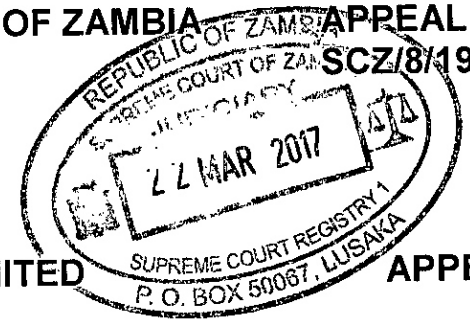
IN THE SUPREME COURT OF ZAMBIA **APPEAL NO. 138/2015**
HOLDEN AT NDOLA **SCZ/8/190/2015**
(Civil Jurisdiction)



BETWEEN

HYGROTECH ZAMBIA LIMITED **APPELLANT**

AND

GREENBELT FERTILIZERS LIMITED **RESPONDENT**

Coram: Chibomba, Hamaundu, and Malila, JJS
On 2nd December, 2015 and on 22nd March, 2017.

For the Appellant: Mr. E. K. Mwitwa, of Messrs Mwenye Mwitwa & Company.
For the Respondent: Ms. A. D. Theotis, of Theotis, Mataka & Sampa Legal Practitioners.

JUDGMENT

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to: -

1. **National Airports Corporation Limited vs. Reggie Ephraim Zimba and Savior Konie (2000) Z.R. 154.**
2. **Wilson Masauso Zulu vs. Avondale Housing Project Limited (1982) Z.R. 172.**
3. **Rosemary Chibwe vs. Austin Chibwe (2001) Z.R. 1.**
4. **Manal Investment Limited vs. Lamise Investment Limited (2001) Z.R. 24.**
5. **Attorney General vs. Marcus Kampumba Achiume (1983) Z.R. 1.**
6. **Alexander Brodgden & Others vs. Director and Co. of the Metropolitan Railway Company (1877) 2 A.C. 666.**
7. **Masusu Kalenga Building Limited, Winnie Kalenga vs. Richmans Money Lending Enterprise (1999) Z.R. 27.**
8. **The Minister of Home Affairs and Another vs. Habasonda (2007) Z.R. 207.**
9. **Zambia Exports and Imports Bank Limited vs. Mkuyu Farms Limited, Elias Andrew Spyron and Mary Ann Langley Spyron (1993-1994) Z.R. 36.**

Legislation and Other Materials referred to:-

1. **Chitty on Contracts, Volume II (Specific Contracts), 13th Edition; and 28th Edition.**
2. **Halsbury's Laws of England, 4th Edition (Re-Issue) Volume 1(2).**
3. **Commercial Law by Roy Goode, 3rd Edition.**
4. **Bowstead and Reynolds on Agency by Peter G. Watts, 19th Edition, 2010.**

The Appellant appeals against the Judgment of the High Court dated 9th July, 2015 in which the learned Judge entered judgment in favour of the Respondent in the sum of US$221,575.60 less the Respondent's commission of US$30.00 per ton of fertilizer sold as agreed, plus interest and costs.

The history of this Appeal is that in September, 2009 the Respondent and the Appellant negotiated for a Memorandum of Understanding to establish an interagency agreement for the sale of the Respondent's fertilizer by the Appellant. The Appellant was expected to sell the fertilizer on the Respondent's behalf and then deposit the monies into the Respondent's designated account.

The Appellant, however, claimed that although the parties drew a Memorandum of Understanding, the same was not executed but that despite not signing, some of the terms of the Memorandum were effected. And that fertilizer was supplied which the Appellant sold and the Appellant deposited the monies into the Respondent's account. As commission, the Appellant was to get US$30.00 per ton of fertilizer sold.

However, a dispute arose when the Appellant suddenly stopped depositing monies realized from the sale of the fertilizer into the Respondent's account. The attempt by the parties to reconcile the amounts due to the Respondent failed. On one hand, the Respondent claimed that 715.45 tons of fertilizer valued at US$221,575.60 was delivered to the Appellant while on the other, the Appellant denied receiving the alleged quantity of fertilizer claiming that it only received 413.75 tons which was delivered to its Ndola Depot and was received and signed for by Felix K. Kamwanga (DW1). The Appellant also claimed that it had mistakenly deposited ZMK1,433,390,950.00 collected into its own account instead of the Respondent's, but that subsequently, that sum was remitted to the Respondent. The Appellant further claimed that it withheld the sum of US$20,868.20 and K2,386, 051.20 in order to offset a debt which the Respondent owed it.

Following the failure to resolve the dispute, the Respondent who was the Plaintiff in the court below by amended Writ of Summons, sought the following reliefs from the Appellant:-

"1. The sum of two hundred fifteen thousand one hundred twelve United States Dollars and ten cents (US$221,575.60).
2. Interest
3. Any other relief the court may deem fit, and .
4. Costs of and incidental to this action."

In the Defence filed, the Respondent disputed liability and the matter proceeded to trial. The learned trial Judge heard evidence from the parties which he analysed.

As regards the question whether or not there was a contract between the parties, the learned trial Judge found that the Respondent had established that there was a contract between the parties whereby the Appellant was to sell the Respondent's fertilizer on the Copperbelt Province using the Respondent's invoices and then bank the proceeds into the Respondent's bank account. He also agreed that the Appellant would be entitled to US$30.00 commission per ton of fertilizer sold on the Respondent's behalf.

As regards the quantum of fertilizer supplied to the Appellant by the Respondent, the learned trial Judge accepted the Respondent's evidence that 715.75 tons of fertilizer was delivered and not the 413.75 tons the Appellant claimed to have received. The trial Judge rejected the Appellant's assertion of only accepting responsibility for the fertilizer shown on the "Goods Received Notes (GRN)" for the reasons that evidence on Record showed that the fertilizer did not only just go to the Ndola warehouse, but that at times, fertilizer was delivered to the Appellant's customers in Kasumbalesa and other places without going through the Appellant's Ndola

warehouse as conceded by DW1. Further, that DW1's evidence was also that some consignments of fertilizer were directly shipped to customers by the Appellant's agents, Mr. Floyd Malembeka and Mr. Oosthuizen, PW2, without passing through the Ndola warehouse and that no documents were raised for those consignments except when DW1 was told to prepare GRN by the two agents. The trial Judge was of the view that this is the reason why DW1 and the Appellant could not account for sales made by the duo. The learned trial Judge also accepted that both Mr. Floyd Malembeka and PW2 were agents of the Appellant in respect of the fertilizer which they directly delivered to the Appellant's customers. Therefore, his conclusion based on the above analysis was that the Appellant was liable for the unaccounted for fertilizer delivered on ground that the Delivery Schedule on Record was accurate and sufficient to show that the amounts of fertilizer shown were delivered to the Appellant and also showed the number of bags that were deducted including the 987 bags of fertilizer which left a balance of 715.45 tons unpaid for by the Appellant.

