

**THE SALE OF GOODS ACT 1893 IN ZAMBIA: ITS APPLICABILITY IN
TODAY'S COMMERCIAL TRANSACTIONS**

School of law

Oblig Essay

By

2003

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**A dissertation submitted to the faculty of the Law of the University of Zambia in
partial fulfilment of the requirements for the award of the degree of Bachelor of
Laws (LL.B)**

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November, 2003.

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Certificate of Acceptance

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Mumba Malila (Supervisor)

27/11/03

Date

Dedication

To my family

'ad astra per aspera'

Acknowledgements

I wish to thank my supervisor, Mr. Mumba Malila, for his patience and guidance throughout the preparation and completion of this dissertation.

I would also wish to thank all my true friends and the staff of the School of Law of the University of Zambia for all their support throughout my years on campus.

Ndala Makayi.

UNZA,
Lusaka.
November, 2003.

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ABSTRACT

The law relating to the sale of goods is codified in the Sale of Goods Act, 1893. Like any other piece of legislature its aim was to give clear and set guidelines for the transactions involving the buying and selling of certain goods, and at its creation was hailed to be a convenient answer to the problems and malpractices encountered in the business of buying and selling goods.

Prior to the Act, buying and selling of certain goods was directed by the customs and usages prevailing in mercantile transactions at the time. It is these customs that were codified and given a statutory force of law where before they only relied on equity as an underlying force. The creation of the Act came at the height of the industrial revolution, an era well documented in history as having altered the social and economic factors of the civilized world, i.e. Europe, at that time.

The industrialisation brought vast leaps and bounds production capability being increased in multiple folds and thereby ultimately leading to more profits. The technology of the revolution used in production, that in turn affected profits, also had an effect on the manner in which people transacted in certain goods. The quantity and quality of goods produced was greatly altered. This in turn altered the manner in which people dealt with goods. Issues of quality of a product became of great importance to parties to a transaction. And it is such issues that often brought disagreements that the mercantile custom of that time could not deal with adequately.

Enter Sir Mackenzie Chalmers. Chalmers originally drafted the Sale of Goods Bill in 1888 that was enacted, save for some modifications as to its jurisdiction, in 1893. The Act of 1893 has been adopted with little modification in most jurisdictions of the British

Commonwealth. Zambia adopted it after her independence in 1964 in its entirety without any modifications and has never revised it.

It is ironic, however, that the originators of the Act, i.e. U.K., saw it fit to amend the 1893 Act so as to keep in line with the ever changing face of mercantile law and other economic factors that affect buying and selling of goods. Yet in Zambia, we are still using an Act that is stuck in the nineteenth century and is confined to the dealings prevailing in that period. The SOGA was received in the Zambian legal system as an English Act of General application due to the English Law (Extent of Application) Act¹.

The question therefore is how applicable is the 1893 Act in Zambia's current commercial atmosphere.

This dissertation aims to answer this important question in four chapters. Chapter one will look the history and evolution of the Act and shall further delve into the salient features of the Act. An understanding of the history of the Act shall give a clear picture as to why such an Act was promulgated at that time and as will also somewhat expose why it is still necessary today. This chapter will also outline the salient features of the Act and the effect they have on a transaction particularly in relation to the position of the buyer and seller.

From the outlined features of the Act chapter two will deal with contentious sections of the Act, especially section 14(2), which deals with the aspect of 'merchantable quality' of a good. This chapter shall be used to clearly show the pitfalls of an archaic statute by giving critique on this section by way of decided cases, in particular the case of *Sumner, Permain & Co. v. Webb & Co.* (1922) 1KB 55, that threw the spotlight on the absurd outcome application of section 14(2) produced. Other cases shall also be

¹ Cap. 11 of the Laws of Zambia.

referred to in order to further bring out the Act's other inadequacies. Chapter two will also dwell on some of the amendments the U.K. has made to improve on the Act and show the effect these amendments have had on positions of buyer and seller.

A crystallization of the problems of the Act shall be pursued in the following chapter in order to direct the reader's attention to the effect the application of the Act in its current form shall have not only to local transactions. This chapter simply aims to make transparent the dire effects maintaining an obsolete law has on a certain section of the economy i.e. trade. A comparison of laws shall also be given by referring to other jurisdictions, particularly India, who being former colonies of Britain as Zambia was, have adopted the same legislation for the sale of goods as Zambia but has made it to suit that country's conditions. This shall be done in order to give some insight into what ought to be considered in amending or creating a Sale of Goods Act that suits Zambia.

Chapter four will attempt answer the question: why amend or repeal the 1893 Act? Since the preceding chapters have outlined the obsolescence of certain sections, the absurdity of outcomes as a result of the application of these sections, and the impairment the Act creates to trade, it is necessary to suggest amendments to the Act so as to make it more applicable to Zambia's economic and trade atmosphere. The amendments of the current U.K. Act will be reflected upon to direct one to realise that the inclusion of economic, social technological and political concepts are crucial to amending or creating a law that is in line with the needs of the people to whom it applies in that era. Particular attention will be given to socio-economic differences existing between Zambia and the U.K. as this will direct one's attention to the specific requirements of the Zambian trade sector. This section shall briefly touch on the effect the maintenance of an obsolete law

has to Zambia's performance of obligations in relation to regional trade agreements such as COMESA FTA. This will be briefly dwelled upon because in international relations of any sort it is custom, normally, for contracting parties (the different states) to agree to have, or at least encourage that, municipal law that does not conflict with or violate obligations of an international trade agreement in any way so as to ensure free flow of trade.

Finally, chapter five shall give a summary of the issues outlined in the preceding chapters in order to come to the conclusion that the Sale Of Goods Act of 1893 ought to undergo major reforms or better still be totally removed from the law books and replaced by a purely home grown, trade friendly Act thereby encouraging more trade and freeing it from legal hurdles it may currently face.

1.0 CHAPTER ONE

The following chapter intends to introduce the reader what the Sale of Goods Act is and some of its salient features. A distinction between a contract of sale under this Act and other similar transactions which are considered to be the most prevalent in Zambia's commercial sector shall also be given in order to ensure that one is able to not only distinguish a contract of sale under the Act but also give a vague picture of what problems one may incur in dealing with the Act, problems that will be highlighted in the following chapters.

1.1 The sale of goods

Not every one who agrees to buy or sell goods is fortunate enough to have the transaction turn out as he or she expected. In many cases, those disappointed with the transaction have to seek the assistance of the law in order to enforce their rights. The law of sale of goods is codified in the English Sale of Goods Act, which came into force in 1893 (herein after referred to as "SOGA") and is supplemented by the Factors Act 1889 and partly by the rules of common law which are not expressly excluded or altered by the Act. This Act contains 64 sections.

The SOGA codifies those principles of the law of sale peculiar to sales, such that it does not necessarily emphasize upon parties the substance of the multitude of rules demanded in mercantile matters, but rather it emphasizes the importance of the certainty of the existence of the rules. If parties know beforehand what their legal position is, they can provide for their particular wants by express stipulation. Its object (the Act) is to lay

down clear rules for the case where the parties have either formed no intention, or failed to express it.”¹

In England the 1893 Act was amended and replaced by the Sale of Goods Act 1979 which consolidated the 1893 Act (with amendments) and parts of other amendments and enactments, such as the Misrepresentation Act and the Unfair Contract Terms Act, that affected the contract of sale in one way or another

The SOGA, since it concerns, generally speaking, contractual transactions, does not attempt to codify the general principles of the law of contract, but does expressly state their significance to a sale in section 62(2), which states that:

“The rules of common law, including the law of merchant, except in so far as they are inconsistent with the express provisions of the Act, and in particular the rules relating to the law of principal and agent and the effect of fraud, misrepresentation, duress or coercion, mistake, or other invalidating cause, shall continue to apply to contracts for the sale of goods”

Since this section says a contract of sale is generally regulated by the law of contract, there must then be at least two parties one offering to sell, the seller, and the other accepting the offer the buyer. It would therefore seem from this provision that the enactors wanted to maintain the freedom of contract in the sale of goods, as it is clear that parties remain free to conclude a contract on the terms they please.

