiting to hear from you.

Yours faithfully

Edmund Hami
CUSTOMER DEVELOPMENT DIRECTOR"

As will be noted from the letter quoted above, the Defendant threatened to cancel the order if it did not hear from the Plaintiff in the next 10 days. On 16th February 2005 the Plaintiff responded to the Defendant's concern. Indeed, the Plaintiff advised the Defendant that the order was being processed and that the vehicle would be delivered within 6-8 weeks.

Plaintiff's Application for irrevocable Letter of Credit.

On 18th February 2005 the Plaintiff apparently made an application for an irrevocable commercial Letter of Credit in respect of a motor vehicle. The beneficiary of the said Irrevocable Commercial Letter of Credit is Conrico International Limited. The court has observed that the supplier's invoice that is attached to the said letter of Credit shows that the vehicle in respect of which the application was made is a Land Rover Freelander with an automatic transmission. This is not the same vehicle that the Defendant wanted to buy from the Plaintiff. Indeed, the Defendant has taken issue with the Plaintiff on the specification of the motor vehicle.

Plaintiff writes suppliers, and cancellation of order by Defendant.

A letter that the Plaintiff wrote Conrico International Limited on 23rd February 2005 is so revealing about what was going on regarding the supply of the vehicle in question in this matter. The Plaintiff wrote the supplier as follows:-

"City Motors Ltd

Conrico International Ltd

Hanworth Lane Business Park

Chertsey, KT16 9LA

England

Att: **Caroline Pease**

Ams/lds/230205

Wednesday February 23, 2005

RE: DRAFT COPY-LETTER OF CREDIT FOR GBP 16,424-AS PER
QUOTATION NUMBER AF4582a-LANDROVER FREELANDER 5DR

Dear Sir,

Attached please find draft copy of the L/C for your kind attention.
Could you please confirm if everything is okay so that our bank can go ahead establishing it.
Your kind attention and action will be greatly appreciated.

Yours faithfully,
For: City Motors Ltd,

A.M. Sabadia
Operations Manager"

It goes without saying that on 23rd February 2005 no confirmed Irrevocable Letter of Credit had been established. Accordingly, the supplier could not have supplied the vehicle. Further, it is well to point out that the Defendant wanted the vehicle supplied on 30th January 2005.

It does not, therefore, come as a surprise that on the very same day that the Plaintiff wrote the supplier to confirm whether the Draft copy of the letter of credit was alright the Defendant wrote the Plaintiff advising the latter that it was canceling the order. Apparently the letter was brought to the attention of the Plaintiff on 24th February 2005. The said letter, from the Defendant to the Plaintiff, canceling

the purchase order was couched in these words:-

"Ref. EH/FG

23rd February 2005

The Managing Director
City Motors Limited
P O Box 30012
Chichiri
Blantyre 3

Dear Sir,

CANCELLATION OF PURCHASE ORDER NO. 23790 FOR LAND ROVER FREELANDER

In reference to several communication with you at your officer with Mr Edmund Hami and in addition to our letter dated 8 February 2005, we would like to inform you that we have cancelled our Order No. 23790 for supply of new Land Rover Freelander 5 Door.
Supply of anything in relation to this order will be invalid and Unilever SEA will have no liability over such a supply. The decision to cancel has been caused by your failure to finance and deliver the motor vehicle in question. We would, however, look forward to have another opportune time to try you again for a possible business relation with you.
We would, however, look forward to have another opportune time to try you again for a possible business relation with you.

Yours faithfully
PATRIQUE CHITHILA
SUPPLY CHAIN DIRECTOR"

The plaintiff, upon receiving this letter, instructed a firm of legal practitioners to assist it in responding to the cancellation of the order.

Commencement of proceedings

The legal representative of the Plaintiff wrote the Defendant demanding that the latter should perform its part of the contract and effect a 50% payment of the sum of US$32,570.50 otherwise there was going to be a legal action commenced against the Defendant. It would seem that the Defendant did not respond to the letter of demand. Accordingly, on 23rd March 2005 the Plaintiff commenced these proceedings.

The above are the facts in this matter. I shall now proceed to discuss the issues for determination in this matter.

Issues for Consideration

The issues for consideration in this matter have already been set out abve. I need not, therefore, repeat them here except to make the following observation. As I see it, the questions put up for determination by the Plaintiff may be summarized into one issue. The said issue being whether or not there was a concluded contract between the Plaintiff and the Defendant for the sale of a motor vehicle by the former to the latter. It is only if the answer to this issue is in the affirmative that the court might consider the other questions alluded to earlier on in this ruling. For avoidance of doubt, and ease of reference, these are, if there was any contract concluded, what were the terms of the said contract? and who, between the Plaintiff and the Defendant, breached its alleged terms?

Determination

This is an opportune time to make a determination of the matters that have been raised in the Originating Summons. As noted above, there is principally one

issue that this court must consider *viz*. whether there was a concluded contract between the Plaintiff and the Defendant respecting the sale of a motor vehicle.

Was there a concluded contract between the Plaintiff and the Defendant?

For this court to properly determine the issues arising and falling to be decided in the Originating Summons herein there is need for this court to answer the question posed above. In saying this I am alive to the fact that the questions as regards the terms of a contract and who is in breach can only arise if there is a valid contract entered into between parties.

