

ICT

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

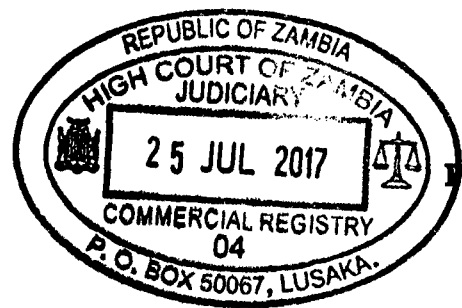
2016/HPC/0019

**BETWEEN:**

**CAROLINE MARSH**

**AND**

**LM KRISTALS LIMITED**



**PLAINTIFF**

**DEFENDANT**

*Before Lady Justice B.G Lunguon 16<sup>th</sup> February, 2017*

*For the Plaintiff*

*Ms. N. N Mbaou, Messrs Nkusuwila Nachalwe Advocates*

---

**J U D G M E N T**

---

**Cases referred to:**

1. *Andrew Tony Mutale v Crushed Stone Sales Limited (1994) S.J. 98 (S.C.), S.C.Z. Judgment No. 17 of 1994;*
2. *Attorney General vs. D.G Mpundu (1984) Z.R 6 (S.C).*

**Legislation and Other Materials referred to:**

1. *Odgers' Principles of Pleading and Practice, 21<sup>st</sup> Edition at page 164*
2. *Odgers on High Court Pleadings and Practice, 23<sup>rd</sup> Edition, D.B. Casson, Sweet & Maxwell, 210 to 211*

On 18<sup>th</sup> January, 2016, the Plaintiff commenced this action against the Defendant by way of Writ of Summons and Statement of Claim. The Plaintiff's claims are as follows:

1. An Order that the Defendant refunds the Plaintiff the sum of United States Dollars \$100,000.00 being the 10% commitment fee paid to the Defendant for the purchase of emeralds at total contract price of United States Dollars \$1,000,000.00 from its Miku Mine in Lufwanyama District of the Copperbelt Province upon a consideration that has wholly failed;
2. A sum of United States Dollars \$14, 587.91 being the direct cost of borrowing funds for the period July 2015 to December 2015 incurred by the Plaintiff;
3. An Order that the Defendant reimburses the Plaintiff a total sum of United States Dollars \$12,000.00 being travel expenses from the United Kingdom to Zambia in relation to the contract;
4. An Order that the Defendant further refunds the Plaintiff a sum of United States Dollars \$2,000.00 for the Professional Service of a Gemstone Valuer engaged by the Plaintiff for the purposes of valuing the gemstones in relation to the contract;
5. An Order that the Defendant pays the fees due and payable to the Advocates accrued in the negotiation and concluding of the transaction in the sum of United States Dollars \$12,500.00;
6. Damages for Breach of a written contract dated 19<sup>th</sup> June 2015 made between the Plaintiff and the Defendant;

7. Any other relief the Court may deem fit.

8. Interest on all sums found due and payable to the Plaintiff at the current commercial bank lending rate as prescribed by the Bank of Zambia; and

9. Costs of and incidental to the action.

The Statement of Claim reveals that on 19<sup>th</sup> June, 2015 the Plaintiff, in her capacity as a business woman, entered into a Sale and Purchase Agreement with the Defendant, a Limited Liability Company which operates a gemstone mine known as Miku Mine in Lufwanyama District. The Contract was for the purchase, by the Plaintiff, of emeralds up to the value of US\$1,000,000.00, from the Defendant.

According to the Statement of Claim, the Contract was for a period commencing on 19<sup>th</sup> June 2015, being the date of execution of the contract, to 27<sup>th</sup> November 2015, the date of termination. Two notable express terms of the Contract were stated to be, firstly, that the Plaintiff would pay the Defendant a commitment fee of 10% of the total contract purchase value and secondly, that the Defendant would return the commitment fee to the Plaintiff in the event of failed fulfilment of the Contract terms.

The Plaintiff contended that she complied with the Contract by paying US\$100,000 commitment fee to Defendant. The Plaintiff averred that she financed the commitment fee and obligations under the contract with borrowed funds from her bank. The

commitment fee was said to have been effected by the Plaintiff by bank transfer to the Defendant's bank account. It was further averred that the terms of the contract were not fulfilled by the date of termination, which termination date had been extended several times.

The Statement of Claim further revealed that the Plaintiff is domiciled in the United Kingdom and that, as such, she incurred travel related expenses to facilitate the execution and performance of the Contract. Additionally, it was contended that the Plaintiff incurred fees for professional services related to the Contract, namely, legal and gemstone valuation fees. Consequently, the Plaintiff took out the Writ of Summons of 18<sup>th</sup> January, 2016, specifically pleading, *inter alia*, the following special damages:

- i. US\$12,000.00 in respect of flights and accommodation from the United Kingdom to Lusaka;
- ii. US\$2,000.00 in respect of fees paid to a professional Gemstone Valuer; and
- iii. US\$14,587.91 in respect of borrowing costs incurred for the period July to December, 2015.