In construing the codifying Act lord Hershell in the leading case of *Bank of England v Vagliano Brothers*² said:

¹ Chalmers' Sale of Goods Act (16ed.), viii.

² (1891) A.C. 107 at 144-145

“I think the proper course is in the first instance to examine the language of the statute and to ask what its natural meaning, uninfluenced by any considerations derived from the previous state of law, and not to start with inquiring how the law previously stood, and then, assuming that it was probably intended to leave it unaltered, to see if the words of the enactment will bear an interpretation in conformity with this view”³

Thus, a contract of sale of goods is defined in section 1(1) as:

“...a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price...”

This subsection and subsequent others imply that there exist distinct transactions: a sale and an agreement to sell. In a ‘sale’ ownership, referred to as property by the Act, is transferred immediately from the seller to buyer. In ‘an agreement to sell’, the property is passed at a future time or is only passed subject to some condition to be fulfilled.⁴ This distinction is important because there are several consequences arising and flowing from how property is passed.

Firstly, once property has passed a seller can sue for the price even if there has been no transfer of possession. Secondly, if the property has passed the buyer may claim the goods, even if they have not been delivered yet. Thirdly, unless otherwise agreed the risk of accidental loss or damage passes with the property. Furthermore, even if a seller becomes bankrupt or liquidated the buyer may claim the goods and transfer from a buyer to a third person may result in the imposition of rules and exceptions resulting from the

³ However, it has been observed that a codifying Act should not be seen to destroy or ignore a well-established rule of law unless it is expressly stated. See *British and foreign Marine Insurance Co. Ltd. v. Samuel Sanday & Co.* (1916) 1 A.C. 650 at 673.

⁴ See subsections 3 and 4

principle of *nemo dat quod non habet*, which simply states that no one can transfer better title in goods than he himself possesses.⁵

Goods are the subject matter of all contracts of sale, but not all things are considered as goods by the Act. Section 62 describes goods to include “ *all chattels, personal other than things in action and money...The term includes emblements industrial growing crops and things attached to or forming part of the land which are agreed to be severed under the contract of sale.*” This definition thus excludes choses in action such as shares, trademarks, debts and negotiable instruments (such have their own statutes e.g. Bills of Exchange Act 1883)

1.2 A sale distinguished from other transactions

It is also important to distinguish a contract under the SOGA and other forms of contracts that fall outside the scope of the Act, since many contracts exist whose features resemble those governed by the SOGA, but in fact are not. The five transactions described here have been picked out of the multitude of transactions that the law recognises because they can be said to be the most common transactions found in the commercial sector, be it formal or informal, in Zambia.

i) Sale and bailment

In a bailment goods are delivered from one person, the bailer, to another, the bailee, for a certain purpose and on a condition that when the goods are passed and the purpose of the delivery is over the goods are to be returned be returned to the bailer. So, the ownership does not pass to the bailee, it is only possession that passes. In a sale,

⁵ This rule is partially set out in section 21(1) of the Act

delivery for the goods must be done for a price, and the buyer becomes the owner and may then deal with whom and how he pleases.

ii) Sale and Gift

Gift requires the transfer of goods, or property in goods, from one person to another without any price or consideration being given in return. The ownership of the goods is transferred *gratis* to the donee, thus having the price element missing and hence not being a sale.

iii) Sale and Exchange or Barter

A sale is chiefly characterised by the necessity of money being consideration for the transfer of property in goods. This money may either be paid or promised (i.e. the sale may either be cash or credit), but if the consideration is something other than money then the contract is not, strictly speaking, one of sale in SOGA. When goods are exchanged for other goods then it amounts to a barter or exchange. But if consideration consists partly, but substantially, of money and partly of goods it would be a contract of sale. If the goods are delivered, on either side, in an exchange any balance of money payable may be recovered as in a contract of sale.

iv) Sale and Agency

A transaction of sale must be distinguished from one agency. When a supplier agrees to procure goods for another, he may do so as the latter's agent or as the principal standing towards him in the relationship of a seller.

In order to determine the nature of the transaction, the whole agreement must be taken into consideration. It is not wholly conclusive that a party was called an 'agent' or conversely the transaction was called a 'sale'. One indicator or evidence towards a sale is that the recipient (the buyer) is entitled to sell at whatever price he thinks fit, accounting to the seller for only the predetermined sum. In addition, if the transaction is one of agency there shall always be privity of contract between the buyer and agent's supplier, or agent's buyer and the supplier.

v) Sale and supply of services

It is important to distinguish a contract of sale and one for supply of services for a number of reasons. For instance in issues relating to the nature of damages claimed it is crucial to determine under which type of transaction the contract lies. In *Robinson v. Graves*⁶ a contract to paint a portrait was held to be a contract for skill and labour and not for a sale of goods, despite the fact that the object of the contract was for the canvass on completion of painting. In addition, a contract for sale is voluntary, therefore contracts that have goods supplied pursuant to statutory scheme for example are not contracts and therefore not a sale. For instance, a scheme for the government through health centres to supply certain drugs to the community is not a contract of sale between the government or that health centre and members of that community.

Other than the five distinctions mentioned above there are many others that can be said to branch out of these categories. The above are a general overview of how it is

⁶ (1935) 1K.B. 579

important to distinguish a sale under the SOGA and other transactions that are very similar for one reason or another.

1.3 Subject matter of a contract of sale

As already noted the subject matter of a contract of sale is goods, if the subject matter of the contract is not goods as defined by the Act then clearly the Act cannot apply to such a transaction. Other than the definition given in section 62 of the Act, SOGA further classifies goods into two classes. The first classification is the division between *existing goods* and *future goods*. The second classification is that of unascertained *goods* which is not expressly defined in the Act, and *specific goods* defined in section 62.

Existing goods may be either owned or possessed by the seller at the time of the contract of sale and future goods are those to be manufactured or acquired by the seller after making the contract, i.e. goods that a seller does not possess at the time of the contract, but he will manufacture or produce after making the contract.⁷ But a more elaborate classification has been made as follows: (a) goods manufactured by the seller, whether from materials which are now in existence or not; (b) goods which are to become, or may become, the property of the seller, whether by purchase, gift, succession, occupation or otherwise; (c) goods expected to come into existence as the property of the seller in the ordinary course of nature e.g. the young to be born of his livestock or the milk to be produced by his cows; (d) things attached to or forming part of land (whether belonging to the seller or another) which are to be severed in the future e.g. minerals to be won, timber to be cut, fixtures to be detached; and (e) crops in the category *fractus*

⁷ Section 5(1)

industriales, crops to be grown by the seller in the future⁸. It must be noted, however, that the present sale of future goods does not amount to sale proper but an agreement to sell the goods; this is simply because a man cannot assign what is not existence, but may only agree to assign property which is to come into existence in the future. This position is recognised both by the common law and by section 5(3) of the Act.

Their second major classification is that of unascertained and specific goods. By section 62 “specific goods” means “*goods identified and agreed upon at the time of the contract of sale is made*”. Such goods are by the agreement of the parties designated as unique goods whose individuality is established and leaving no room for substitution or any further selection, and can be delivered by the seller in performance of his contractual obligations. Goods cannot become specific in the statutory sense unless they are so at the time of contracting, they cannot become specific at a later stage. In other words, if goods are not considered specific at the time of contracting then they cannot acquire such a description later.

Goods that are not specific are “unascertained”. These goods are not specifically identified but are defined only by description. So, if A agrees to sell one of his ten cows to B and does not specify which cow it is, the contract is one for unascertained goods because the cow will become ascertained when A makes up his mind as to which one of his cows he will sell and B consents to buying that cow.