This was the basis upon which the learned trial Judge entered Judgment in favour of the Respondent in the sum of US$221,575.60 less the Appellants commission of US$30.00 per ton of fertilizer sold as agreed, with interest and costs.

Dissatisfied with the Judgment of the court below, the Appellant appealed to this Court advancing five Grounds of Appeal in the Memorandum of Appeal as follows:-

"1. **The learned trial Judge misdirected himself in law and in fact when he concluded and found at page J29 of the Judgment that the Appellant was responsible for fertilizer which was directly delivered to customers in places other than its Ndola warehouse.**

2. **The learned trial Judge misdirected himself in law and in fact when he concluded and held at pages J30 and J31 of the Judgment that Mr. Floyd Malembeka acted on behalf of the Appellant in respect of the fertilizers which were directly delivered to the Appellant's customers in places other than the Appellant's warehouse in Ndola.**

3. **The learned trial Judge erred in law and in fact when he found as a fact at page J33 of the Judgment that the Respondent delivered a total of 715.45 tons of fertilizer to the Appellant.**

4. **The court below erred in law and in fact in holding at page J33 of the Judgment that the Respondent had proved its case on a balance of probabilities when there was no evidence to show how the Respondent computed the sum of US$221,575.60 or that the Appellant had agreed to the manner in which the said sum claimed was to be converted from Zambian Kwacha to United States Dollars.**

5. **Further and/or in the alternative, the Appellant asserts that the learned trial Judge erred in law and in fact when he entered Judgment in favour of the Respondent at page J33 of the Judgment for the total sum of US$221,575.60, without taking into account or deducting the sum of K1,433,390,950.00 which the Appellant had paid to the Respondent for the 413.75 tons of fertilizer that the Appellant acknowledged receiving from the Respondent, less the amounts deducted from the said amount by the Appellant."**

In support of this Appeal, the learned Counsel for the Appellant, Mr. Mwitwa, relied on the Appellant's Heads of Argument filed on 9th September, 2015 which he augmented with oral submissions. In the Heads of Argument in Support, Mr. Mwitwa argued grounds one and two together

on ground that they were related, while grounds three, four and five were argued separately.

In support of grounds one and two of this Appeal which attack the learned trial Judge for finding that the Appellant was responsible for the fertilizer which was directly delivered to customers in places other than its Ndola warehouse and for concluding that Mr. Floyd Malembeka acted on behalf of the Appellant, Mr. Mwitwa submitted that it was not in dispute that the parties herein had an agreement whereby the Respondent was to deliver fertilizer to the Appellant for the Appellant to sell to its customers. And that although the **MOU** between the parties was never signed, the parties proceeded to act on the terms of the agreement and that part of the terms of the oral agreement was that the sale of the Respondent's fertilizers would be coordinated by Martin Oosthuizen, PW2, as evidenced by the emails sent by the Appellant's General Manager, Alec Foster to David Scott Bradshaw, the Respondent's General Manager, PW3. That however, in the Amended Defence, the Appellant categorically denied any responsibility for any fertilizer delivered by the Respondent to any place other than the Appellant's warehouse in Ndola. Therefore, according to Counsel, the trial court fell into error when it concluded that the Appellant was responsible for fertilizers delivered directly by the Respondent to the Appellant's customers.

To illustrate this point, Counsel referred to PW2's evidence which was to the effect that the only warehouse the Appellant had at the material time was in Ndola and that he used to send emails to the Respondent for any fertilizer delivered to farmers directly or to the Appellant and that no fertilizer was to be delivered to a farmer directly or to the Appellant without PW2's request. Counsel submitted that PW2 told the court below under cross examination, that Floyd Malembeka also used to sell some fertilizer on behalf of the Respondent and that he (Floyd Malembeka) would collect the money himself and that in re-examination, PW2 stated that some retailers would place orders on their own with the Respondent or through Floyd Malembeka and the Respondent would arrange delivery.

Counsel argued that the Respondent did not produce any emails at trial to prove that the deliveries of the fertilizer to places other than the Appellant's warehouse in Ndola was at the instruction of the Appellant through PW2 and that without such evidence on Record, the Respondent did not prove that all the deliveries of the fertilizer to any places other than the Appellant's warehouse in Ndola were done on behalf of the Appellant.

Counsel referred to an email dated 5th October, 2009 on Record which reads as follows:

"We will be placing an order for consignment stock to be held at Ndola. Martin will coordinate it and will be promoting your products to commercial and small-scale farmers."

Counsel argued that from the above email, it is clear that the Respondent knew from the beginning that the fertilizer would be held at the Appellant's premises in Ndola and that the only person that would coordinate the sales was PW2. Therefore, the Respondent abrogated the parties' agreement by delivering the fertilizers directly to the Appellant's customers and by involving Floyd Malembeka.

It was Counsel's further contention that the evidence on Record suggests that nobody seemed to know exactly who appointed Floyd Malembeka and what his designation was. Hence, the court below erred in fact and in law by holding that Floyd Malembeka was acting on behalf of the Appellant in respect of the fertilizer which was directly delivered to the Appellant's customers in places other than the Appellant's warehouse in Ndola. And that there is no evidence to show that the Appellant ever paid Floyd Malembeka any commission for his dealings with the fertilizer in question but that what is clear, however, is that Floyd Malembeka worked closely with PW2 and that he was PW2's sub-agent as there is no evidence

to show that the Appellant ever gave PW2 the authority to appoint Floyd Malembeka as his sub-agent.

To buttress the above submissions, Counsel called to his aid the Latin maxim ***delegatus non potestdelegare*** and submitted that the law is clear on the consequences of a delegate who delegates his authority. To buttress this point Counsel cited, among other authorities, the learned authors of **Halsbury's Laws of England, 4th Edition (Re-issue) Volume 1(2) at page 95 paragraph 136.**

Counsel pointed out that where an act by an agent is not within the scope of the agent's express or implied authority or falls outside the apparent scope of his authority, the principal is not bound by, nor is he liable for that act, even if the opportunity to do it arose out of agency and was purported to be done on his behalf, unless he expressly adopted it by asking the benefit of it or otherwise.