On 27<sup>th</sup> April, 2016, the Defendant filed its Defence which expressly denies liability in respect of the special damages. In particular, the Defendant contended that it advised and informed the Plaintiff not to borrow money or make commitments to third parties because the

business of gemstones was not only seasonal but was also unpredictable.

As regards travel expenses, the Defendant averred that the Plaintiff was advised not to travel to Zambia for contract addenda or monitoring of production progress because those aspects could have been managed by her lawyers and agents in Zambia. The Defendant similarly refused liability in respect of any fees incurred for a gemstone valuer on the ground that it was not agreed that the Plaintiff should use a private professional gemstone valuer from South Africa. The Defendant avowed that the Plaintiff was advised to use government valuers, whose report would have bound the parties. In conclusion, the Defendant's position was that the Plaintiff was responsible for her own costs in respect of the special damages claimed.

With regard to the commitment fee, the Defendant, in paragraph 7 of its Defence, admitted that the said fee was premised on successful production of gemstones. The Defendant also acknowledged having received the commitment fee and acquiesced to refunding the same. On the basis of the Defendant's admission, Judgment on Admission in the sum of US\$100,000.00 was entered in favour of the Plaintiff by the Court on 20<sup>th</sup> April, 2016. The matter now before me is therefore confined to the remaining claim for damages and special damages.

When the matter came up for trial, the Defendant did not appear and there were no reasons on record for their absence. I noted the Affidavit of Service dated 13<sup>th</sup> February, 2017, and being satisfied that service was effected, proceeded to hear the cause.

In presenting the Plaintiff's case, two witnesses were called: (i) The Plaintiff; and (ii) her Contract agent, Mr Godfrey Mwansa.

The Plaintiff's testimony, as contained in her Witness Statement filed on 20<sup>th</sup> October, 2016, was a comprehensive account of the contractual agreement between the Plaintiff and the Defendant. I will not recount the testimony of the Plaintiff for the simple reason that the testimony did not address the special damages claimed. Beyond pleading special damages, no proof of any of the special damages claimed was tendered into Court.

It will suffice to point out, however, that the uncontested testimony of the Plaintiff was that the Parties entered into a Sale and Purchase Agreement for the purchase of emeralds, which Contract the Defendants failed to perform.

The Plaintiff also called one Godfrey Mwansa in aid of her claim. Mr Mwansa's Witness Statement was equally garrulous on the aspect of the contractual relationship between the parties. However, it too fell short of itemising the special damages claimed. Notwithstanding this shortcoming, his testimony was consistent with that of the Plaintiff's in that he confirmed that the Defendant had failed to

perform the Contract executed between the Plaintiff and the Defendant.

I have interrogated clause 6 of the Contract contained in the bundle of documents and it clearly gives either party to the agreement the right, upon termination, to "***claim compensation for all or any loss and/or damage suffered, including legal costs***".

Having considered the terms of the Contract, and bearing in mind the facts before me, and on the totality of the uncontested evidence before me, I am satisfied that the Plaintiff has established that the Defendant breached the Contract by failing to produce and sell the emeralds to the Plaintiff as agreed. Accordingly, I enter Judgment in favour of the Plaintiff in respect of general damages for breach of contract, the said damages to be assessed by the Deputy Registrar.

I now turn to the Plaintiff's claim for special damages. I find it both necessary and useful to begin by setting forth the law relating to special damages.

In the case of ***Andrew Tony Mutale v Crushed Stone Sales Limited (1994) S.J. 98 (S.C.), S.C.Z. Judgment No. 17 of 1994<sup>1</sup>***, the Supreme Court held that "***There is need for satisfactory proof to be provided before special damages can be awarded by the court.***"

The declaratory principle that special damages must not only be pleaded but must also be proved was earlier applied by the Supreme Court in the case of the *Attorney General vs. D.G Mpundu (1984) Z.R 6 (S.C)<sup>2</sup>*, where the Court extensively quoted from the learned authors of *Odgers' Principles of Pleading and Practice, 21st Edition at page 164*, and of relevance, *in casu*, as follows:

**"Special damage, on the other hand, is such loss as the law will not presume to be the consequence of the defendant's act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the defendant's conduct."***(Court emphasis)*

Thus, in order for this claim to meet with this Courts favour, the Plaintiff must do more than merely plead special damages; the Plaintiff must tender evidence to support the existence of a state of affairs showing that it did, indeed, incur loss and that the loss incurred is drawn from the conduct of the Defendant. In that regard, this Court will not relax an old and intelligible principle which it is bound to uphold under the principle of *stare decisis*. In summation, I take the view that the failure to prove special damages is, in law, fatal to a claim for special damages.



As already concluded above, the record is bereft of any evidence supporting the Plaintiff's claim for special damages. Thus, the Plaintiff cannot walk away with a favourable judgment from this Court for special damages in the absence of proof thereof. Accordingly, the Plaintiff's claim for special damages fails.

Costs are awarded to the Plaintiff, to be taxed in default of agreement.

Leave to appeal is granted.

**Dated the 25<sup>th</sup> day of July, 2017**



.....  
Lady Justice B.G.Lungu

**HIGH COURT JUDGE**