Section 16 speaks of unascertained goods becoming ascertained, and sections 17(1) and 52 use the expression “specific or ascertained goods”. Thus, it is clear that “ascertained goods” means those goods originally unascertained which are identifiable in

⁸ Benjamin’s Sale of Goods (4ed.), p.80.

accordance with the parties' agreement *after* the contract of sale is made (thus it follows that future goods are usually unascertained).

The distinction between specific and unascertained goods is of utmost importance in relation to the passing of property. Under section 16, no property in the goods is transferred to the buyer unless and until goods are ascertained, but the property in specific goods may pass to the buyer when the contract is made. Also, due to the goods being unascertained a buyer may not have the remedy of specific performance of a contract when property has not passed.⁹

1.4 The price

By section 1, it is obvious that the consideration must be money, and not anything else. By section 8(1) the price in a contract of sale may be fixed by the contract or may be fixed by the parties in an agreed manner, e.g. by a third party valuer, or determined by the course of dealing between the parties.

Where the price is not determined in accordance with section 8(1) the buyer must pay a reasonable price.¹⁰ What is reasonable is a question of fact dependant on the circumstances of each particular case.

The existence of a price in accordance with section 8 presupposes that a contract has been already concluded. Thus, it may be implied that absence of an agreement on the price may show that the parties have not yet reached an agreement on a sale.

Where parties agree for the price to be fixed by a third party valuer, section 9(1) states that if such party cannot or does not make a valuation, the agreement is avoided

⁹ Section 52

¹⁰ Section 8(2)

provided that if any goods or any part of them have been delivered to and appropriated by the buyer he must pay a reasonable price for them. Furthermore, where a third party valuer is prevented from making such valuations through the fault of the buyer or the seller, then the party not at fault may maintain the right of action in damages against the party in fault.¹¹

1.5 Terms implied by SOGA

Parties, who conclude a contract of sale, orally or in writing, freely decide the terms of their agreement e.g. the price, the quality, time of delivery, etc. Thus, the parties are at liberty to enter into contract under any terms they please, and this liberty in ordinary common law is partly captured by the maxim *Caveat Emptor*-let the buyer beware. That is to say, the buyer gets the goods as they come to him and takes the risk of their suitability for the purpose; it is not the seller's duty to ensure that the goods have no defects or point such out to the buyer. Yet, this does not mean the buyer must 'take chance' but rather he must 'take care'. However, where the parties have not expressly agreed the SOGA will imply certain terms into the contract. Sections 12 to 15 of the Act, generally stipulate which terms are implied by the Act. The Act implies certain conditions and warranties that cannot be excluded from the contract, except in certain circumstances. These implied terms are designed to protect the buyer because a strict and unrestricted application of the principle of *caveat emptor*, a buyer may be left at the mercy of a seller or may have no remedy at law.

Contractual terms are classified as conditions and warranties by SOGA, and the Act distinguishes them not necessarily by reference to their intrinsic or specific nature but

¹¹ Section 9(2)

rather by reference to a buyer's remedies. As in general law of contract, a condition is a vital term, breach of which enables the innocent or injured party to repudiate the contract. A warranty is a secondary or subsidiary term breach of which may only attract or enable the innocent party to recover damages and not repudiate the contract.¹² However, a buyer may elect to waive a breach of condition or elect to treat it as a breach of warranty.¹³

Section 12 of the Act protects the buyer from a seller who does not have good title to the property he is selling. It guarantees to the buyer that the seller is the owner of the goods he is selling. Section 12(1) has the implied condition that the seller has, or will have, at the time when the property in the goods is to pass the right to sell the goods. If the seller is in breach of this and as a result there is no property that passes to the buyer, the buyer can claim that there has been total failure of consideration and can recover the price for which he paid for. However, this remedy may also extend to recovery of other damages as well. This avenue may also be used even if goods had been used by the buyer for some time.¹⁴

Section 12(2) places an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The scope of this subsection, it has been argued, would seem to allow the buyer a longer period of limitation than subsection (1) above, since time does not begin to run until the buyer's possession is disturbed. It also protects the buyer where the seller has a right to sell the goods but the goods are subject to rights of a third party e.g. if the third party is a judgement creditor of the seller

The Act also provides an implied warranty that goods shall be free from any charge or encumbrances in favour of any third party, not declared or known to the buyer

¹² Section 62 describes a warranty. However, the Act does not define a condition.

¹³ Section 11

¹⁴ Rowland v. Divall (1923) 2K.B. 500

before or at the time when the contract is made¹⁵. Clearly, this would protect an innocent buyer from any claims of third parties.

Section 13 deals with *sale by description* and states that there is an implied condition if such a sale occurs, the goods shall correspond with the description, and if it is a sale by sample, the goods should correspond with that sample; and it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not correspond with the description. A sale by description can be defined as sale where words are used to identify or describe the goods being sold. Therefore, a sale of future goods or unascertained goods is a sale by description. In addition, it has been held to apply to contracts when goods are specific goods, simply because the buyer contracts on the reliance of that description found in the contract¹⁶.

It is worth noting that for section 13 to apply the descriptive statement must be or form a term of the contract in question. Thus, the common law distinction between mere representations and statements that become contractual terms is relevant in light of this section. But, at the end of the day it is left entirely to the courts to decide if a statement is one that is descriptive and falls within this section or not.

Section 14 in relation to quality and fitness of goods, provides statutory exceptions to the rule caveat emptor. Generally, the section provides that there is no implied warranty or condition as to quality or fitness for any particular purpose if the goods supplied under a contract of sale performed under the SOGA except for the exceptions given in the subsections of this section.

¹⁵ Section 12(3)

¹⁶ Per Channell L. in *Varley v. Whipp* (1900) 1Q.B. 513 at 516

This section has been litigated and discussed upon enormously and has resulted in its amendment in the United Kingdom due to the problems that arose in its definitions and application that, more often than not, resulted in the buyer being put in unfair position as compared to the seller. This section shall not be delved into in this chapter, as it will form the bulk of the discussion the following chapter.

Section 15 deals with sale by sample. The Act does not give an exact definition of such a sale, but it can be described as a sale where a seller expressly or impliedly promises that the goods sold should answer to the description of a small parcel or specimen exhibited at the time of sale that should correspond with the bulk. Therefore, a sale by sample is simply an implied condition that ensures the subject matter of bargain by describing through the specimen, sample, model or pattern to ensure that the buyer gets what he has bargained for in the contract of sale.

The sections highlighted in this chapter give the general and salient features of the Act, and what is expected by the Act in a contract of sale. There many other sections that have not been mentioned or fully discussed in this chapter, as they are not the main concern of this paper, that deal with issues ranging from sale by auction to the rights of an unpaid seller, remedies of the seller and of the buyer and many other such rights and obligations.

Furthermore, the aim of this chapter was to highlight the contractual features as apposed to proprietary features of a contract of sale under the SOGA, especially in relation to implied terms and obligations that are often the major points of contention and have resulted in the bulk of litigation based on the Act.

2.0 CHAPTER TWO

The SOGA does not attempt to entirely erase the freedom of contract between parties to a sale; its aim is to give general directions on how to transact in a contract of sale. However, the Act does imply certain representations as having been made and it is these that can be considered as implied conditions or warranties. That is, the law provides exceptions to the general freedom of contract and in particular to the principle of *caveat emptor*.

This chapter shall look at some of the most contentious conditions demanded by the Act and in particular section 14(2) as this condition deals with the merchantable quality of goods, which is a vital prerequisite with regards to the state goods are in at the time of sale as this affects the position of the buyer and seller. The issues highlighted shall be of particular importance to Zambia as she has a large market dealing in second hand goods that are not covered by any sections of the 1893 Act.