As regards the argument that Floyd Malembeka had apparent or ostensible authority to act for the Appellant in the sale of fertilizer, Counsel relied on the learned authors of **Chitty on Contract, 13th Edition, volume II, paragraph 31-057 at pages 34 and 35**. He contended that in the case in *casu,* there was no evidence from the Respondent's officers to show that

any of its officers had been informed by any of the Appellant's authorized officers that Floyd Malembeka was the Appellant's agent and hence, the Respondent was fully aware that the only person nominated by the Appellant to coordinate the marketing and sale of the fertilizer was PW2. To buttress this point, the case of **Wilson Masauso Zulu vs. Avondale Housing Project Limited**[2] was cited to support the argument that although Counsel was alive to the fact that this Court does not interfere with findings of fact of the lower court easily, however, in the current case, the findings of fact by the learned trial Judge as regards Floyd Malembeka's position and the fertilizers delivered by the Respondent to places other than the Appellant's Ndola warehouse were made in the absence of any relevant evidence or upon a misapprehension of the facts and was a finding which on a proper view of the evidence, no trial court acting correctly could reasonably make.

In summing up his arguments, Counsel beseeched us to reverse the finding of the lower court and to uphold grounds one and two of this Appeal.

In support of ground three which attacks the learned trial Judge for finding that the Respondent delivered a total of 715.45 tons of fertilizer to the Appellant, Mr. Mwitwa argued that the learned Judge indicated that he had scrutinized the Schedule in light of the invoices, delivery notes and

GRNs in the Respondent's Bundle of Documents in coming to the above finding. That however this was erroneous because of the reasons and arguments advanced under grounds one and two above to the effect that the Appellant was not responsible for any fertilizer that was delivered directly to its customers or through Floyd Malembeka.

Counsel argued that the learned trial Judge found that the evidence on Record only showed that a total of 611.05 tons of fertilizer were acknowledged by the Appellant using its GRN, and that a total of 104.4 tons of fertilizer were delivered to other people and that the Respondent's delivery notes were used as opposed to the Appellant's; that the 104.4 tons referred to by the learned trial Judge are indicated at the bottom of the Schedule in the Record as having been delivered from 8th December, 2009 to 22nd May, 2010; that in the "Acknowledged By" column of the said entries, the Schedule indicates that the fertilizer was received and signed for by the farmer or "HT Staff". Counsel argued that there are some entries on the Schedule which should not have been ascribed to the Appellant. He pointed out that the entry dated 22nd May, 2010 which he submitted, though the delivery note is almost illegible, shows that the 11.05 tons of fertilizer was delivered but it is not clear how much this was worth or who received the consignment on behalf of the Appellant. And that this consignment was

column which simply states that the consignment was "received and signed by HT Staff".

Counsel submitted that it is trite law that the court's findings must be made on the basis of facts stated on the Record. Counsel cited and relied on our decision in **Rosemary Chibwe vs. Austin Chibwe**[3]. He submitted that despite PW2's sweeping statement that the delivery notes and GRNs in the Respondent's Bundle of Documents were evidence of deliveries made by the Respondent to the Appellant, PW2 did not go into detail as regards the issue of who signed the Respondent's delivery notes without supporting GRNs from the Appellant.

Counsel further argued that although the learned trial Judge only found that a total of 104.4 tons of fertilizers was delivered to the Appellant's customers, the Appellant's position was that the total tonnage delivered directly to its clients is 174 as indicated in the Record. That the GRNs, which the Appellant indicated were evidence of the fertilizer that did not in fact pass through its Ndola warehouse are on the Record and accounts for 174 tons of fertilizer. In addition, that the fertilizer the Appellant received at its Ndola warehouse was only 413.75 tons and that DW2 also indicated in his Witness Statement that the GRNs for which he was personally

responsible for and whose fertilizer was sold at the Appellant's warehouse and sales points were those in the Appellant's Bundle of Documents.

In concluding the argument on ground three, Counsel submitted that the court below did not appear to have addressed its mind to the evidence presented by the Appellant but focused on the Respondent's evidence and that this is evident from the fact that the learned trial Judge did not make any comment or findings on the evidence adduced by the Appellant's witnesses regarding the actual fertilizer that the Appellant received. Counsel argued that had the learned Judge done so, he would have equally come to the conclusion that the Appellant's evidence in the form of GRNs and invoices showed that it only received 413.75 tons of fertilizer as the Appellant had gone further and produced a list of invoices issued to its clients and the value of the fertilizers it sold on behalf of the Respondent as evidenced by the Schedule on Record. And that it was on the basis of this Schedule that the Appellant came up with the figure of K1,430,845,700.00 as the amount payable to the Respondent, which amount the Appellant eventually paid to the Respondent as confirmed by the evidence on Record.

Counsel submitted that arising from the foregoing evidence, the decision by the learned trial Judge that the Respondent had in fact delivered

715.45 tons of fertilizer to the Appellant is erroneous as the learned Judge did not properly evaluate all the evidence on Record.

In support of ground four which criticizes the learned trial Judge for holding that the Respondent had proved its case on a balance of probability, Counsel for the Appellant argued that there was no evidence to show how the Respondent computed the sum of US$221,575.60 or that the Appellant had agreed to the manner in which the said sum claimed was to be converted from Zambian Kwacha to United Stated Dollars. Counsel submitted that in its amended pleadings, the Respondent claimed the sum of US$221,575.60 as the outstanding balance on the Appellant's account in respect of the fertilizer. However, that the Record will show that there was no agreement by the parties that the fertilizers would be sold in United States Dollars, and that all the invoices issued by the Appellant show that all the transactions or sales that the Appellant made were in Zambia Kwacha. And that none of the Respondent's witnesses gave any evidence to justify the calculation of the amount in United States Dollars. Counsel argued that during the negotiations, the parties did not agree on the currency to be used in the transactions save for the fact that the Respondent agreed to pay the Appellant a commission of UD$30.00 for every ton sold by the Appellant.

Further that when cross-examined about the justification for the Respondent computing the amount claimed in United States Dollars, the Respondent's witness, PW1's response was that the invoices that the Respondent issued in the Appellant's name were in United States Dollars, but that the Appellant was depositing amounts in Zambian Kwacha in the Respondent's account which was converted to United States Dollars at the Stanbic Bank prevailing rate.

In furthering this point, Counsel submitted that the conversion of the amount from Zambian Kwacha to United States Dollars adversely affected the amount payable by the Appellant to the Respondent. Hence, he urged us to take judicial notice of the fact that the United States Dollar at the time of the transactions was stronger than the Zambian Kwacha and as such, whatever Kwacha amounts the Appellant would deposit in the Respondent's account would fetch less United States Dollars. Therefore, Counsel's position was that this had the effect of increasing the Appellant's alleged indebtedness to the Respondent and that the Appellant raised this issue in its submissions in the court below but that the learned Judge disregarded the issue and that he did not give reasons for not addressing his mind to it. As such, Counsel submitted, the failure by the trial court to address its mind to the foregoing issue was contrary to the guidance of this Court in a

plethora of cases where this Court has guided that courts should give reasons for their decisions. These include the case of **Rosemary Chibwe vs. Austin Chibwe**[3] and **Manal Investment Limited vs. Lamise Investment Limited**[4].

