

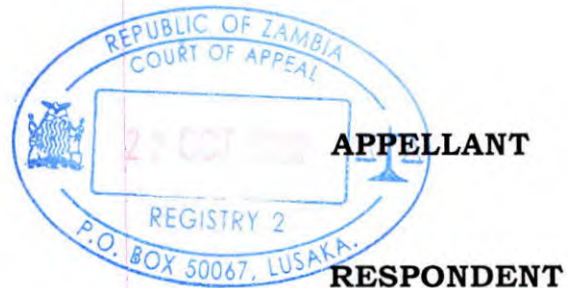
IN THE COURT OF APPEAL FOR ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

Appeal No. 80/2020

B E T W E E N :

HITECH LOGISTICS LIMITED
AND

UGONDO ITALIAN STYLE LIMITED



CORAM : Mchenga DJP, Chishimba and Ngulube, JJA.
On 13th October, 2020 and 22nd October, 2020

For the Appellant : Mr. P. Sambo of Messrs Friday Besa &
Associates

For the Respondent : Mr. Matalilo of Messrs James & Doris Legal
Practitioners

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court

CASES REFERRED TO:

1. Galaunia Farms Limited v. National Milling Corporation Limited
(2004) ZR 1 S.C
2. Zambia Railways v. Pauline S. Mundia Sialumba (2008) ZR 287 Vol.1
(S.C)
3. Nkhata and Others v. The Attorney General (1966) ZR 124
4. Mohamed v. The Attorney General (1992) ZR 49
5. Justin Chansa v. Lusaka City Council (SCZ) Judgment No. 29 of 2007
6. YB and F Transport Limited v. Supersonic Motors Limited SCZ
Judgment No. 3 of 2000

7. Verrechia v. Commissioner of Police for the Metropolis (2002) EWCA CIV 605
8. Wilson Masauso Zulu v. Avondale Housing Project Limited (1982) ZR 172 SC
9. Holmes Limited v. Buildwell Construction Limited (1973) ZR 97
10. Wilson Short v. Wilson (1842) 9 CL
11. Credit Africa Bank Limited (in Liquidation) v. John Dingani Mudenda SCZ Judgment No. 10/2013
12. JZ Car Hire v. Malvin Chala and Scirocco Enterprises Limited (2002) Z.R 112
13. B.P Zambia PLC v. Zambia Competition Commission Total Aviation and Export Limited Total Zambia SCZ Judgment No. 22of 2011
14. Anderson Kambela Mazoka and 2 Others v. Levy Patrick Mwanawasa and 2 Others (2005) ZR 130
15. Michael Mabenga v. Sikota Wina and 2 Others (2003) ZR 110
16. Attorney General v. Achiume (1983) ZR 221

LEGISLATION AND OTHER WORKS REFERRED TO:

1. Phipson on Evidence, 17th Edition (London, Thomson Reuter 2010
2. Treitel, The Law of Contract 13th Edition (Sweet and Maxwell) 2011
3. Halsburys Laws of England 4th Edition, paragraph 538
4. Halsbury's Laws of England(Custom and Usage) Volume 12(1) Reissue
5. Halsburys Laws of England Civil Proceedings (Volume II) (2009) 5th Edition
6. Hatchard, M. Ndulo, The Laws of Evidence in Zambia, Cases and Materials (2013) Southern Institute for Policy and Research

7. Order XL Rule 6 of the High Court Act,
8. Order 62 of the Rules of the Supreme Court (RSC) 1999 Edition
9. Zambia Civil Procedure: Commentary and Cases Volume 2, by DR P. Matibini
10. Murphy on Evidence 5th Edition (2002) Universal Publishing Company, New Delhi

1.0 **INTRODUCTION**

1.1 This is an appeal against the judgment of the court below delivered by Justice W.S Mweemba dismissing the appellant's counter claim and upholding the respondent's claims.

1.2 **BACKGROUND FACTS**

The respondent had ordered a consignment of shirts from Eritrea, loaded in a 20 foot container. The goods were to be shipped to Lusaka through Dar es Salaam port. The respondent engaged the appellant as clearing and forwarding agent, to clear the consignment at Dar es Salaam port and transport to Lusaka. The agreement between the parties was verbal. The respondent paid the appellant the agreed commission of US\$ 4,000. In addition, the appellant was paid the sum of K32, 000 on 28th October 2014 in respect of

customs duty and Value Added Tax (VAT) payable to Zambia Revenue Authority.

1.3 The terms of the oral contracts were that the goods be cleared and delivered in the 20 foot container within two weeks upon arrival. Contrary to the above, the goods were delivered late and in a Canter truck. As a result of the negligent transshipment of the goods, some were allegedly damaged and lost. The loss was valued in the sum of K29, 600.