2.1 The conditions stated in section 14

“Condition” is not explicitly defined in section 62 of SOGA, but section 11(1) impliedly defines it as “a stipulation...the breach of which may give rise to treat the contract as repudiated. “Warranty” as opposed to a “condition”, is the breach of which give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated.¹

Ordinarily there is no implied warranty or condition in relation to quality or fitness for a particular purpose of the goods supplied. But where the buyer expressly or

¹ See sections 11 and 62. The Act in section 11 provides guidelines on how a condition may be treated as a warranty.

impliedly makes it known to the seller what the goods are to be used for, so as to show that he relied on the seller's skill or judgement the law demand's that there is an implied condition that the goods are reasonably fit for such a purpose.

Section 14 of the Act specifically deals with these obligations. The preamble of this section reads:

'Subject to provisions of the Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale...'

This preamble is followed gives statutory recognition to the principle of *caveat emptor*, but it followed by the exceptions to this principle.. Section 14 (1) has the exception relating to fitness or suitability for any particular purpose for the goods and section 14(2) deals with the merchantable quality of the goods. The order of these subsections has marked implications on the position of the buyer. It would seem that the creators of the Act felt that fitness of goods is of more importance than their quality. The reason for this may be historical. Due to the nature of mercantile custom in the pre-1893 era if a good was sellable for one purpose or another then this was much more important because this ensured money was made and losses were minimized. In other words, it was a commercially driven notion.

Although the arrangement of the subsections may outwardly seem to have little effect on the parties to a sale, the reparations may more often than not be gargantuan. As stated earlier this chapter will deal more specifically with section 14(2) because it has

been the most litigated condition in the section due, in essence, to the fact that the Act does not give an exact definition of the term ‘merchantable quality’

Section 14(2) reads:

“Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality, there shall be no implied condition as regards defects which such examination ought to have revealed”

2.2 The definition of ‘merchantable quality’

The Act does not define merchantable quality. And this has been one of the great difficulties of the Act. The only reference the Act gives to quality is in section 62(1) where it states that “quality of goods” includes their state or condition. It is a wonder why such a technical term was left to be judicially interpreted. As a result of this there have been a variety of definitions advanced by judges. The widely accepted definition was enunciated in the dictum of Dixon, J. in *Australian Knitting Mills V. Grant*² as approved by the House of Lords in *Henry Kendell & Sons v. William Lillico & Sons Ltd*³. where the court said,

“Merchantable can only mean commercially saleable. If the description is a familiar one, it may be that in practice only that quality of goods answers that description-then that quality and only that quality is merchantable quality. Or it may be that various qualities of goods are commonly sold under that

² (1933) 50 C.L.R. at 387

³ (1968) 2 ALL E.R. 444 at 449

description-then it is not disputed that the lowest quality commonly so sold is what is meant by merchantable quality; it is commercially saleable under that description.”

The House of Lords recognised that the section required that for a good to be said to be merchantable it is essential that one takes into account two factors or tests: firstly, the description of the goods and the purpose for which they are required, and secondly is the price of those goods.

Lord Reid⁴ advanced the first test by saying:

“If the description in the contract was so limited that the goods sold under it would normally be used for one purpose then the goods would be unmerchantable under that purpose. And if the description was so general that goods sold under it are merchantable under that description if they are fit for any one purpose”

With regards to the second test he said :

“The condition that goods are of merchantable quality requires that they should be in such an actual state that the buyer fully acquainted with the facts and, therefore, knowing what hidden defects exist, and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods in reasonably sound order and condition . . . without special terms.”

The two tests cater for both the description and the price but they still do not escape one fact: that merchantability is tied to reasonable suitability of the goods. For if the buyer were to succeed in a claim, he must show that the goods were unsuitable for their only usual purpose or that if they are unsuitable for that purpose though not unsuitable for others, the difference in purpose makes the goods different in character by

⁴ (1968) 2 ALL E.R. 444 at 452

reference to description or price or other circumstances from those he reasonably believed he was ordering.⁵ Thus, “‘Merchantable. . .’ is the composite quality comprising elements of description, purpose, condition and price. The relevant significance of each of these elements will vary from case to case according to the nature of the goods in question and the characteristics of the market which exists for them”⁶

Section 14(2) in itself can be said to have a further proviso with regard to defects. This subsection expressly states that conditions of merchantability do not apply to defects that ought to have been revealed by examination from the buyer. But this does not provide for a situation where the buyer does examine the goods yet is not competent enough to recognise defects in these goods. Would the courts still say he is unprotected under the section, for it would only be reasonable to expect one to examine something if they knew what possible defects to look for. In reverse, however, there is a strict duty placed upon the seller who was expected to examine goods and it is no defence that the seller could not examine the goods nor that all possible precautions were taken before the sale was effected.

Another defect in the subsection is the issue whether the seller is the “manufacturer or not”. This phrase in the subsection implies that there is still a wide application of caveat emptor. This is so because it can be said that rules of merchantability (and of fitness for purpose) do not apply to private sales i.e. sales from one individual to another, they apply to sales made by manufacturers or dealers who normally deal in goods of the type in question. Therefore, if the seller does not normally deal in goods of the type in question then the conditions of quality nor as to fitness do not

⁵ p. 187, Atiyah, .P.S. (1980) Sale of Goods, 6th Ed.

⁶ Cehave N.V. v. Bremer Handelgesellschaft (1975) 3 All E.R. 739 at 763, (1976) Q.B. 44 at 80

apply.⁷ The only condition in a private sale is that the goods must correspond with the description.

Therefore, it would seem that the Act was created to define and protect the buyer and seller relationship with respect to quality and fitness only if the seller is a regular dealer in such goods. This means that, for example, if a chemist does not usually deal in pressing irons then the implied condition as to the fitness or quality of the said goods being supplied by him to members of the public does not exist, thereby leaving the public unprotected.

2.2.1 An illustration

***Sumner Permain & Co. v. Webb & Co.*⁸**

The defendants, manufacturers of mineral waters, sold to the plaintiffs 2,000 cases of tonic water, under the description of “Webb Indian Tonic”, to be delivered f.o.b. London. The water, as the defendants knew, was bought for the purpose of shipment to the Argentine. Among the ingredients of the water there was, unknown to the plaintiffs, a certain percentage of salicylic acid, i.e. 0.0005%. A Law of the Argentine prohibited the sale of any article of food or drink containing salicylic acid, but the defendants had no knowledge of that law. On arrival of the water in the Argentine, the authorities, finding that it contained salicylic acid, condemned it as unfit for human consumption. The plaintiffs brought an action for damages for alleged breach of sale by the defendants of their contract in two respects. They claimed first that they had committed a breach of the implied condition, specified in section 14(1), that they should be reasonably fit for the

⁷ Unless the sale is by sample as provided for under section 15

⁸ (1922) 1 K.B. 55

purpose for which they knew that they were required, that is to say sale and consumption in the Argentine; and secondly that they broken the implied condition specified in section 14(2) that the goods should be of merchantable quality. It was held that by reason of the local law the water was unsaleable in the country in which the defendants knew that it was intended to be sold was not a breach of the implied condition that it should be of “merchantable quality”.

This case clearly illustrates how the courts are forced to apply the condition of merchantability only where the skill of the seller was expressly or impliedly relied upon. And, even though it would be expected that the seller should have reasonable knowledge of any facts pertaining to the goods to be sold, especially where the use of the goods are a general purpose, the Act still puts him in an untouchable position if his skill was not relied upon, as illustrated by the above case.⁹

2.3 The condition of suitability

It has already been stated that the condition of merchantability is closely connected to that of suitability for purpose. If goods are not fit a particular purpose or any purpose at all in fact, then how can they in any way be merchantable? It is for this reason that perhaps the drafters sought to make suitability for purpose a primary condition of sale followed by merchantable quality.