Counsel therefore, invited us to determine the question whether the Respondent was justified to issue invoices to the Appellant and if so whether the Respondent was at liberty to issue the invoices in United States Dollars and to claim the amount from the Appellant in United States Dollars. Counsel further urged us to find in favour of the Appellant in this regard as the Respondent, instead of claiming the figure in United States Dollars should have indicated the amount in Zambian Kwacha and the United States Dollar equivalent of the sum claimed as an alternative amount but not as the main claim.

It was Counsel's further argument that the Respondent did not show how it arrived at the sum of US$221,575.60 claimed as the Respondent could also not tell how many tons the sum claimed amounted to. And that PW1 conceded, in cross examination, that he could not tell how many tons the said sum of US$221,575.60 accounted for. Counsel argued that since the Respondent conceded that the Appellant had paid the sum of K1,433,390,950.00 for the 413.75 tons of fertilizer which the Appellant

acknowledged to have sold, the Respondent should have easily computed the value of the remainder of the tons by simply deducting the tonnage acknowledged by the Appellant (413.75) from the total tons the Respondent claimed to have delivered (715.45) which gives the difference of 301.70 tons.

Counsel argued that the Respondent computed the total tonnage delivered to the Appellant on the wrong premise, that is, on the basis of the invoices it issued to the Appellant and as a result it became apparent from the evidence adduced at trial that despite the ownership of the fertilizer still remaining in the Respondent as the Appellant was a mere conduit for the sale of the fertilizer, the Respondent used to issue invoices in the name of the Appellant after delivering the fertilizer to the Appellant or its customers as confirmed by PW1 in cross examination but that some of these invoices were issued in Zambian Kwacha and that no explanation was given by the Respondent's witnesses as to why they were charging in United States Dollars in some transactions while in the others Zambian Kwacha was used. The Appellant therefore, contends that the Respondent failed to prove its case on a balance of probabilities.

Counsel drew our attention to the evidence of the Respondent's witness, (PW7), who told the Court below under cross-examination, in

relation to the invoices which the Respondent would issue to the Appellant for the fertilizer that was delivered to the Appellant or its customers at pages 223 to 232 of the Record, that these were computer generated and that the Respondent used the said invoices to determine the quantity of the fertilizer delivered to the Appellant and its value. And that PW7 also confirmed that the moment a computer generated invoice was issued to a customer, the customer would be expected to pay the amount endorsed on the invoice and that the same system applied to the Appellant. And that according to PW7's evidence, the information on the computer generated invoices was based on manual invoices issued by the person delivering the fertilizer but that in this matter, the Respondent only produced two such invoices which are in United Stated Dollars. Counsel argued that there was no evidence to show that the Appellant signed any of the manual or computer generated invoices to confirm the accuracy of their contents or that it had accepted to be charged in United States Dollars and that PW7 conceded that if the manual invoices had been produced in court, it would have helped the court to determine the question whether the Respondent did in fact deliver 715.45 tons of fertilizer to the Appellant and the value of the total tons so delivered. Therefore, that the Respondent did not adduce sufficient evidence to prove its claim on a balance of probabilities.

In concluding his submissions on ground four, Counsel argued that on the basis of the foregoing arguments and authorities, ground four of this appeal should be allowed as the Appellant has shown that the evidence on Record shows that there was no agreement between the parties that the Respondent could convert the value of the fertilizer into United States Dollars at the prevailing Stanbic Bank rate.

In arguing ground five of this appeal, Counsel for the Appellant reiterated his arguments under ground four. He added that the Appellant's quarrel with the Judgment of the court below is that even assuming that the court below was right in awarding the Respondent the sum of US$221,575.60 as the amount due to the Respondent for the fertilizer in question, the Appellant's contention is that the court below fell into grave error by not deducting the sum of K1,433,390,950.00 paid by the Appellant to the Respondent. Counsel argued that as submitted under ground four, there is no dispute that the Appellant paid the said sum to the Respondent in respect of the total tonnage of 413.75 which the Appellant acknowledged as the amount due to the Respondent for the said quantity of fertilizer. And that according to PW2 and PW3, the arrangement between the Appellant and the Respondent worked well for about two months between 23rd October 2009 to the end of December, 2009 or beginning of January, 2010

and therefore the Respondent should have given the court an indication of the actual amounts that it received for the fertilizer that was sold in the first two months when the agreement worked very well. That however, the Respondent did not clearly demonstrate how much it received from the Appellant or its customers in the first two months.

Counsel submitted that the Respondent did submit in evidence, a final reconciliation of the transactions which show the total number of invoices issued to the Appellant by the Respondent and there is a sum indicated in the very last roll of the first table of the sum K1,433,390,950.00 being the amount paid by the Appellant to the Respondent. Counsel argued that the reconciliation however failed to show how much the said sum amounted to in United States Dollars and how the claimed sum of US$221,575.60 was computed. It was Counsel's submission that the Respondent and indeed the court below did not properly take into account or deduct the said sum of K1,433,390,950.00 from the total value of fertilizer that the Respondent delivered to the Appellant.

Counsel argued that the Respondent's own witness, PW1, testified that even he was unable to tell how many tons of fertilizer the sum of US$221,575.60 amounted to, and that with such an admission from the person who prepared the final reconciliation, the Respondent failed to prove

its case on a balance of probability. Counsel submitted that the Respondent also failed to show how much the sum of K1,433,390,950.00 paid by the Appellant to the Respondent amounted to in United States dollars.

In his conclusion and prayer, Counsel for the Appellant submitted that on the strength of the above authorities and arguments, he was urging this Court to uphold this appeal in its entirety and to set aside the Judgment of the court below with costs to the Appellant.

In opposing this Appeal, the learned Counsel for the Respondent, Ms. Theotis, also relied on the Respondent's Heads of Argument filed which she augmented with oral submissions. Grounds one and two were responded to together, while grounds three, four and five were argued separately.