1.4 The appellant despite having been put in funds neglected to pay Zambia Revenue Authority (ZRA) the requisite taxes. The sum of K12, 000 was refunded back to the respondent from the disbursed sum of K32, 000. The respondent was forced to pay the sum of K44, 833.94 being customs duty tax on the imported goods inclusive of late payment penalties imposed by ZRA.

2.0 **DEFENCE AND COUNTER CLAIM BY THE APPELLANT**

2.1 In its defence, the appellant admitted entering into the aforementioned contract on the 14th October 2014. The appellant averred that it could not deliver the goods within the time frame agreed upon because of errors contained on the bill of lading which required amendment. A fact brought

to the respondent's attention on 29th October 2014. The bill of lading indicated that the shipment was terminating in Tanzania instead of transiting through and terminating in Zambia. The respondent insisted on correcting the error and delayed in effecting the amendments to the bill of lading until the 2nd December 2014.

2.2 The loss suffered if any was occasioned by the respondent. The appellant denied clearing the goods on special delivery. That due to the delay in amending the bill of lading the appellant was forced to hire a canter motor vehicle to transport the goods to Lusaka because the 20 foot container was ordered back by the owners due to lapse of time.

2.3 The appellant as a result of the delay by the respondent in amending the bill of lading, counter claimed the following charges and expenses;

(i) USD 1,600 detention charges for ordering the truck without using the port.

(ii) USD 2,800 advanced sum paid to the agent at Dare es Salaam.

(iii) USD 2610 penalties due to Tanzanian Authorities.

(iv) UDS 2,000 being hire charges for the truck from Dare es Salaam to Lusaka.

(v) USD 350 being transshipping costs.

(vi) USD 200 communication expenses.

The total sum being US\$ 10,050. In addition damages for breach of contract were claimed.

3.0 **EVIDENCE ADDUCED IN THE LOWER COURT**

3.1 The evidence adduced was as stated in the pleading and witness statements. The disparity being the date when the bill of lading was allegedly amended. PW2 testified that the amendment was effected on the 7th of November 2014 though he had no evidence to show the actual date of amendment. PW2 conceded that the amendment to the bill of lading was effected outside the period of two weeks agreed for delivery of goods. That the delay in clearing the goods was caused by the defective bill of lading. According to PW2, the amendment was effected on 11th November 2014.

3.2 The appellant testified that the error in respect of the bill of lading was made by the supplier who indicated the wrong port of termination. That the supplier only amended the error on the 4th of December 2014, despite notifying the respondent of the error on 29th October 2014. The delivery order was subsequently issued on 13th December 2014 after approval of amendments by customs authority.

3.3 The consignment left Dare es Salaam on 16th December 2014 and arrived in Lusaka on 22nd December 2014. The release order was dated 20th November 2014. As regards the alleged missing and damaged goods, the appellant was not aware of the same.

4.0 **HOLDING BY THE COURT BELOW**

4.1 The court considered the claims and the evidence adduced. On the issue of whether or not the respondent delayed to amend the bill of lading, justifying delay on the part of the appellant to clear the goods, the court made a finding of fact that the amendment of the bill of lading was done between 31st October and 20th November 2014. The bill of lading was amended before the delivery order was issued on 20th November 2014.

4.2 The court below found that both parties were in breach. On the part of the appellant, the breach was as follows;

- (i) The failure to seek and obtain consent from the respondent, before transshipping the goods from the 20-foot container into a Canter truck. This breach led to the damage of some of the goods.

The learned trial court stated that;

“When it became evident that the contract could not be performed within 14 days, the appellant was at liberty to repudiate the contract within a reasonable time. This was not done and the contract remained open. The parties must therefore accept any benefit or risks arising out of the extended contract because it was not discharged”

(ii) The failure by the appellant to clear and deliver the goods from the 20th of November 2014 within 14 days by the 10th of December 2014. The goods being delivered on 22nd December 2014.

(iii) The failure to pay customs and vat duty.

4.3 In respect of the respondent, the breach being the failure to provide the appellant with the bill of lading indicating the right port of determination of the goods.

4.4 The court proceeded to grant the respondent the claims sought, including the payment of 50% of the penalties imposed by ZRA in the sum of K5, 400, save for the claim of damages for breach of contract.

4.5 As regards the counter claim sum of US\$ 10,050, the learned trial judge rejected the claims and held that the respondent

did not produce documentary evidence such as receipts to prove the claims and dismissed it accordingly.