Generally, the subsection protects a buyer who buys goods that have in the ordinary way one purpose or where the purpose is obvious and having no need for the

⁹ Although issues of conflict of laws arose in this case due to the buyer and seller being in different jurisdictions of law, it is still a valid illustration of how courts interpreted section 14 with regards the seller’s skill and merchantable quality.

buyer to specify the use in such a case. In *Priest v. Last*¹⁰ a hot water bottle was sold to the plaintiff, a draper, from a chemist who sold such articles. The plaintiff bought it to be used by his wife and while using it, it burst and injured her. It was held that the seller was responsible for damages.

The seller must supply those goods of that description in the course of his business to supply for this subsection to apply. This means that if such a seller does not normally supply such goods, such as a chemist who decides to sell car parts, then the buyer may not find shelter in this subsection; so too does this apply to the reliance on description. But this only applies where the use is of a general purpose and not one specific to the buyer. In *Ashington Piggeries Ltd v. Christopher Hill Ltd*¹¹ the House of Lords said if one deals in goods of “*that kind*” then the seller has a condition of suitability implied upon him. But where the buyer has in mind a special use then he cannot use this subsection as protection if he did not express such special use or circumstances.

This also means that reliance on the seller’s skill and judgement must be shown for a buyer to succeed. This reliance may be express or by implication. This express or implied reliance has to be said to be objectively tested. The question of partial reliance is not dealt with by the Act and leaves such situations to the courts to decide. In *Ashington Piggeries*¹² reliance was on the seller to use the best ingredients for the job and not the outcome or the result of mixing. Since one of the ingredients was toxic this rendered the sellers liable.

¹⁰ (1903) 2 K.B. 148 C.A.

¹¹ (1972) A.C. 441

¹² *Supra*

2.4 Second hand goods

Section 14 draws no distinction between new and top quality goods on one hand and second hand and substandard goods on the other. The application of the section to the former is clear. In relation to the latter, it is not about whether the second hand items are merchantable, but *how* the condition of merchantability should be applied and operates on such a transaction; and this is where there has been some debate.

There have been varying views on this matter but what seems to be agreed upon is that price is of relevance. This implies that, in so far of one was called upon to test the merchantability of second hand goods the test of quality would be between the comparison of the price paid and what one would normally pay for new quality goods. Thus, second hand goods cannot be said to be unmerchantable simply because it is substandard. Indeed it has been said that the article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in usable condition. It is then merchantable.

2.5 United Kingdom amendments

The United Kingdom, from which this statute originated, has repealed this Act and replaced with the Sale of Goods Act 1979. This Act is a culmination of cases, amendments and creation of other Acts and opinions of the Law Reform Commissions in the U.K.

The reformers recognised the significance of having one definition of merchantable quality and clarity on the situations and circumstances to which the conditions of section 14 apply.

Section 14(1) of the 1979 Act now reads:

“Except as provided by this section and section 15 below and subject to any enactment, there is no implied condition or warranty about the quality and fitness for any particular purpose of goods supplied under a contract of sale.”

This Act reproduces with minor changes the wording of the 1893 that appeared as a preamble to section 14 and not a subsection. The condition of merchantable quality is better elaborated in the 1979 Act. By section 14(2) of the 1979 Act:

“Where the seller sells goods in the course of a business, there is an implied condition that the goods supplied under the contract are of merchantable quality, except that there is no such condition-

- (a) as regards defects specifically drawn to the buyer attention before the contract is made; or*
- (b) if the buyer examines the goods before the contract is made, as regards defects which that examination ought to reveal.”*

Furthermore, subsection (6) defines the phrase “merchantable quality” by saying:

“Goods of any kind are of merchantable quality within the meaning of subsection (2) above if they are as fit for the purpose or purposes for which goods are bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all other relevant circumstances.”

This definition largely consolidates pre-1979 case-law doctrine.

Adoption of this definition has certainly put to rest the plethora of definitions that often inundated the courts, and even if particular case-law doctrine were recognised as definitive (such as in *Henry Kendell*), without this definition courts still were at pains to find a suitable definition in order to conclude a dispute.

The condition implied by the 1979 subsection differs from the condition of merchantable quality implied in the 1893 Act in the following respects:

- i) The 1893 provision only applies where goods are bought by description. In the 1979 provision, it is no longer necessary that goods should be bought by description.
- ii) The 1893 provision only applies where the seller deals in goods of that description. With the 1979 provision, it is not necessary that the seller should have ever dealt in such goods as long as he deals with the goods in the course of a business. This includes sales that are totally different from the seller's usual course of business.

The 1979 Act also did a lot for describing what defects were considered under the Act and more importantly circularised the parties to whom the conditions apply. Thus, the conditions not only apply to a seller “who deals in goods of *that* description” but also to one who “sells goods in the course of *a* business”, meaning private sales can be covered.

2.6 The position of the law of sale in Zambia

Unlike the United kingdom Zambia has not amended the 1893 Act in any way. Therefore, all the defects that the U.K. had recognised and attempted to rectify still exist in Zambia. This makes the use of the Act a very difficult task especially that the commercial conditions currently prevailing in Zambia are not, and were not, important factors to the Acts creation or existence.

Zambia is in situation where there is a large market for the buying and selling of second hand goods, and since section 14, or other sections in the Act, does not cater in any way for this market then the contractual activities of this market are not regulated by any statutory provisions. This is clearly a recipe for confusion and uncertainty of the parties with regard to their legal rights and obligations in a contract for sale. It is this situation of uncertainty that law reformers in the U.K. recognised from past litigation and the anticipation of further disputes that prompted them to amend the 1893 Act.

This chapter has endeavoured to clarify the position of parties with regard to their rights and obligations in a contract of sale particularly on the condition of merchantable quality stated in section 14(2) of the 1893 Act. To further highlight the effect of this section amendments made to it in the United Kingdom and now found in the current English Act of 1979 have been discussed so as to show the positive effects of amending the section to suit Zambia's situation would have on a contract of sale.

3.0 Chapter Three

The previous chapter underlined some of the thorniest issues pertaining to a contract of sale that is determined by the SOGA. Many of these have been detected and rectified in the United Kingdom and other jurisdictions so as to smoothen out and regularise the instances of sale. Furthermore, as already stated, this Act was designed with mercantile custom of the 1893 era which, logically, cannot be the same custom today as such custom is directed and influenced by various factors in a society, chief among them the economic regime of that society.

This chapter will bring forth the profound obstacle the 1893 Act may be to parties transacting in second hand or substandard goods, especially because Zambia has over the years grown a culture of trading in such goods. This manner of trade and the Act itself also has an effect on third party liability which is also discussed and elaborated to show its setback to contracts of sale.

3.1 The influence of second hand goods in Zambia

Since the so called ‘third republic’, that is, the ushering in of the multiparty era in 1991 many of what could be called governmental restraints on trade and industry were abolished. Everything from dealings in real estate to telecommunications was liberalized so as to allow the private individuals take part in what ever business they wanted.

In a country where the economy has had no significant growth and in fact whose economy has undergone some of the most difficult times, the consumer culture has experienced a profound shift. This shift is dictated by the amount of income and expenditure that the people have. This income and expenditure may be determined by the

gross domestic product (GDP) of the country. In 2002 the GDP per capita in Zambia stood at ZMK 1, 520,506¹. This figure implies that the average Zambian spent this amount on goods and services. This figure also shows that, in comparison to other countries, the Zambian does not have much to spend on goods and services. It could, furthermore, be assumed that this expenditure is on brand new or top quality goods and services and therefore does not take into account second hand goods.

Because of the depressed economy where unemployment levels are high and average salaries are low the culture of relying on second hand goods which are much cheaper than brand new goods, has grown over the years. And as such, the dealing in second hand or substandard goods plays a major part in the everyday mercantile transactions of Zambia. So influential has the market in some second hand goods become that the Finance Minister in his Parliamentary Budget speech for 2003 announced an increase in excise duty of second hand clothes commonly known as “salaula” to ZMK2500 per kilogram and for motor vehicles from 5% to 10%². It is clear that policy and law makers have recognised the influence of second hand goods, yet they have not provided adequate redress or restitution for parties who enter into transactions of sale in second hand goods that end in dispute.