Counsel begun by highlighting that the appeal by the Appellant attacks the findings of fact by the trial court. Citing the case of **Zulu vs. Avondale Housing Project**[2], she submitted that in that case, this Court set out circumstances in which findings of fact by a lower court could be overturned by this Court as follows:-

> "(ii) **The appellate court will only reverse findings of fact made by a trial court if it 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."**

She submitted that this position was further reinforced by this Court in the case of **Attorney General vs. Marcus Kampumba Achiume**[5]. Counsel argued that the findings of fact appealed against are not perverse nor were they made in the absence of any relevant evidence or upon a misapprehension of facts for reasons set out hereunder.

Counsel submitted that contrary to the arguments by the Appellant, the evidence in the court below was that the parties carried out certain provisions of the Memorandum of Understanding and paragraph 2 of the Appellant's Defence also states that the parties only carried out certain provisions of the Memorandum of Understanding. And that in addition, PW3's evidence in paragraph 3 of his Witness Statement was to the effect that although the agreement was never formally signed, both parties proceeded to act on its terms. Therefore, Counsel's submission was that the fact that both parties acted in accordance with the arrangements in the Memorandum of Understanding was evident in the court below from the undisputed evidence that the Respondent produced and supplied fertilizer to the Appellant and the Appellant marketed and carried out sales of the same through its agents in Ndola, Kasumbalesa, Kabwe and Chingola and thereafter made payments to the Respondent in accordance with the Memorandum of Understanding. Counsel argued that in addition, the

evidence shows that commission on sales in the sum of US$30 was paid to the Appellant by the Respondent. Therefore, that it is not true as alleged by the Appellant that the terms of the Memorandum of Understanding were not followed by the parties.

Counsel submitted that the contract between the Appellant and the Respondent was an oral contract with unsigned terms of agreement and that it is trite law that the conduct of the parties may establish a binding contract between them even though a written agreement has not been formally executed by either party. To buttress her argument, Counsel cited the case of **Alexander Brodgden & Others vs. Director and Co. of the Metropolitan Railway Company**[6] where it was held that once a party begun to accept deliveries, there was a contract on the terms of the draft agreement despite one party not expressly assenting to it, and that a party that breaches the contract will be held liable on it.

Counsel contended that applying the above to the facts of the case in *casu*, whereby the Appellant begun to accept deliveries from the Respondent, there was a contract between the parties on the terms of the draft Memorandum of Understanding.

Counsel submitted that the emails referred to by the Appellant clearly show how following the agreement between the parties and the preparation of the draft Memorandum of Understanding, the Appellant's General Manager introduced one Mr. Martin Oosthuizen as the Appellant's agent or representative who was to be placing orders for the fertilizer to be produced by the Respondent. Consequently, there was no need for the Respondent's objection to the contents of the emails as the draft Memorandum of Understanding envisaged that the Appellant, being a corporate body, would act through agents.

Counsel argued that the learned trial Judge did not misdirect himself in law and fact when he concluded and found that the Appellant was responsible for the fertilizer which was directly delivered to customers in places other than its Ndola warehouse. And that this is so, because the finding was based on the evidence of both parties in the court below. That the email correspondence between the parties shows how the Appellant introduced PW2 as its agent who would place orders for fertilizer on behalf of the Appellant from the Respondent and sell the same for a commission and that the invoices raised for the sale would be the Respondent's. Counsel submitted that despite the fact that an interagency agreement was

drafted but never signed between the parties, both parties proceeded to act on the terms therein.

Counsel submitted that despite the denial by the Appellant, Mr. Floyd Malembeka had an understanding with the Appellant and was one of the Appellant's commissioned agents. Further, DW1's testimony was that PW2 and Mr. Floyd Malembeka directly shipped some consignments of fertilizer to customers without passing through the Appellant's warehouse and that the books he used to sell fertilizer as well as the books which were being used by PW2 and Mr. Floyd Malembeka belonged to the Appellant. And that DW1, PW2 and Mr. Malembeka were selling the Respondent's fertilizer on behalf of the Appellant. Counsel argued that the above all points to the learned Judge's conclusion that the Appellant was responsible for the fertilizer which was directly delivered to places other than Ndola.

To buttress her argument, Counsel cited **Chitty on Contracts, Specific Contracts, 28th edition, volume II at page 30, paragraph 32-055** which states as follows:-

> **"The general rule is that a principal is bound and entitled to the benefit of the contract his agent made on his behalf within the scope of such agent's actual authority. This is so whether the agent at the time of acting named or identified his principal, or merely indicated that he was acting for a principal but did not identify him."**

Counsel submitted that reading the Appellant's Heads of Argument shows that the Appellant does not appreciate the principle of agency which influenced the court below's decision. It was Counsel's position that the Appellant failed to adduce any evidence to rebut the Respondent's evidence that deliveries of fertilizer to places other than Ndola were done at the instruction of the Appellant through PW2 or to show that the Appellant never appointed Mr. Floyd Malembeka as an agent or that Mr. Floyd Malembeka did not on a number of occasions act as their agent. Based on the above, Counsel argued that the court below cannot be faulted for concluding and holding that Mr. Floyd Malembeka acted on behalf of the Appellant in respect of the fertilizer which was directly delivered to the Appellant's customers in places other than the Appellant's warehouse in Ndola. To fortify her argument, Counsel cited the case of **National Airports Corporation Limited vs. Zimba**[1] and the learned authors of **Bowstead and Reynolds on Agency, 19th Edition, by Peter G. Watts, Sweet & Maxwell, London 2010** which discuss the authority and apparent authority of an agent.

In response to ground three, Counsel for the Respondent submitted that the finding by the learned Judge was not erroneous as the Appellant

was responsible for the fertilizer that was delivered directly to its customers or through Mr. Floyd Malembeka.

In response to the Appellant's argument that there is an entry showing that the quantity of 11.05 tons of fertilizer was delivered on 22nd May, 2010 three months after the relationship was ended, Counsel submitted that this Court should not consider this issue as it was not raised in the court below. That the Appellant's argument in the court below was that the penultimate invoice from the Respondent for fertilizer delivered to the Appellant was issued on 25th February, 2010 and the last invoice was issued on 14th July, 2010 but that the latter was not produced in the Bundle of Documents. That Counsel's argument is fortified by our decision in **Mususu Kalenga Building Limited, Winnie Kalenga vs. Richmans Money Lenders Enterprises**[7] where we stated that it is not competent for any party to raise on appeal issues not raised in the court below. She submitted that the invoices, delivery notes and GRNs which were considered by the court below were confined to the period of October, 2009.