5.0 **APPEAL**

Being dissatisfied with the judgment of the court below, the appellant raised seven grounds as follows;

- (1) The learned trial judge erred in law and in fact when he held that the amendment to the bill of lading was done some time between 31st October 2014 and 20th November 2014 and not on 4th December 2014 when there was no evidence whatsoever to support the conclusion that the amendment was done during that period.*
- (2) The learned trial judge erred in law and fact when he held that DW1 did not lose control over the process of amendment of the bill of lading on the ground merely that he was copied in the email from Ahlam Kaled, as being copied in the email did not and could not be considered to mean DW 1 had control of the process of amendment of the Bill of lading.*
- (3) The learned trial judge erred in law and in fact when he refused to accept the evidence that the release order was obtained under pre-clearance in the absence of any evidence to support his contrary position particularly given that the appellant herein, being defendants in court below had no onus to prove its defence on the balance of probabilities.*
- (4) The learned trial judge erred in both law and fact when he held that the appellant breached the contract when it trans shipped the goods from the 20 foot container into a Canter truck in the face of evidence showing that arising from the delay in amending the bill of lading by the respondent, the time for using the container expired and the owners of the container called it back.*

- (5) The learned trial judge grossly misdirected himself in both law and fact in that despite expressly making a finding that the respondent breached the contract when she delayed in amending the bill of lading, the court still went ahead to find the appellant liable and excused and/or ignored the fact that the delay herein was entirely caused by the respondent.*
- (6) The trial judge erred in law and fact when he dismissed the entire counter-claim despite the appellant tendering documentary evidence which showed the extra expenses the appellant incurred to as a result of the respondent's delay in amending the bill of lading.*
- (7) The learned trial judge grossly misapplied the principle of law on award of costs when he went ahead to award the respondent costs in these proceedings even when the judge expressly stated more than four times in his judgment that the respondent was in breach of her obligation under the contract and therefore contributed to the delay in the performance of the contract.*

6.0 **ARGUMENTS ADVANCED**

- 6.1 The appellant relied on its heads of arguments dated 15th May 2020. In regard to ground one, assailing the holding by the learned trial judge to the effect that the bill of lading was amended between 31st October and 20th November 2014, the appellant submits that there was no evidence to support the conclusion. That the bill of lading was amended by the shipper on 4th December 2014, two months after the contract, hence the delay by the appellant in performing the

contract. Any consequent loss suffered by the respondent is its own.

6.2 Further that the learned trial judge reversed the burden of proof by insisting that the appellant adduce evidence to disprove several aspects of the respondent's case, particularly the holding the "***I find that the defendant has failed to show or account for what DW1 was doing between the date when the order of release was printed on 20th November 2014 and 10th December 2014 when he said he submitted it for clearance***"

6.3 It is submitted that there was no document pointing to a specific date and the court took to speculation as regards the date which was a misdirection. The appellant in a nutshell argued that the respondent failed to prove its case on a balance of probabilities. The cases of ***Galaunia Farms Limited v. National Milling Corporation Limited*** ⁽¹⁾ and ***Zambia Railways v. Pauline S. Mundia Sialumba*** ⁽²⁾ were cited on whom the burden of proof lies. The learned authors of ***Phipson on Evidence, 17th Edition (London, Thomson Reuter Limited)*** paragraph 6-06 at page 151 were referred to where they state that;

“As far as persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues.... A negative is more difficult to establish than an affirmative”

6.4 In ground two, the appellant contends that the court below erred in law and fact when it stated that DW1 did not lose control over the process of the amendment of the bill of lading merely because he was copied in the email from Ahlam Khaled to PW2.

6.5 The appellant submits that the respondent was responsible for effecting the amendment of the bill of lading, therefore it had no control of the process in respect of amendment. Being copied into an email cannot be interpreted as having control of the process of amendment. This findings of fact ought to be reversed as held in ***Nkhata and Others v. The Attorney General*** ⁽³⁾

6.6 Further that for all intents and purposes, the appellant was not privy to the contract between the shipper and the respondent, in which the shipper had prepared a defective bill of lading. The appellant went on to refer to the doctrine of privity of contract stated in **Treitel, the Law of Contract 13th Edition (Sweet and Maxwell) 2011**. It was submitted

that the misdirection by the court below materially altered the weight and effect of the appellant's oral evidence that it had no control of the process of amendment and ought to be set aside.

6.7 Ground three, assails the holding by the court that the release order was not obtained under pre-clearance. The appellant contends that the release order was obtained prior to the amendment of the bill of lading under "*pre clearance*". Though the respondent refuted this fact it failed to disprove the allegation. The appellant had no onus to prove its defence on the balance of probabilities. The case of ***Mohamed v. The Attorney General*** ⁽⁴⁾ was cited where the Supreme Court stated that he who alleges certain facts must prove the facts alleged. The appellant reiterated that the judge erred by shifting the burden to the appellant and neglected to apply the principles of law in respect of the burden of proof.