The issue of second hand goods in relation to the SOGA was raised in the previous chapter. It was highlighted that the Act does not expressly cater for second hand goods in its implied obligations as regards merchantable quality or suitability for purpose. This, strictly speaking, means that the contract for sale of second hand goods does not

¹ Statistical information provided by the Bank of Zambia on its official website: <http://www.boz.zm>

² The speech given by Honourable Emmanuel Kasonde on 13th February, 2003 in Parliament when he presented the proposed budget for the year 2003.

carry any of the obligations of the Act or even demands the application of the Act in its current form.

Furthermore, a strict interpretation given to the phrases “...*the goods are of a description which it is in the course of the seller’s business to supply...*” and “...*goods are bought by description from a seller who deals in goods of that description...*” found in section 14(1) and (2) respectively, that deal with the obligations of quality and purpose exclude transactions deemed to be private sales i.e. sales between persons that do not normally deal in such goods like retailers or manufacturers. The grave implication here is that the average Zambian who more likely than not will buy a second hand good, for example a motor vehicle, will not be protected by the Act because the Act only deals with brand new goods which, logically, ought not to have any defects. Second hands goods warrant the assumption that there exists in them some form of defect which may negatively affect the quality and purpose for which the goods were made and therefore any one who uses it will not receive its original optimum functionality. Thus, *caveat emptor* resurfaces.

But this rigid position of completely excluding second hand goods from the reaches of the obligations implied in the Act would in the practical sense be unjust. As such, courts over the years have attempted to adopt a more flexible approach to the issue of second hand goods.

In the United Kingdom the courts had tried to circumvent this legislative defect by pronouncing in a number of cases (but there is still little authority on the subject) that a lesser standard of merchantability and fitness is to be exacted on second hand goods

than that applicable to new goods. Thus, in *Bartlett v. Sidney Marcus Ltd*³ a car bought with a reservation as to the condition of the clutch was held to be merchantable though the actual state of the clutch proved to have been much worse than anticipated with the result that complete replacement was required at substantial cost. It has been further suggested that a second hand car was merchantable if it was “in a road worthy condition, fit to be driven along the road safely.”⁴

In addition, where a second hand good is prima facie considered unmerchantable this has been too narrow a test, as Lord Denning put forward the proposition that

“...the article may be of some use though not entirely efficient use for the purpose. It may not be in perfect condition but yet it is in usable condition. It is then, I think, merchantable.”

Here, a broader test of the fitness for the purpose is being used. So, if it is not reasonably fit for the purpose it follows, then, that it is of unmerchantable quality; but if it can be said to be fit for its purpose then it is merchantable.

Still, even with these tests of a ‘lesser standard’ being applied the issue of second hand goods is still dependant upon the matter of *caveat emptor* and is, therefore, still a thorn in the side a buyer, and even retailer, of such goods.

3.2 Product liability: The position of third parties

Intrinsically linked to the defects of the Act mentioned in chapter two is another major defect that the law of sale of England, which Zambia has inherited, is almost exclusively based in contract law. In contract, the rights of the user have to be proved or

³ (1965) 2 ALL E.R. 753; (1965) 1 W.L.R 1013

⁴ Id at 755; at p.1017

their existence shown by way of a contract between himself and the party he wishes to sue. Here, sections 13 to 15 of the SOGA render no assistance to one who wants to rely on them if:

- (i) he is not the person who bought the goods(this falls under privity in contract law); or
- (ii) he wishes to sue someone other than the seller.

3.2.1 The non-contracting plaintiff

The problem here often arises in the domestic sphere, and involves specific loss or injury to an individual. If the family television fails to operate soon after it was bought, any one in the family can press for its repair or compensation if the televising proves totally useless. It does not matter who bought the television. But, if a family member other than the one who bought the television, is injured then the buyer himself is only entitled to recover in respect of losses personally incurred, but not the injury of that member of his family.

Thus, there is a clear distinction between the contracting party who can rely upon the seller's skill or judgement in providing suitable goods and a non contracting party who must establish negligence on the part of the seller or manufacturer in order to succeed in his claim.

The arbitrariness in the nature of this distinction that was created through the Act is quite apparent when applied in cases. In *Priest v. Last*⁵, a husband who bought a hot water bottle, mentioning the special purpose but not the precisely specifying it was warned by the seller, a chemist, that it would take hot, but not boiling water. It was used

⁵ (1903) 2 K.B. 148

by his wife for a few days before it burst thereby scalding her. The husband's claim succeeded but was only limited to recovering his losses incurred in purchasing the bottle and having his wife treated for her injuries, i.e. the medical expenses. There was no compensation to the wife in respect of her actual injuries. So, as long as one is not privy to the contract of sale then he or she may not succeed in an action under contract.

It will usually be fortuitous whether a husband or wife purchases a particular item for use. And in cases where goods bought injure children, it will seldom happen that the child in question would have been the buyer. Thus, if a toy proves defective or unsuitable (whether brand new or not) the child will have to claim in tort, not in contract and to establish negligence against a seller will not be an easy task. This situation may bring about duplicity or multiplicity of suits much to the dismay of any judiciary worth its salt.

The illogic of this principle may further be illustrated in the case of *Godley v. Perry*⁶. A six year old boy purchased a plastic catapult from a shopkeeper. While using it the catapult broke due to a defect and he was blinded in one eye by a stone from the defective catapult. He was able to succeed in his action against the local retailer because the boy himself purchased the catapult and not his parents or guardians. If any one of the parents made the purchase then no remedy would have existed in contract and it would have been extremely difficult to sue the seller in tort.

Applying this to the Zambian situation where a great many of goods are manufactured in other jurisdictions how would a party, worse still a non contracting one, have any practical remedy against such a manufacturer, because even on a local level a non contracting party would fail against the local seller in contract and would also probably fail in tort.

⁶ (1960) 1 ALLER 36

3.2.2 Claims against the manufacturer

Where goods are purchased from a retailer and such goods cause injury or damage no action can be brought against the manufacturer under the SOGA. This is because all the conditions and warranties implied in the Act only apply where there is a contract and since there was no contract between purchaser and manufacturer then the rule of privity prevails. It is even more difficult for a non purchaser to prove and succeed in an action for negligence against the seller more especially where even after reasonable examination by the seller, the defects were so latent that they escaped his detection.

However, a buyer may succeed in an action for negligence under the law of torts against the manufacturer in respect of physical injuries caused by defects in the goods. There is an “assumption of duty” placed on the manufacturers that the goods will reach the purchaser in the quality and fitness that they ought to have left the manufacturer. D.W. Greig⁷ elaborates on this assumption which was laid down in *Donoghue v. Stevenson*⁸ in which it was found that the manufacturer had a strict duty to take care rather than a duty of supplying merchantable goods under a contract of sale. This landmark case in negligence requires that there be established for the duty of care to exist. In the words of Lord Atkin:⁹

“a manufacturer of products, which he sells in such a form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination, and with the knowledge that the absence of reasonable care in the preparation of the

⁷ *Sale of Goods* (1974), p.247

⁸ (1932) A.C. 562

⁹ at p.599

products will result in an injury to the consumer's life or property, owes a duty to the consumer to take that reasonable care."

This, therefore, an action in tort may be the only recourse a non-buyer (and also includes a buyer) may have against a manufacturer with regards defects in goods that cause injury. The case *Grant v. Australian Knitting Mills Ltd*¹⁰ is one in which the plaintiff also would have succeeded in an action for negligence by the manufacturer (the plaintiff succeeded under breach of merchantable quality).