With regard to the finding by the trial court that the deliveries that were not recorded on the Appellant's GRNs were signed for by the Appellant's agents, employees or customers, Counsel submitted that this finding was supported by the evidence on Record and that the learned Judge stated that

there was sufficient proof that the alleged quantity of fertilizer was delivered to the Appellant through PW2's evidence under cross- examination regarding the delivery of fertilizers to farmers and retailers in Northern and Copperbelt Provinces and how the fertilizer was to be received. Counsel submitted that the finding by the learned Judge was further supported by the invoices, delivery notes and GRNs on Record which showed that a total of 611.05 tons of fertilizer were acknowledged by the Appellant and that 104.4 tons of fertilizer was signed for by either the Appellant's agents, employees or customers on the Appellant's delivery notes.

It was Counsel's further submission that DW1's evidence under cross-examination, was that it had been agreed that 413.75 tons claimed to have been received by the Appellant consisted only of fertilizer that went through his hands and did not include the larger sales of fertilizer made by PW2 and Floyd Malembeka. Counsel pointed out that this meant that DW1 could not tell the court below whether or not there was still money outstanding from the Appellant to the Respondent. And that DW2 also stated, in cross-examination, that not all sales of the Appellant's fertilizer were made over the counter at the Appellant's warehouse in Ndola and that he was not aware of some sales done by the Appellant's commissioned vendor, PW2, and Floyd Malembeka. And that DW3, also stated in cross- examination that

his recollection of sales did not include sales done by PW2, Mr. Floyd Malembeka and those that were done on the Respondent's invoices.

Consequently, Counsel submitted, the evidence before the court below was strongly in favour of the Respondent's claim for a total of 715.45 tons consisting of the 611.05 tons of fertilizer acknowledged by the Appellant and the 104.4 tons of fertilizer which was acknowledged by the Appellant's agents, employees and customers and that the Appellant failed to adduce sufficient evidence to traverse the Respondent's assertion that the said 715.45 tons of fertilizer was supplied to the Appellant.

In response to ground four, Counsel submitted that the mode of computation of the US$221,575.60 was provided for in the delivery notes, GRNs, as well as the schedule in the Respondent's Supplementary Bundle of Documents. And that PW2 testified that he collected monies from farmers in Kasumbalesa in dollars and that the Appellant instructed him to deposit the money in its First National Bank account in Ndola. Counsel argued that had the Appellant had any reservations about the collection of the money in dollars, it would not have instructed PW2 to make the deposits in the aforesaid manner in its account.

Counsel's contention was therefore, that the Appellant's arguments in this respect fly directly in the teeth of the Memorandum of Understanding upon which the agreement between the parties was based which provided that the Appellant would be paid a sum of US$30.00 per ton sold as commission. And that DW2 corroborated this in his evidence in chief. Hence, it would have been impossible to pay the Appellant's commission in dollars when the amount was to be calculated in Kwacha. Counsel further argued that the evidence of DW2 in his Witness Statement was to the effect that after proceedings were commenced, the Appellant acknowledged that there was a sum of US$15,000.00 or K70,725.80 that was due to the Respondent and that the Appellant paid this sum through its advocates. That the collection and payment of monies on behalf of the Respondent was in dollars so therefore, the Appellant cannot argue that the court below fell into error in awarding the judgment sum in dollars.

It was Counsel's contention that PW5, Mr. Bijoy Krishna Sarker, and PW1 both testified that the Respondent's reconciliation is the correct reflection of what is outstanding from the Appellant to the Respondent. And that PW5 testified that the computer generated invoices were based on the input of information from manual invoices prepared by PW1, Nicholas Chilambo. And that the evidence on Record shows proof of delivery of

715.45 tons of fertilizer to the Appellant after the deduction of the returned bags which culminates into US$221,575.60.

Counsel submitted that the Judgment of the court below satisfied the requirements set out by this Court in the case of **The Minister of Home Affairs and Another vs. Habasonda**[8] where this Court made it clear that every judgment must reveal a review of the evidence, where applicable, a summary of the arguments and submissions, if made, findings of fact, the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts.

In response to ground five which was argued as an alternative to ground four and which criticizes the learned Judge for entering Judgment in favour of the Respondent in the sum of US$211,575.60 without deducting the sum of K1,433,390,950.00 which the Appellant claimed to have paid to the Respondent for the 413.75 tons of fertilizer, Counsel for the Respondent argued that the evidence on Record shows that the sum awarded was arrived at after deducting the sum of K1,433,390,950.00 that the Respondent had already received. And that the judgment sum entered was less the Appellant's commission of US$30.00 per ton sold.

In her oral submissions in supplementing ground five, Ms. Theotis drew the Court's attention to the reconciliation on Record. She argued that the sum of K1,433,390,950.00 was taken into consideration when reconciling the figures therein. And that the Respondent did not dispute receiving the above sum from the Appellant and that this sum was taken into account in arriving at the sum owed of US$221,575.60 claimed to be owed.

In reply, Mr. Mwitwa maintained his arguments in support of ground five that if the total tonnage of fertilizer delivered to the Appellant was 715.45 tons, then there should have been a figure ascribed to that total tonnage and that if the Respondent acknowledged that K1,433,390,950.00 was paid, and that it was for 413 tons of fertilizer, then it should be easy to calculate the balance in tonnage and the sum owed.

In reply to the Respondent's computation of the sum owed in United States dollars whilst leaving the sum of K1,433,390,950.00 in Kwacha, Counsel submitted that it cannot be agreed with certainty that this figure was taken into account in computing what is allegedly owed by the Appellant to the Respondent. As regards to the reconciliation on Record, Counsel argued that it was equally difficult to ascertain how much the sum of K1,433,390,950.00 amounted to in United States dollars.

Counsel went on to reply to grounds one and two by repeating his written submissions in the Appellant's Heads of Arguments. He added in reply to the Respondent's assertion that the Respondent did everything in line with the Memorandum of Understanding and that it in fact paid the US$30.00 per ton commission to the Appellant; that no evidence was adduced to show that the commission was ever paid to the Appellant.

In reply with regard to the status of Floyd Malembeka, Counsel for the Appellant argued that this Court has held in a plethora of cases that he who alleges must prove, and that the allegation that Floyd Malembeka was appointed as an agent of the Appellant, which came from the Respondent, should have been proved by the Respondent and not the Appellant. Further that if Floyd Malembeka was appointed as a sub-agent of PW2, then PW2 did not have the authority to appoint any sub-agents.

As regards the issues raised by the Respondent in ground three of appeal, Counsel submitted that because the Appellant denied receipt of any fertilizer at places outside of Ndola, this issue was raised in the court below and was therefore, sufficient as a pleading which entailed the Respondent to adduce evidence to demonstrate that every ton was delivered to the Appellant or its appointed agents. Further, that if the court below makes a finding of fact, it is open to an aggrieved party to attack such findings

because they are coming up for the first time through the Judgment of the court.

