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Judgment No. HB 28/07  
Case No. HC 2650/04

**NATIONAL RAILWAYS OF ZIMBABWE**

**Versus**

**INTERNATIONAL FREIGHT ZIMBABWE (PVT) LTD**

IN THE HIGH COURT OF ZIMBABWE  
CHEDA J  
BULAWAYO 8 FEBRUARY 2006 AND 22 FEBRUARY 2007

Civil Trial

**CHEDA J:** Plaintiff issued out summons against defendant wherein it claimed the following relief: -

- “(i) delivery within seven days of the issue of this order of electric locomotive spares, namely 544 brush type, axle brush EL1 in one case weighing 319 kilograms, failing which payment of
- (ii) 135 347-63 pounds
  - (iii) \$2 883 044-63
  - (iv) interest a tempora mora in respect of the two sums set out above calculated from date of issue of summons to date of payment.
  - (v) Costs of suits
- And as against first defendant only
- (i) \$103 586-79.”

Plaintiff initially sued Air Zimbabwe and Transtel Freight International P/L t/a UTI as second and third defendants respectively. However, it later abandoned its claim against them.

The background of this case and the facts of which are largely common cause are that Plaintiff purchased electric locomotive spares namely 544 brush type, axle brush gear EL1 for BP 135 347-63 in the United Kingdom and caused them to be transported from England to Zimbabwe. They were transported by second defendant from Heathrow Airport on the 31<sup>st</sup> March 2001, in a package weighing 319kgs. On arrival in Harare they were placed in the custody of Air Zimbabwe. This consignment was subsequently cleared out of the Department of Customs and Excise on the 20<sup>th</sup> July 2001 by International Freight Zimbabwe

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(Pvt) Ltd who then took its possession and purported to release it to Transtel Freight International (Pvt) Ltd t/a UTI which was acting as its agent.

The said consignment which was supposed to be locomotive spares was, however, not delivered to Plaintiff thus leading to these proceedings.

As pointed out supra second and third defendants are no longer party of these proceedings. The matter is now between plaintiff and first defendant (herein after referred to as defendant). For this service, defendant was paid the sum of \$103 586.79.

It is not in issue that the supplier of the goods, namely Railway Wheelset dispatched 544 axle brushes in a consignment which also inadvertently included 300 brushes not intended for plaintiff. This consignment weighed 319kg.

Defendant then caused 300 brushes weighing 76kgs not intended for plaintiff to be delivered to plaintiff through UTI on the 1<sup>st</sup> day of August 2001. On discovering that the 300 brushes weighing 76kgs were not theirs, plaintiff returned them to defendant who then re-exported them back to the United Kingdom as this consignment was not what they had ordered.

The fact that these goods were lost admits of no doubt. The question is who is responsible for the loss.

I find as a fact that there existed a contractual relationship between plaintiff and defendant. It is trite that each party in such a contract is duty bound to perform its part of the contract. Plaintiff paid the purchase price, freight clearance and handling charges for its cargo. Defendant through its agent received the consignment together with the consignment note and forwarded it to plaintiff through its own agent.

For all intents and purposes defendant was acting as plaintiff's agent.

The correct legal position is that, because of the relationship of the principal and agent each party is bound by the obligations which it expresses or impliedly undertakes. Consequently the agent is therefore obliged to: -

- (1) do what he has been asked to do,

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- (2) exercise care and diligence,
- (3) impart information in relation to his mandate,
- (4) give adequate and relevant advice to his principal,
- (5) act in good faith at all times, and
- (6) account to his principal

Defendant received the consignment, but, it turned out that it was not that which he had undertaken to receive and deliver in accordance with the consignment note. In other words it did not carry out its mandate. Failure to carry out that mandate is a breach of contract.

Consequently, such breach entitles the principal to normal civil remedies. In undertaking to perform its part of the bargain, an agent is expected to exercise care and diligence ordinarily possessed and employed by persons of common capacity and engaged in the same trade or business. This point was aptly put by Milne J in *Bloom's Woollens (Pty) Ltd v Taylor* 1961(3) SA 248(N) at 253-4 where he stated: -

“It must be accepted that in the course of time, the law has implied into every contract of agency an undertaking by the agent that he will act with care and diligence of the ordinary prudent man when he engages upon his principal’s business---.”

In the present case defendant undertook to facilitate the arrival and delivery of the purchased goods. Therefore, it had a legal duty to exercise care and diligence in handling the said goods. Its failure to ascertain the identity and mass of the consigned merchandise was clearly negligent, to say the least. The difference in weight between 319 and 76 kilograms is so large so much so that a simple and quick check would have no doubt revealed an apparent anomaly.

Every agent holds a position of trust and confidence. His relationship with his principal is a fiduciary one, see, *The Transvaal Cold Storage Companies Ltd v Palmer* 1904 TS 4.

Defendant was found wanting in terms of its duty which it owed to its principal.

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Defendant has argued that it is possible that the error could have been made by the supplier of these goods. While this may be so, this argument does not assist defendant because it was its duty to ascertain the goods received as reflected on the consignment note. This is what it was contracted to do. All it had was an obligation to perform its part of the contract to the satisfaction of the plaintiff. Defendant lacked due diligence in the performance of the said duty and is therefore liable.

Accordingly, plaintiff succeeds as prayed for in the summons.

*James, Moyo-Majwabu and Nyoni*, plaintiff's legal practitioners.  
*Messrs Coghlan, Welsh and Guest*, defendant's legal practitioners