At this point it is important that we look at the law relating to the creation of an agreement between parties. It is trite law that if a court is to determine whether parties have reached an agreement it has to ask itself if an offer was made one party and accepted by the other party[3]. Further, it is common place that in resolving whether there has been an agreement the court is at law enjoined to apply the objective test[4]. Moreover, the way I understand the law, an acceptance is a final and unqualified expression of an assent to the terms of the offer made by the offeror[5]. Furthermore, and more importantly, it is settled law that a reply to an offer which varies one of the terms of the offer or introduces an entirely new term is not an acceptance but amounts to a counter-offer liable to be accepted or rejected by the offeror. Without doubt, such a counter offer not only fails as an acceptance, but also generally amounts to a refusal of the original offer and, for that reason, can not subsequently be accepted.[6] Additionally, it is well to observe that it is apparently a

[3]Chitty on contract General Principles 25th ed p. 25 @ para 41
[4] Ibid para 41
[5] Ibid para 54 @ page 35
[6]

settled principle of law that where a party varies the time of performance of a contract when communicating acceptance that may amount to a variation of the terms of the offer and accordingly be treated as a counter offer[7] Finally, as I understand it, the position at law is that where time is of essence of a contract, a breach of the condition as to time for performance will entitle the innocent party to consider the breach as a repudiation of the contact[8].

The above discussion centred on the law that I thought is relevant with respect to the creation of a contract. So much with the discussion of the law on the formation of contracts. I should now apply the law to the facts of this case. The facts being mentioned here are those that have been established by the evidence on record.

As I see it, and this court finds and concludes, there was no valid contract entered between the Plaintiff and the Defendant. The parties were not *ad idem* as to the essential terms of the contract they wanted to create. Indeed, the facts of this case show that the Defendant did not accept the offer as it was put to it by the Plaintiff. The Defendant introduced new conditions regarding payment and delivery of the vehicle. It was established before this court that the Defendant had not paid the 50% deposit that the Plaintiff wanted as confirmation that it was ready and willing to buy the vehicle. It is well to remember that the Plaintiff wanted a 50% non-refundable deposit with[9] confirmed order and the balance was to be paid on delivery. The Defendant, in purporting to accept the offer to buy the vehicle, put

---

[7]7 Chitty on contract General Principles 25th ed page 35 @ para 57. See also the celebrated case of Hybe vs. Wrench [1840] 3 Bea v 334

8 1 bid page 34 para 56

[8] Mdumuka vs. Lindani 11MLR 390 citing with approval the principle established in the case of Maryon vs. Carter [1830] 172 E.R. 711

[9]In terms of Oxford Advanced Learners Dictionary the word "with" meant that the Order from the Defendant was to be accompanied with a 50% deposit. This is not what the Defendant did

it to the Plaintiff that payment for the vehicle would be made on or about the 25th day of the month following that in which delivery would be made. Further, it is important to note that the parties were at cross purposes as regards the delivery time of the motor vehicle in question. Whereas the Plaintiff had wanted to deliver the vehicle within 6-8 weeks of confirmed order, the Defendant wanted the subject matter of the purported agreement delivered on 30thJanuary 2005. Further, the court has observed that the Defendant, through the Engineering Buying Order, advised the Plaintiff that the time for the delivery of the vehicle was of essence and that if the goods were not delivered on or before the requisite date i.e. 30thJanuary 2005 it would proceed to, *inter alia*, cancel the order. In this court's judgment, the conditions set out in the Defendant's Engineering Buying Order, at law, contained a counter-offer regarding the mode of payment and time for delivery of the motor vehicle if it were to be supplied. Accordingly, there was no binding contract between the Plaintiff and the Defendant as the latter had refused the offer from the Plaintiff[10]. Indeed, as rightly put by Counsel for the Defendant, the elements satisfying an agreement at law were not met since there was a counter-offer from the Defendant which amounted to a refusal of the offer by the Plaintiff. As was said earlier on, for there to be a binding contract there must be a definite offer which is accepted by another. The Defendant's Engineering Buying Order did not conform to the offer by the Plaintiff and therefore the Defendant never accepted the offer[11] from the Plaintiff.

For the reasons given above, the Plaintiff's claim ought to be and is hereby dismissed. There was no binding contract in respect of which an order for specific

[10] Chitty on Contract General Principles 25th ed page 35 @ para 57; Hyde vs. Wrench [1840] 3 Bear 334
[11] Abeles vs. Viola [1992] 15 MLR1 @ 4

performance should issue against the Defendant.

As a final point, the court would like to make the following finding. On the evidence on record the counter offer that was made by the Defendant in its Engineering Buying Order was not accepted by the Plaintiff. This finding is premised on these undisputed facts:-

Firstly, notwithstanding the Defendant putting it to the Plaintiff on 8th December 2004 that payment for the vehicle would be made on or about the 25th day of the month following delivery the Plaintiff continued to demand a half down payment. This comes out clearly from the Plaintiff's letter of 26th January 2005 when the Plaintiff was still demanding payment of 50% deposit towards the purchase price of the motor vehicle. Secondly, if we read the Plaintiff's letter to the Defendant dated 16th February 2005 it is obvious that the former was desirous of wanting to deliver the motor vehicle in question within 6-8 weeks from date of this letter. However, sight should not be lost of the fact that the Defendant had made a counter-offer. It wanted the vehicle delivered on 30th January 2005 and that time of delivery of the said vehicle was of essence. It follows, therefore, that on 16th February 2005 the parties had not agreed on delivery period. Indeed, this court finds and concludes that on this date the parties were not in agreement as regards the payment details and delivery period of the vehicle. Put differently, in this court's opinion, the parties were still at cross purposes as regards the mode of payment and delivery period of the subject matter of the content they wanted to enter into. In point of fact, one may safely say that the parties were still negotiating the contractual terms respecting the motor vehicle. Thus, it will be idle talk for one to assume that there was any contract for which this court should start deducing either its terms or who was in breach of the purported contract.

Conclusion

The Plaintiff has failed to establish its case against the Defendant. Naturally, it must suffer payment of the costs of these proceedings.

Pronounced in Chambers this 14th day of December, 2005 at the Principal Registry, **BLANTYRE.**

F.E. Kapanda

JUDGE