We have seriously considered this Appeal together with the grounds of Appeal filed, the arguments in the respective Heads of Argument, the authorities cited and the oral submissions by the learned Counsel for the parties. We have also considered the Judgment by the learned Judge in the court below.

It is not in dispute as found by the trial Judge that the Appellant and the Respondent negotiated for an MOU through which the Appellant was to sell fertilizer on behalf of the Respondent and that as consideration, the Appellant was to be paid US$30.00 commission per ton of fertilizer sold. It is also not in dispute that the MOU was not signed by the parties but that the parties entered into an oral agreement through which fertilizer was delivered to the Appellant which the Appellant sold on the terms contained in the MOU. It is also not in dispute that the Appellant was depositing monies realized from the sales of the fertilizer into the Respondent's designated account. And that the dispute leading to this Appeal arose when the Appellant stopped depositing monies into the Respondent's designated bank account. The dispute was on the quantity of fertilizer that the

Respondent delivered to the Appellant and subsequently, the Respondent commenced the action leading to this Appeal as stated above.

The learned trial Judge found, *inter alia*, that the 715.45 tons of fertilizer valued at US$ 221,575.60 that were delivered to the Appellant were not accounted for; that Floyd Malembeka was an agent of the Appellant in the marketing and selling of the Respondent's fertilizer; that the Appellant was supposed to deposit the monies realised from the sales of the fertilizer in the Respondent's designated account in dollars; and that the Appellant was responsible for the Respondent's fertilizer that did not go through the Appellant's warehouse in Ndola.

The crux of this Appeal is therefore whether 715.45 tons of fertilizer were delivered to the Appellant as claimed by the Respondent; whether Floyd Malembeka was an agent of the Appellant; whether the Appellant was responsible for the fertilizer that was delivered elsewhere other than through its Ndola warehouse; and whether payment for the fertilizer was supposed to be in United States dollars or in Zambian Kwacha and if in US$, the applicable conversion rate.

For convenience and to avoid repetitions, we shall consider grounds one and two together as they are inter-related. Grounds three, four and five will be considered separately.

Grounds one and two of this appeal raise the question whether the learned Judge was on firm ground when he found that the Appellant was responsible for the fertilizer that was delivered directly to the Appellant's customers in places other than the Appellant's warehouse in Ndola and whether Floyd Malembeka acted on the Appellant's behalf for the fertilizer that he 'purported' to have collected on behalf of the Appellant. The gist of Counsel for the Appellant's submissions in support of the two grounds of appeal was that no evidence was adduced by the Respondent to prove that the fertilizer that was delivered directly to the Appellant's customers was on the Appellant's behalf or that Floyd Malembeka was acting on behalf of the Appellant when he sold the fertilizer. Counsel's contention was that it was erroneous for the trial Judge to have found the Appellant responsible for the fertilizer that was delivered directly to its customers and for the fertilizer delivered through Floyd Malembeka as the Appellant had no connection or relationship with him either as its agent or via an ostensible relationship.

The kernel of the submissions in response by Counsel for the Respondent was that this appeal attacks findings of fact made by the trial court and that the Appellant has not demonstrated that the findings in question are either perverse or that they were made in the absence of any relevant evidence or upon a misapprehension of facts. And that the learned

trial Judge did not misdirect himself in law and fact when he found that the Appellant was responsible for the fertilizer which was delivered directly to customers in places other than its Ndola warehouse as this finding was based on the evidence of both parties on Record. Further, that contrary to the Appellant's denial of any connection with Floyd Malembeka, the evidence of DW1 on Record shows that PW2, the Appellant's agent, and Floyd Malembeka shipped and were selling some consignments of fertilizer directly to customers without passing through the Appellant's warehouse and that the Appellant's books were being used for the sales by the duo.

We have considered the above arguments. In this case and in respect of the two grounds of appeal in casu, the learned trial Judge found firstly, that there was a contract between the parties through which the Appellant was selling the Respondent's fertilizer on the Copperbelt Province of Zambia. And that the Appellant was responsible for the fertilizer that was delivered directly to customers in places other than the Appellant's warehouse in Ndola and secondly, that Floyd Malembeka acted on behalf of the Appellant in respect of fertilizer which was delivered directly to the Appellant's customers in places other than the Appellant's warehouse in Ndola. It is these findings by the learned trial Judge that the Appellant attacks in grounds one and two of this Appeal. Therefore, we agree with the

submission by the learned Counsel for the Respondent that the two grounds of appeal attack findings of fact made by the trial court.

As to when findings of fact made by the trial court may be reversed by the appellate court, we guided in **Wilson Masauso Zulu vs. Avondale Housing Project**[2] that findings of fact made by a trial court can only be reversed where the appellate court is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts.

The question therefore, is has the Appellant discharged its burden of satisfying this Court that this is a proper case in which we should interfere with the findings of fact made by the learned trial court as they relate to the two grounds of this Appeal?

We have perused the Record. As regards the places where fertilizer was being delivered, the GRNs and delivery notes on Record show that fertilizer was being delivered and signed for in Ndola, Kasumbalesa, Chingola and Kabwe. To this end, the Appellant's own witness, DW1, who was the Appellant's Stores Controller and Assistant Sales representative at the Ndola branch and whose name appears on the GRNs and delivery notes, told the court below that he used to sign the GRNs and delivery notes. And that some of the fertilizer was shipped directly to the customers

as it did not go through the Appellant's Ndola warehouse. Further, PW2, the Appellant's agent, testified that fertilizer sales in Kasumbalesa were under his supervision and that there were sales and deliveries of fertilizer made directly to farmers and retailers in Northern and Copperbelt Provinces from whom he collected monies in United States Dollars and that he used to deposit the monies realized from the sales into the Respondent's account.

From the above evidence, it is abundantly clear that not all the fertilizer that the Appellant sold to its customers on behalf of the Respondent went through the Appellant's warehouse in Ndola as some of the fertilizer was delivered directly to the Appellant's customers in Kasumbalesa and other places. For the reasons stated above, we cannot fault the findings by the learned trial Judge that the Appellant was responsible for the fertilizer that was delivered to the Appellant's customers in places other than its Ndola warehouse as the finding was supported by the evidence on record which we have illustrated above.