But, does this apply to second hand goods. Would it be reasonable to suggest that the duty of care owed to a person of a brand new car who sells it some years later as second hand car or a retailer who deals only in second hand cars, and expect this duty to be part of the sale? The duty of care only exists where there was still examination of the goods by the manufacturer when it was received by the buyer; where this chain of examination is broken then the duty of the manufacturer falls away. This means that a buyer of second hand goods cannot sue the manufacturer.

Greig¹¹ further points out that the chain of examination may be broken not only by the goods being classified as second hand goods and therefore not coming from the manufacturer in the state he intended the goods to reach the ultimate purchaser, but also if there was what Lord Atkin above termed 'intermediate examination'. Such examination is often done by a retailer when or if it was reasonably possible for him to examine the goods without affecting or altering the state in which they were supposed to reach the purchaser before he supplied them to the ultimate purchaser. If it can be shown that the

¹⁰ (1936) A.C.85. The plaintiff succeeded under breach of merchantable quality of goods.

¹¹ *Sale of Goods*, (1974), pp. 248-50

retailer or supplier of the goods ought to have examined the goods and defects in such goods were not of a latent nature then the ultimate purchaser may sue the supplier in contract and not the manufacturer. Looking at in another way, a manufacturer may only be sued by the ultimate purchaser or the injured user of the goods if the defects in the goods were so latent that no reasonable inspection by a retailer would have detected the defects.¹²

But with the law applicable in Zambia there is still an area of uncertainty created by the reference made by Lord Atkin of ‘intermediate examination’ because this does not shed light on issues of control of the goods. Because it could be reasonably argued that due to control of the goods passing from the manufacturer to a retailer the manufacturer ought to escape liability of a third party if he shows that there ought to have been some examination likely by the retailer before sale or use.

Remember, however, that this proposition applies to brand new goods and not second hand goods of which the manufacturer more probably than not will be absolved of any and all liability whatsoever.

3.3 The Sale of Goods Act in other jurisdictions

The Indian Sale of Goods Act, 1930 (Act No. III of 1930)

The Republic of India enacted the rights and duties in contract of sale of goods in the Indian Sale of Goods Act, which came into force on 1st of July, 1930. This Act follows closely in the footsteps of the English 1893 enactment. This is because India, like Zambia was once a British colony.

¹² As was the case in *Grant v. Australian Knitting Mills*. (Supra)

India, to suit its local conditions, modified the Act to give a generally clearer understanding of the English Act even though in essence most, if not all, sections of the two Act are the same. India rearranged some sections and simplified the language in the Act. For example, the part of the Indian Act that deals with conditions and warranties has seven sections, 11 to 17, that restate and generally simplify what the English Act states in sections 11 to 15. This simplification is probably the reason why the Indian Act has two more sections than the English Act. Further, section 12 of the Indian Act provides four sections to explain what a condition and warranty in a contract of sale which makes a party easily understand his or her position with regards such issues. The English Act does not do all this. It assumes that the law of contract shall be used to determine such rules and more often than not the average citizen is not conversant with even basic concepts of contract law.

Unfortunately, the Indian Act does not provide any more clarity issues of merchantable quality, fitness for purpose or the position of third parties with regard to second hand goods. However, there have been a number of amendments made to the Act with respect to other aspects of the 1930 Act and in addition the application of other Acts such as the Consumer Protection Act of 1967 compensates for some of the loopholes in the Act.

Most other jurisdictions that have a Sale of Goods Act, such as Nigeria, Australia and certain states of the United States of America, have engaged in the trend of increasing consumer protection and have in place a great many laws that cover a contract of sale in one form or another such that many of the loop holes and lacunas in their law of sale are well plugged. The United Kingdom also has a multitude of local as well as

international laws that deal with various aspects of the contract of the sale of goods. Some of their laws include the Consumer Protection Act (1987), Unfair Contract Terms Act (1977) and the Vienna Convention for the International Sale of Goods (1930).

Having legislation that takes into account the unique nature of a particular society is crucial to that society's development. It follows, then, that Zambia ought to have an Act pertaining to sales that has the peculiar nature of the society in mind, but also the Act should also have room for an ever changing society as an Act that ignores the society's dynamism is a wet blanket over development.

4.0 CHAPTER FOUR

This chapter will give answers and reasons to the question: Why amend the 1893 Act? There are many factors that influence such a question. Matters of public policy, economics, politics and technology direct the kind of laws a society may have and the sale of goods does not escape these factors. The jurisprudence dwelled upon will have far reaching implications as to nature extent and effectiveness of a piece of legislature.

The aim of this chapter is to suggest possible amendments that can be made to the current Sale of Goods Act in Zambia in light of the country's peculiar socio-economic circumstances in order to make it a more user friendly, consumer protective law and above all more applicable law. Many of the suggestions are based on reflections of the United Kingdom's current Sale of Goods Act of 1979 which provides valuable insight and direction into plugging loopholes and injustices of the 1893 Act. The position of the Act as regards international transactions or trade shall also be discussed.

4.1 The quest for a better statute

Many states that adopted the 1893 Act, such as India, Nigeria and parts of the United States of America, have since amended it to suit their individual commercial climates. And it is only a matter of time that such alterations are made to any Act as an Act is supposed to reflect the aspirations and needs of a particular country.

Two unfortunate effects of the 1983 Act have to be pointed out. In the first place the Act did not in all respects accurately reproduce the pre-existing law. Secondly, the general effect of codifying of law was inevitably to render it static, and the law of sale was a branch of law that needed to develop further if it is to answer to the requirement of

the society. The second effect is perhaps of much more importance as it deals with the future of the law sale in a society.

It is clear from the previous chapter that the static effect of the Act has caused numerous defects in the law of sale that need serious and urgent attention from the law-maker and reformer in Zambia. What can these amendments be and how best may these recommended amendments be approached?

4.2 Recommendations

i) Conditions of merchantable quality and fitness for purpose

The Law Reform Commission of England made vast changes to section 14 of the 1893 Act to correct the negative effects it had particularly on the position of the buyer. The section was rearranged to have the condition of merchantability first followed by fitness for purpose. This implies that they wanted to put the condition of merchantability on a more important footing than fitness for purpose, because if something is of merchantable quality then it generally follows that it is fit for the purpose it was made and bought for.

The U.K. Act also removes the constraints the phrases “ *...in the course of a seller’s business to supply (whether he be the manufacturer or not),...* ” and “ *...a seller who deals in goods of that description(whether he be the manufacturer or not),...* ” respectively found in subsections 1 and 2 of section 14 which did not apply to private sales. It now applies to private sales and to those who do not always deal in *that* particular good. The phrase found in section 14 of the 1979 Act now says “ *Where the seller sells goods in the course of a business...* ” which now allows applies to sales

between private individuals as this transaction falls in the general definition of a “business”¹.

Another point is that a proper definition of “merchantable quality” is not present in the 1893 Act. The technical meaning of the term is of utmost importance, for if it is defined then this will certainly reduce on disputes as to what the term means and also move a load off the judges in constantly trying to define the term in case that comes before them. Section 14(2) of the 1979 Act defines “merchantable quality” by saying: *“Goods of any kind are of merchantable quality within the meaning of the subsection (2) above if they are fit for the purpose or purposes for which the goods of that kind are commonly bought as it is reasonable to expect having regard to any description applied to them, the price (if relevant) and all the other relevant circumstances.”*

This definition takes into account many factors that countless judges over the past century have expressed in their attempts to define the term., and it this definition that ought to be placed in a future SOGA.

ii) Second hand goods

In a society where there is a large market in second hand goods it is only expected that there ought to be legislation that clarifies the rights and duties of the parties in transactions for such goods. It is therefore recommended that the SOGA must have embodied in it sections that deal specifically with second or sub-standard goods.

