



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: D. S. MAJANJA J.**  
**CIVIL CASE NO. 342 OF 2007**

**BETWEEN**

**CHIORINO SOUTH AFRICA (PTY) LIMITED (Formerly**

**PRECISION BELTING (PTY) LIMITED) ..... PLAINTIFF**

**AND**

**BELTPRO (K) LIMITED .....DEFENDANT**

**JUDGMENT**

1. The plaintiff's claim against the defendant as set out in the amended plaint dated 17<sup>th</sup> February 2016 is for EUROS 76,000.00 being the balance due and owing to the plaintiff in respect of goods sold and delivered to the defendant. While the defendant denied the claim in its statement of defence dated 1<sup>st</sup> August 2007, it pleaded in the alternative that the plaintiff was seeking to compound the undertakings of two distinct entities hence it was liable. It further pleaded that the plaintiff had not made full disclosure of its case and that the claim was vague as it lacked particulars.

2. The plaintiff called its financial director, Gareth Evans Jones (PW 1), as its only witness. The matter was heard in part by Havelock J. After the close of its case, the court allowed the plaintiff to amend its plaint to reflect the fact that Precision Belting (Pty) Limited had changed its name to Chiorino South Africa (Pty) Limited.

3. The matter came up for hearing of the defence case on 26<sup>th</sup> May 2019. I rejected the defendant's advocate's application for adjournment and in the absence of any witness, I directed the defendant to close its case. Both parties filed written submissions in support of their respective pleadings.

4. PW 1 testified that between 2002 and 2004, the plaintiff supplied to the defendant transmission belts. The defendant would place orders and be afforded credit for a period of 90 days from the date of the invoice. The plaintiff duly issued invoices to the defendant for goods supplied. PW 1 further testified that the defendant informed it that it had changed its name from Trackspa Limited to Beltpro (K) Limited. The parties continued trading until March 2002 when the defendant started disputing the debt. PW 1 stated that as at February 2004, the outstanding amount was EUROS 76,002.00.

5. Although the defendant did not call any evidence, it submitted that that the defendant did not have capacity to enter into a legally binding contract at the time some of the goods were delivered. Counsel for the defendant referred to its bundle of documents which showed that the defendant was incorporated on 15<sup>th</sup> August 2002 hence it could not have entered into any contractual relationship with the plaintiff. While I agree with the defendant's position, supported by **section 44** of the **Companies Act, 2015**, that a pre-incorporation contract cannot be enforced against a company unless it is adopted or ratified by the company upon incorporation (see **Kelner v Baxter [1866] LR 2 CP 174**), I also hold that the question whether the company is liable for such contracts is a question of fact.

6. The plaintiff's case was not controverted as the defendant did not call any evidence to support its defence. Its evidence, as set out in its list and bundle of documents, was not admitted in evidence and cannot be relied upon to support its contention that it was not liable. I find that the plaintiff proved the business relationship between it and the defendant by producing invoices, statements of accounts and correspondence between them. The defendant did not object to production of any of these documents. Although the defendant claimed in its defence and written submissions that the plaintiff was conflating claims against two different entities, PW 1 showed that Trackspa Limited changed its name to Beltpro (K) Limited and the parties continued trading after it re-issued invoices on the same terms. I also hold that a mere change of name does not affect the liability of the company as provided under **section 66(2)** of the **Companies Act, 2015** which states that, "66(2) The change [of name] does not affect any rights or obligations of the company or invalidate any legal proceedings by or against it."

7. PW 1 also produced correspondence showing that the defendant admitted the debt. In a letter dated 12<sup>th</sup> September 2003 referenced "Settlement Plan", the defendant accepted that it was indebted to the plaintiff and offered to give a payment plan. The parties also exchanged emails in which the defendant admitted its indebtedness. For example, in an email dated 17<sup>th</sup> September 2003, the defendant's managing director addressed PW 1 and informed him that according to their reconciliation, it owed EUROS 75,813.60 and would prepare a payment plan on that basis. Regrettably no payment was made resulting in this suit. It is on the basis of clear admissions by the defendant that I dismiss its submission that the plaintiff, "disingenuously altered its accounts by forging invoices, alteration of its own contract documents, misrepresentation of facts and uttering false documents, in an attempt to defraud and steal from the defendant." These assertions were simply not proved by the defendant.

8. From the totality of the evidence, I find and hold that the plaintiff proved its case on a balance of probabilities. Consequently, I enter judgment for the plaintiff against the defendant for:

(a) EUROS 76,000.00

(b) Interest on (a) above at court rates from the date of filing suit until payment in full.

(c) Costs of the suit.

**DATED and DELIVERED at NAIROBI this 19<sup>th</sup> day of NOVEMBER 2019.**

**D. S. MAJANJA**

**JUDGE**

Ms Wambugu instructed by KRK Advocates LLP for the plaintiff.

Mr Amollo instructed by Rachier and Amollo Advocates LLP for the defendants.