6.8 The appellant in ground four, submits that the court below erred by holding that it breached the contract by transshipping the goods from the 20 foot container into a Canter truck in the face of evidence that the delay arose from

the amendment of the bill of lading by the respondent. The delay is said to have been unavoidable because of breach by the respondent.

6.9 It is contended that the failure to deliver the goods in the 20 foot container did not amount to breach on the part of the appellant. Further that performance of the contract by the appellant was of "*the same kind*" as that promised, but only differed in time of delivery, quantity and manner in which the goods were delivered.

6.10 The supervening event being the process of amendment of the bill of lading which took long to be rectified, causing the delay in delivery of goods as agreed. As the contract became impracticable to perform on the agreed terms due to breach by the respondent. No permission was needed to tranship the goods onto the Canter. The appellant had no choice because the 20 foot container had already been taken back by its owners. Further that the respondent was not willing to pay additional charges for the container to be used.

6.12 The appellant under ground five submit that the respondent breached the contract before its performance by the

appellant. Reference was made to the definition of breach of contract and to **Halsburys Laws of England paragraph 538 4th Edition** on the rights of an innocent party to rescind the contract and sue for damages as a result of breach.

6.13 The contention by the appellant in this ground is that the court below only faulted one party and ignored the omission by the respondent as well as the evidence tendered by the appellant. The case of **Justin Chansa v. Lusaka City Council** ⁽⁵⁾ was cited on the rejection of evidence by a court without advancing reasons being considered a misdirection. Therefore the learned trial court's judgment should be set aside.

6.14 In ground six, the appellant contends that the dismissal of its counter claim on account of unsubstantiated evidence at trial is unfounded. The appellant's bundle of documents shows various documentary proof of receipts showing additional expenses incurred. The appellant had proved its counter claim case on a balance of probabilities.

6.15 Ground six assails the award of costs to the respondent despite the court below holding that the respondent was in

breach of the obligation under the contract and contributed to the delay in the performance of the contract. The Supreme Court decision in the case of ***YB and F Transport Limited v. Supersonic Motors Limited*** ⁽⁶⁾ was cited in which it was stated that costs follow the event unless the successful party did something wrong in the action or conduct of it. The appellant further made reference to the cases of ***General Nursing Council of Zambia v. Mbangweta*** ⁽⁷⁾ and ***Verrechia v. Commissioner of Police for the Metropolis*** ⁽⁸⁾ as well as **Order XL (6) of the High Court Rules** on the award of costs being in the discretion of the court.

6.16 It is submitted that the lower court misapplied the law on costs by awarding them to the respondent, without clear reasons. We were urged to set aside the order of costs as there was no malafides in the conduct of proceedings on the part of the appellant. We were urged to uphold the appeal.

6.17 The respondent filed heads of arguments dated 13th October 2020. In response to grounds 1, 2 and 3, it is submitted that the appellant is seeking to reverse findings of fact made by the lower court. Namely, that the bill of lading was amended between the 31st and 20th November 2014 and that there was

therefore no justification for the delay in clearing the goods and transshipping into a canter truck instead of the agreed container.

6.18 It is submitted that the issue is whether the findings of fact made by the court below are perverse or made in the absence of evidence or upon misapprehension of facts to warrant reversal by the appellant court. The case of ***Wilson Masauso Zulu v. Avondale Housing Project Limited*** ⁽⁹⁾ was cited on reversal of findings of fact made by the lower court on appeal.

6.19 The respondent went on to refer to the evidence in the court below, particularly the trail of email communications between it and the shipping agents dated 31st October 2014, 7th November 2014 and 10th November 2014 regarding the amendment to the bill of lading. The respondent's contention being that the trial court had sufficient evidence to make the findings and cannot be faulted. Further there was evidence to show that the appellant was aware directly or indirectly of the issue of the amendment of the bill of lading. He was therefore in control of the amendment process as held by the court below.

6.20 As regards ground three, the respondent disagreed with the contention by the appellant that the court arbitrarily refused to accept the evidence that the Release Order was obtained under pre-clearance. The respondent submits that the trial judge stated that the release order is the last document that comes after the bill of lading. Further that the issue of the Release Order was an afterthought. In any event, the release order document does not indicate as being a pre-clearance order.