The Act perhaps in the sections dealing with merchantable quality and fitness for purpose should include subsections that protect the buyer of such goods and places some form of

¹ Sec 61(1) of the 1979 Act and also *Borough of Havering v. Stevenson* (1970) 3 ALL E.R. 609

obligations on the seller as it is evident from the problems highlighted in chapter three a buyer may have great difficulty bringing an action against a seller or manufacturer. Therefore the conditions merchantable quality and purpose must be made applicable to second hand goods.

iii) Third parties

Tied to the suggestion above is the issue of a consumer or third party who did not actually purchase the goods but is the ultimate user of the goods. The Act in its current state does not give much recourse to a third party as a contract of sale of goods is primarily based on contract law, and one of the fundamental precepts of contract is the principle of privity of contract. So, as a result a third party may only find recourse in the law of torts, particularly negligence.

It is only fair that the Act takes into account the position of non-contracting parties because it is only reasonable to presume that goods often purchased by a buyer may be intended for use by another. The section of the Act to deal with this may provide under what law a claim with respect to third parties must fall under, either contract or negligence or some other law, or a combination of laws. This will recognise and respect the position of third parties even further.

iv) Contract terms and consumer protection statutes

The United Kingdom and other jurisdictions have had Acts that deal with terms of contracts and consumer protection for an number of decades. These Acts give proper directions on factors that the SOGA alone does not offer. Factors such as that a party in

dealing as a consumer, one of the parties is acting, or that the goods are the type ordinarily supplied for consumer use or consumption. Such Acts further provide for penal provisions and special rules of evidence or procedure that the SOGA does not have which make dispute settlement easier by prescribing punishment and rules. For example, the Consumer Transactions (Restrictions on Statements) Order (1976) made under the Fair trading Act (1973), sections 22 and 134(2), which makes it an offence to purport to include in a consumer sale transaction any term which is declared void by sections 6 and 20 of the Unfair Contract terms Act (1977). This, in effect, makes it an offence to purport to contract out of liability for certain undertakings as to title, quality, etc., implied in favour of a consumer-buyer under sections 12 to 15 of the Sale of Goods Act 1979.

Although this recommendation seems to suggest that a contract of sale may become inundated with a plethora of statutes, which would defeat the aim of the law as being simple to allow the layman to understand, it is unavoidable because all legal relationships are or have become more complex as people constantly push for better rights and obligations. It will therefore be necessary to cater for these changes in the relationships and the best way is to provide appropriate legislation to elaborate on the different aspects of the relationships.

iv) International trade and transactions

Zambia is a member of a number of regional and international groupings that have at the core of their aims increased bilateral and multilateral trade and investment among the members. Of particular note is Zambia's membership to the Common Market for Eastern and Southern Africa (COMESA). COMESA is designed along the lines of the

European Union and intends to have a Common Market by 2010. Zambia is already a member of the COMESA Free Trade Area (FTA) that enhances trade in goods and services on duty and quota-free terms.

For Zambia importation of goods far exceeds what she exports to the rest of the world; and her membership of groups like COMESA would imply that once the group becomes a fully fledged Common Market like that found in most of continental Europe then Zambia shall be flooded with a huge amount of imported goods due to the removal of tariff and non-tariff barriers. It would only be wise that Zambia designs a statute that will take these future changes into account and state which law will be applicable to international transactions of sale if one of the parties to it is based in Zambia. This will not only circumvent the still internationally contentious issue of conflict of laws but above all protect the Zambian retailer, buyer or consumer with regards to the imported goods who ultimately the local law ought to protect.

It would also be prudent to consider findings and recommendations made by various other international and intergovernmental bodies or conventions that Zambia is a member of or a signatory to, particularly the United Nations Commission on International Trade Law (UNCITRAL) and United Nations Commission on Trade and Development (UNCTAD)². Such bodies have undertaken various studies and meetings that have given very helpful insight into the issues of commercial law in developing countries like Zambia.

² For a discussion of this see Ndulo, M., *UNCITRAL: The Unification of International Trade Law in developing Countries*, Zambia Law Journal (Special Edition, 1998)

viii) Small claims court

The Small Claims Court Act, chapter 47 of the laws of Zambia, was enacted in 1994 and was designed to provide a fast track court system to handle matters that were not of a substantial monetary amount and further simplify the court process thereby decongesting the already established courts. The court is designed to use an arbitral style rather than the adversarial system that is predominant in the Zambian court system.

It is suggested that matters in relation to the SOGA be dealt with by this court because it is most likely that disputes would often arise out of damage or loss from small appliances such as an iron or woollen undergarments. Therefore the injured party should have recourse that is cheaper and easier to understand to resolve the matter expediently. But this should not exclude claims that may result in substantial amounts of damages being awarded such as those that may be found in disputes between a manufacturer and a retailer.

The use of this court would ensure that matters arising out of contracts of sale of goods are expediently handled with less expense and legal jargon and requirements of the traditional courts, of which the majority of Zambians still do not comprehend. This would also have the effect alleviating the traditional court system, which is already over stretched, of a multitude of cases.

Reasons for amending the 1893 Act are abundant, and the recommendations given above are not the only ones that should be considered. What may make it an easier task in implementing these reasons is that there have already been vast amounts of works done in other countries which have a similar legislation and further more by multi-governmental

bodies and international organisations that have addressed key issues and made very useful recommendations with respect to the sale of goods, which can be applied in Zambia. But what should be at the core of any amendments, or even creation of a new Act, is that Zambia has its own unique aspects with respect to transactions of sale of goods and it these that should direct the law of sale in Zambia. This will most certainly result in the advantage of having an Act that is very much applicable to the Zambian society today and in the future.

5.0 CHAPTER FIVE

5.1 Conclusion

The Sale of Goods Act has existed in its current form for over one hundred and ten years, and has been in application in this form in Zambia since her independence in 1964. Even at Zambia's independence the Act was already under question and scrutiny the United Kingdom. To date, other more modern and progressive societies that were once British colonies or protectorates, who after attaining their independence also adopted the 1893 Act like Zambia did, have in essence discarded the 1893 Act and replaced it with more applicable legislation to their respective situations. From the United States of America to the islands of New Zealand it was recognised in the past century that alteration of the 1893 Act was imperative to a more conducive and acceptable form of conducting transactions in sales of goods.

It is therefore only expected and certainly imperative that Zambia begins to seriously look into the law of sale by also determining the impact the 1893 Act has on commercial transaction in her jurisdiction today.

The preceding chapters have, therefore, given an insight to the nature, requirements and results of a contract of sale under the Sale of Goods Act, 1893. This Act has a number of defects that have been highlighted against the backdrop of the Sale of Goods Act, 1979 of England that has erased most if not all the defects stated in this paper.

This paper has predominantly dwelled on the defects of the contractual aspect of the 1893 Act and not on the proprietary aspect because it has been recognised that the bulk of English litigation based on this Act, which still carries a lot persuasive weight in

Zambian courts, has been on the contractual side such as implied terms and obligations or the question of whether the goods are ascertained or not. In Zambia, however, most litigation, which is not large in volume at all, with respect to the Act has been on the questions on proprietary rights such as those resulting from goods in transit. This is because the question of contractual demands of the Act are quite contentious, such that litigants and the courts prefer to handle such questions under other heads of law such as pure contract law or the law of torts.

It is these questions that the preceding chapters have attempted to dissect and offer possible solutions for. This paper has further attempted to make one realise the corner that a consumer or buyer is placed by the Act because of the amount of proof that this party often has to show in a dispute as opposed to the seller, both on a local and international level. This is also as a result of the Act attempting not to interfere in the freedom of contract and the rule *caveat emptor*. It may be that the emphasis is on consumer protection at the expense of the seller, but this is unavoidable as the consumer is often the party injured in contracts of sale.

It is therefore up to those tasked with law reform, particularly the Law Development Commission, to make the Sale of Goods Act one that takes into account the peculiarities of the Zambian society but still remains abreast with today's local and international commercial transactions. It is conceded however that such reform may take a long time to come because in a country battling crippling economic and political downturns the law of sale may not be considered as a pressing issue that is affecting the Zambian society today.

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