6.21 It was contended that the appellant was merely attempting to introduce extrinsic evidence which is inadmissible. The case of ***Holmes Limited v. Buildwell Construction Limited*** ⁽¹⁰⁾ was cited where it was held that as a rule of law, parol evidence cannot be admitted to add or contradict a deed or other written documents, except in cases of fraud etc. Further, reference was made to the case of ***Wilson Short v. Wilson*** ⁽¹¹⁾ as well as **Halsbury's Laws of England (Custom and Usage) Volume 12(1)** on the inadmissibility of oral or extrinsic evidence to alter the terms of a contract expressed in writing and the reading of the instrument as a whole in order to ascertain its true meaning.

6.22 The respondent drew our attention to the definition of a **Bill of Lading** which may be regarded in three several aspects;

(i) As a receipt given by the master of the ship acknowledging that the goods specified in the bill have been put on board.

(ii) A document containing the terms of the contract for the carriage of goods.

(iii) A document of title to the goods.

6.23 It is contended that because a Delivery/Release Order is produced to direct that the goods specified therein can be released to the person claiming the goods, the bill of lading must have been amended before 20th of November 2014.

6.24 As regards the assertion that the court below shifted the burden of proof to the appellant, the respondent contends that in respect of the counter claim, the appellant had the onus to prove its claim. The appellant had made an assertion that the Release Order dated 20th November 2014 was obtained under pre-clearance, therefore he had the onus to prove what he asserted. The respondent extensively cited paragraphs 1-1108 of **Halsburys Laws of England Volume II (2009) 5th Edition** on the burden and standard of proof and

Hatchard, M. Ndulo, The Laws of Evidence in Zambia: Cases and Materials (2013). In a nutshell, the respondent argued that the court below was on firm ground in rejecting the assertion that the release order was obtained under preclearance and issued before the bill of lading was amended.

6.25 In respect to ground four, the respondent contends that the lower court was on firm ground by holding that the appellant breached the contract by delivering the goods in a Canter truck instead of a 20 foot container. The respondent referred to the terms of the contract earlier alluded to. It is further contended that though the bill of lading was defective, it was rectified before the 20th of November 2014. The appellant ought to have delivered the goods within 14 days from the said date, the goods were only delivered on 22nd December 2014. This amounted to breach.

6.26 The appellant having not repudiated the contract when it received a defective bill of lading requiring amendments resulting in the delay, acquiesced to the use of the defective document. As authority the case of **Credit Africa Bank**

Limited (in Liquidation) v. John Dingani Mudenda ⁽¹²⁾ was cited on the definition of acquiescence.

6.27 The start date of the contract was the date the bill of lading was amended. As regards the delivery of the goods in a Canter truck, the respondents argues that no consent was obtained. The appellant made no effort to contact the respondent to inform it that the container was needed back. The delay in amendment of bill only affected the time within which to deliver but not the form of transshipment of goods.

6.28 In relation to ground five, it is submitted that the despite being partly to blame for the delays in amending the bill of lading, the breach was not material and did not go to the root of the contract. The respondent was awarded claims arising from breach on the part of the appellant, therefore the court below was on firm ground. The appellant reiterated the holding of the court in respect of 'its' claims for damages for breach and consequential loss of business, declined by the lower court.

6.29 As regards ground 6, the dismissal of the appellant's counter claim for lack of proof, the respondent referred to the burden

of proof stated in **Halsbury's Laws of England Volume 2, 5th Edition** and cited the case of **JZ Car Hire v. Malvin Chala and Scirocco Enterprises Limited** ⁽¹³⁾ where it was stated that mere production of the hire chart charges was not proof that a particular vehicle was hired. It was contended that in the absence of receipts from the entities alleged to have been paid, the appellant failed to substantiate their counter claim for special damages. Mere production of the listed expenses was not sufficient to prove their claims.

6.30 In response to ground 7, on the award of costs to the respondent, it was submitted that costs are in the discretion of the courts. Reference was made to the following; **Order XL Rule 6 of the High Court Act, Order 62 of the Rules of the Supreme Court (RSC) 1999 Edition**, the case of **B.P Zambia PLC v. Zambia Competition Commission Total Aviation and Export Limited Total Zambia** ⁽¹⁴⁾ and Dr P Matibini's book entitled **Zambia Civil Procedure: Commentary and Cases Volume 2**, on the principle that costs follow the event, unless it appears to the court that in the circumstances of the case, some other order should be made, or the successful party did something wrong in the

action or in the conduct of it. It was submitted that the respondent having succeeded in its claims for repayment of the sum for customs duty advanced to the appellant and damages in respect of the goods lost and there being no improper conduct in prosecuting the matter, the respondent was entitled to costs. We were urged to dismiss the appeal.

7.0 **ARGUMENTS IN REPLY**

7.1 The appellant in its heads of argument in reply dated 16th October 2020, reiterated their arguments on the burden of proof in civil matters, that it lies on the person asserting the facts to prove them. Instead, the court below placed the burden of proof on the appellant. The cases of ***Anderson Kambela Mazoka and 2 Others v. Levy Patrick Mwanawasa*** ⁽¹⁵⁾, and ***Michael Mabenga v. Sikota Wina and 2 Others*** ⁽¹⁶⁾ were cited. It is contended that there was no proof to show that the bill of lading was amended on a specific date and time. Therefore the finding of fact to that effect must be reversed as held in the case of ***Attorney General v. Achiume*** ⁽¹⁷⁾

7.2 The said findings of fact are perverse and made upon a misapprehension of facts. The appellant went on to refer to the holding by the court below, that the appellant did not lose control of the amendment process of the bill of lading. This is contended to be contrary to the holding by the court that the respondent was also responsible for the delay.

7.3 As regards the contention by the respondent that the appellant was seeking to introduce extrinsic evidence to vary the release order, it is submitted that there was no such attempt. The Release Order was obtained under pre-clearance and the issue of extrinsic evidence does not arise. We were urged to uphold the appeal with costs.

8.0 **DECISION OF THE COURT**

8.1 We have considered the appeal, the authorities cited and the submissions advanced by Learned Counsel for the parties. Grounds one, two and three attack the findings of fact made by the court of first instance namely the holding that;

- (i) The amendment to the bill of lading was done between the 31st of October 2014 and 20th November 2014 and not 4th December 2014.

(ii) DW1 (appellant) did not lose control over the process of amendment of the bill of lading because he was copied in the email from Ahlam Kaled and had control of the process of amendment of the bill of lading.

(iii) The release order was not obtained under pre-clearance.

8.2 It is trite that an appellate court will only reverse findings of fact made by the lower court in instances where there is no evidence to support the conclusion; or where the conclusion is based on a misunderstanding of the evidence or where the conclusion was one that no reasonable judge could have reached or is not reasonably justified.

8.3 There is a plethora of cases by the Supreme Court in which it has stated that an appellate court will only reverse findings of fact made by a trial court where an appellate court is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts. See the case of ***Wilson Masuso Zulu v. the People***⁽⁹⁾ (*supra*).

8.4 The issue to be determined is whether the findings of fact made by the court below, were made in the absence of any

relevant evidence or upon misapprehension of facts as contended by the appellant.

8.5 The court below in respect of the amendment of the bill of lading, held that the bill of lading was amended between 31st October 2014 and 20th November 2014. The evidence in the court below tendered by the appellant was that the bill of lading was amended by the 4th of December 2014. The respondent on the other hand testified that the amendment was done on the 31st of October 2014 as per email of even date.

8.6 It is not in issue that the initial bill of lading given to the appellant contained errors as to the final port of destination. This fact was brought to the attention of the respondent on the 26th of October 2014. The respondent opted to attend to the issue of amendment of the bill of lading, when the appellant offered to resolve the issue.

8.7 Though the respondent contends that the bill of lading was amended on 31st of October 2014, the record shows that on that date an email was sent advising of the fees in respect of amendment in the sum of US\$ 150. That is the same date

the shipper was advised of the error in amendment. We refer to pages 135 and 136 of the record. At page 113 of record of appeal, there is a Release Order dated 21st November 2014 issued by Tanzania Revenue Authority.

8.8 We are of the firm view that the lower court cannot be faulted for holding that the bill of lading was amended between 31st October and 20th November 2014. This is deduced from the date of the Release Order. Any reasonable court would have come to the same conclusion. We therefore decline to overturn the findings of fact made by the lower court to that effect.

8.9 As regards the holding by the court that the appellant did not lose control of the process of amendment of the bill of lading because he was copied into the correspondence, we are of the view that the court below erred in fact and law. The mere fact that the appellant was copied in the correspondence between the shipper and respondent did not entail that the latter had control of the process of amendment of bill of lading.

8.10 We refer to the emails in record on which the appellant was copied in. Even the fact that the appellant had emailed the shipper advising them to amend the bill of lading to read ‘*in transit*’ to Zambia, it had no control over the changes to be effected. It is trite that a bill of lading serves as a document of title to the goods subject to the *nemo dat* rule. The shipper is obligated to provide correct information to the carrier regarding the goods. In the case of ***Mason v. Lickbarrow 1 BIH 359, Longborough CJ*** state that;

“A bill of lading is the written evidence of a contract for the carriage and delivery of goods sent by sea for certain freight... the contract in the usual form is the undertaking to deliver to the order or assigns of the shipper...”

8.11 Clearly there was privity of contract as regards issues of amendment to the bill of lading. The appellant was not privy to the contract of shipment between the shipper, carrier and consigner of the goods in issue. Therefore, we uphold ground two and set aside the holding by the court below that DW1 did not lose control over the process of amendment of the bill of lading merely because he was copied in the emails.

8.12 As regards the issue of whether the Release Order was obtained under pre-clearance, we have analysed the evidence

adduced in the court below. The appellant contends that the Release Order was obtained under pre-clearance. Pre-clearance or pre-arrival customs processing is a system that allows importers to begin the process of clearing their goods through customs before the products actually arrive at the port of entry. The shipment is essentially pre-approved.

8.13 We have perused the Release Order on the record dated 20th November 2014. The release order does not indicate that it was obtained under pre-clearance. Further there is no documentary evidence of the application for pre-clearance. It is trite that the process for pre-clearance as well as clearance of shipments require bills of lading to be presented, in addition to other requisite documents. It is not in issue that the bill of lading contained an error as to the final port of determination. This required amendment by the shipper/carrier of goods to correct the consignment from determining in Dar es Salaam to Lusaka Zambia.

8.14 Therefore, it cannot be argued that the release order for goods was obtained under pre-clearance before the bill of lading was amended. The goods could only be pre-cleared upon presentation of the amended bill of lading if at all pre-

clearance was to be sought. We are of the view that the lower court was on firm ground by holding that the goods were not obtained under pre-clearance.

8.15 The appellant further raised the contention that the court below shifted the burden of proof to the appellant (defendant) which it had no onus to prove. The appellant contends that the burden to prove that allegations in the matter rested on the respondent and did not at any point shift to it to raise an affirmative defence. The appellant in its defence and counter claim made certain assertions such as that the bill of lading was amended on the 31st October 2014, that the goods were obtained under pre-clearance before the bill of lading was amended.

8.16 The learned author Peter Murphy in his book **“Murphy on Evidence”** in respect of the burden of proof states at pages 89 and 90 that;

“The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential... if the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. Since the plaintiff affirmatively asserts his claim, the plaintiff bears the

burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes) referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence. An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiffs claim”

8.17 In the present case the affirmative defence by the appellant (defendant) was that the bill of lading was amended on 31st of October 2014 and further that the Release Order was obtained under pre-clearance. Having asserted the affirmative defence, which went beyond a mere denial, the defendant assumed the legal burden of proving such a defence. The appellant in this matter failed to prove his assertions that the bill of lading was amended on the 4th of December 2014 and the goods were obtained under preclearance even before the bill of lading was amended. Equally the respondent failed to prove that the bill of lading was amended on the 31st of October 2014. We find no merit on the issue of the burden of proof having shifted. The court was on firm ground by rejecting the assertions made by the appellant accordingly.

8.18 Ground four and five assail the holding by the court that the appellant breached the contract when it transhipped the goods from the 20 foot container into a Canter truck and that despite holding that the respondent breached the contract by delaying amending the bill of lading, held the appellant liable.

8.19 The contract in issue stipulated that the goods were to be delivered in a 20 foot container to the consignee by the appellant. The bill of lading contained an error which required amendment. The respondent who had the obligation to instruct the shipper to amend, delayed in obtaining the amended bill of lading. The documents furnished by the consignee contained errors as to the port of final destination. The shippers were notified and instructed to change the status of the consignment to Lusaka.

8.20 It is clear that the respondent breached the contract by supplying a defective document of bill of lading. At that stage of breach, the appellant was entitled to treat himself as discharged from liability to further perform his own obligations under the contract. The appellant instead of rescinding the contract went ahead and accepted the amended bill of lading and to the performance of the

contract. In any event, this breach was not material. The appellant equally breached the contract by not delivering the goods in a 20 foot container as per terms of the agreement. The appellant contended that the delay in amending the bill of lading resulted in the container being recalled back and it had to tranship the goods in a Canter truck. . The appellant also contended that delivering the goods in the 20 foot container would have attracted further costs.

8.21 We are of the view that the appellant did equally breach the contract by transshipping the goods into a Canter truck without obtaining the consent of the respondent. The issue here is that despite the delay occasioned in amending the bill of lading, the performance by the appellant was not in line with the agreed terms. No consent was obtained to tranship the goods. Though the appellant alleged a number of reasons for transshipping the goods in the container, no evidence was adduced of the extra costs to be incurred in delivering the goods in the container from the shippers or owner of the container. Equally no evidence was adduced to prove that the container was recalled back. Hence the holding by the court that both parties were in breach of

contract. The appellant was in further breach by failing to deliver within 2 weeks from the date of the Release Order of goods and by failing to pay the requisite Zambia Revenue Authority customs duty when it had been put in funds. We find no merit in ground four and five.

8.22 As regards the dismissal of the counter claim raised in ground six, the appellant contends that it had adduced evidence to prove the expenses incurred as result of the delay in amending the bill of lading. The appellant sought refund of detention charges, fees paid to an agent at Dar -es - Salaam port, penalties paid to Tanzanian authorities, hire charges for the truck, fees paid to customs at Nakonde in respect of the supervision of trans-shipping of the shipment and communication expenses totalling US\$ 10,050.

8.23 The appellant on record did not produce documentary proof of payment of the expenses incurred. At page 155 of the record, there is an invoice by Triple D limited in the sum of US\$ 5,800 made of various expenses including amendment storage, demurage and stripping to mention a few. There are no corresponding receipts or proof of payments that the appellant paid the alleged incurred expenses. The bundle of

documents produced by the appellant did not contain documents showing payments made in regard to the expenses allegedly incurred.

8.24 It is trite that special damages must not only be pleaded, but strictly proved. A plaintiff or defendant (counter-claim) who brings an action for damages for breach must prove the damages suffered. In our view it is not enough to just produce invoices/proformas or to write down the particulars and throw them at the court, they have to prove loss occasioned or damages sought. The proof is by way of evidence. A proforma invoice is not satisfactory proof of loss. The proof having lacked, the learned judge was entitled to dismiss the counter claim by the respondent.

8.25 We now move on to the contention that the respondent was not entitled to the awarded sum of K29,000 being the value for the missing goods arising from the transshipment of the goods into a Canter truck. Having earlier held that the appellant was in breach by transshipping the goods into the Canter truck from the 20 foot container without obtaining consent from the respondent, the court below was on firm ground in awarding the said sum. It appears in fact that the

transshipping of goods happened twice. Initially from the 20 foot container into a Canter truck. Secondly as can be deduced from the request to Zambia Revenue Authority (Nakonde), the appellant requested for transshipment. The reason advanced being that the goods cannot proceed to Lusaka due to 'un adequate' of funds, therefore request to tranship goods from truck No. T 257AXY to the Truck AJD 2471 was sought, this was approved by ZRA. The appellant did not refute the allegations that some goods were missing and whilst others were damaged. Its defence being that any loss was due to the fault of the respondent who delayed in amending the bill of lading. As earlier stated, the delay therein is not disputed, the issue is that no consent was obtained to tranship the goods or to vary the terms of the contract in respect of mode of delivery of the goods or performance. This was a unilateral variation of the terms of the contract. Therefore the loss occasioned from the aforementioned lay at the appellant's foot.

8.26 The last issue to be determined raised in ground seven is whether the court below erred by awarding costs to the respondent when the it was equally in breach and

contributed to the delay in the performance of the contract. The court below at J32 to 32 held that;

“In respect of the claim for damages for breach of contract and damages for consequential loss of business, I find that although the defendant (appellant) did breach the contract between the parties, the Plaintiff (respondent) was also in breach of contract in that it failed to provide the defendant with a correctly worded bill of lading upon executing the contract.... As both parties were in breach an award of damages would in my view be unjust enrichment ...”

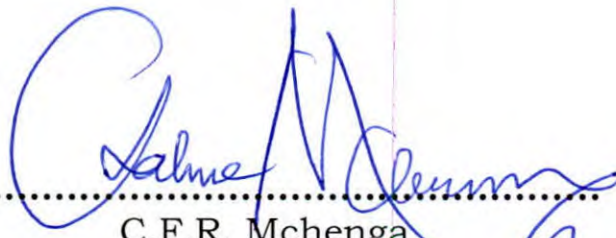
8.27 The court below therefore, declined to grant damages for breach of contract and consequential loss of business sought by the respondent. The contention by the appellant is that the court below misdirected itself by awarding costs to the respondent, which equally breached the contract.

8.28 It is trite that the general principle as regards costs is that they follow the event. Costs are awarded at the court's discretion. Departure from the general principle must be on good reasons. We will not belabour the issue on costs because the respondent clearly succeeded substantially on the other claims. Namely the payment of the outstanding sum of K12,000 being refund of the sum paid to the appellant in respect of customs duty which was not paid, the

sum of K5,400 being 50% penalties imposed on customs duty and the payment sum of K29,000 being the value of the missing/damaged items. The appellant's counter claims were dismissed.

8.29 We hold that the court below had exercised its discretion properly by awarding costs to the successful litigant and applying the general principle that costs follow the event.

8.30 We find no merit in the other grounds of appeal save for ground two, which does not alter the outcome of the appeal. The net result being that the appeal substantially fails and is dismissed accordingly. Costs to the respondent to be taxed in default of agreement.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL



.....
F. M. Chishimba
COURT OF APPEAL JUDGE



.....
P. C. M. Ngulube
COURT OF APPEAL JUDGE