As regards the question whether Floyd Malembeka acted as an agent of the Appellant when he collected and sold some of the fertilizer, we find it imperative to first define who an agent is. The learned authors of **Halsbury's Laws of England, 4th edition (re-issue), vol. 1 (1) at paragraph 1** define the term *'agent'* in the following terms:

> **"...in law the word 'agency' is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called 'the agent' has authority to act on behalf of another, called 'the principal', and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the circumstances of the relationship between the alleged principal and agent."(underlining ours for emphasis)**

The same authors also describe the creation of the agency relationship at paragraph 19 as follows:-

> **"The relation of agency is created by the express or implied agreement of principal and agent, or by ratification by the principal of the agent's act done on his behalf. Express agency is created where the principal or some person authorised by him, expressly appoints the agent whether by deed, by writing under hand, or orally. Implied agency arises from the conduct or situation of the parties". (underlining ours for emphasis)**

We wish to state here that as the learned authors of **Commercial Law by Roy Goode, 3rd edition, at page 162** put it, it is trite that in trading business, a commercial enterprise may employ a variety of techniques to ensure that its goods reach the intended market. In the current case, the Respondent in the marketing of its fertilizer, engaged the Appellant as its agent.

The same authors also state at pages 162 and 163 that in modern commercial transactions, agency is a vital tool in bringing goods and services to the market. So it is often convenient for the business enterprise to appoint one or more agents whose business is to effect sales. Therefore,

the question whether or not a person was an agent of the other depends on the facts of each case.

In the current case, the evidence of DW1 on Record was that some consignments of fertilizer were delivered directly to customers by the Appellant's agent, PW2, and Floyd Malembeka without passing through the Ndola warehouse. And that both PW2 and Floyd Malembeka were dealing in bulky deliveries of the fertilizer and that they used to instruct DW1 to prepare GRNs for the fertilizer delivered directly to the Appellant's customers in Kasumbalesa and that the books which were used for the sales were the Appellant's books. DW2, who was the Appellant's Technical Sales Manager and none-executive Director, also told the court below that both PW2 and Floyd Malembeka were not employees of the Appellant but were supposed to account for their sales of fertilizer to the Appellant.

From the above, we find that the Appellant's claim that it did not have any relationship with Floyd Malembeka as it only engaged PW2, Martin Oosthuizen, whom it introduced to the Respondent as its agent, is not supported by the evidence on Record as the evidence shows that Floyd Malembeka was involved in the sale and marketing of the Respondent's fertilizer to the Appellant's customers on behalf of the Appellant as can be deduced from the evidence of PW2, DW1 and DW2. Therefore, although no

formal written or express agreement was produced by the Respondent to show that Floyd Malembeka was the Appellant's agent in the fertilizer sale transaction, the only reasonable inference that can be drawn from the conduct of the Appellant as regards Floyd Malembeka's acts in the sale of the Respondent's fertilizer is that he acted as an agent of the Appellant because the Appellant held him out as a person who had apparent (ostensible) authority to act on its behalf. This is demonstrated by the evidence of PW2, DW1 and DW2 which we have illustrated above. We therefore, find no basis upon which we can reverse the findings of fact made by the learned trial Judge that Floyd Malembeka was the Appellant's agent as the finding is supported by the evidence on Record which came from the Appellant's own witnesses, DW1 and DW2 and its own agent, PW2. Therefore, grounds one and two of this appeal have no merit. We dismiss them.

In support of ground three, which attacks the finding by the learned Judge that the Respondent delivered 715.45 tons of fertilizer to the Appellant, the gist of Counsel for the Appellant's arguments was that the lower court's finding was wrong both in law and fact as the learned Judge failed to properly evaluate all the evidence on Record. Counsel argued that the evidence shows that the Appellant received only 413.75 tons of fertilizer

at its Ndola warehouse as evidenced by the GRNs on Record. And that the Respondent's schedule of invoices, GRNs and delivery notes relied upon by the learned trial Judge were not sufficient evidence or proof of the actual tonnage of fertilizer delivered to the Appellant as the Appellant was not responsible for any fertilizer that was delivered to places other than at its Ndola warehouse.

The core of Counsel for the Respondent's arguments in response to ground three was that the finding by the learned trial Judge was not erroneous as the evidence on Record shows that the 715.45 tons of fertilizer which was supplied to the Appellant consisted of deliveries to the Appellant's Ndola warehouse as well as deliveries that were made directly to the Appellant's customers in other places through its agents PW2 and Floyd Malembeka and that 611.05 tons was acknowledged by the Appellant while 104.4 tons was acknowledged by the Appellant's agents, employees and customers.

We have considered the above arguments. As regards the issues raised in ground three, perusal of the judgment appealed against shows that after evaluating the evidence before him, the learned trial Judge based his finding that 715.45 tons of fertilizer was delivered by the Respondent to the Appellant on the schedule produced in the court below by the Respondent.

Perusal of this schedule shows that it contains a summary of the fertilizer which the Respondent claimed to have delivered to the Appellant during the period October, 2009 and February, 2010. The schedule is based on the invoices, delivery notes and the GRNs which were produced by the Respondent in the court below. This is what the learned Judge relied upon to support his finding that the Respondent delivered 715.45 tons of fertilizer to the Appellant. The learned Judge also found that the information posted on the schedule was generally accurate. He also relied on the evidence of PW2 who was the coordinator of the fertilizer sales on behalf of the Appellant. PW2 confirmed in his evidence the tonnage of fertilizer delivered to be as claimed by the Respondent and this is also contained in paragraph 21 of his Witness Statement where he testified that the delivery notes, the GRNs and the Schedule produced by the Respondent showed all the fertilizer that was delivered and sold through the Appellant.

This is the evidence which the trial Judge considered and relied upon in coming to the conclusion that there was sufficient proof to show that 715.45 tons of fertilizer was delivered to the Appellant because the documents on Record showed that the Appellant acknowledged receipt of 611.05 tons of fertilizer while a total of 104.4 tons was signed for by either

the Appellant's agents, employees or the customers on the Appellant's delivery notes.

Therefore, we are not persuaded by Counsel for the Appellant's assertion that the Appellant was responsible only for the fertilizer that was delivered to its warehouse in Ndola as the Appellant was also responsible for the fertilizer collected and delivered directly to its customers in other places through its agents, PW2 and Floyd Malembeka. As such, the learned Judge cannot be faulted for finding that 715.45 tons of fertilizer was supplied to the Appellant by the Respondent as this finding is supported by the evidence on Record. There is therefore, no merit in ground three of this Appeal. The same is dismissed for want of merit.

In support of ground four, which criticises the learned trial Judge for awarding the Respondent the sum of US$221,575.60 claimed, the kernel of Counsel for the Appellant's argument is that the Respondent did not produce evidence to show how it came up with the figure claimed as there was no agreement between the parties which provided that currency of sale was in United States Dollars or/and how the amount claimed was to be converted from Zambian Kwacha to United States Dollars. In support of this argument, Counsel referred us to the Appellant's invoices on Record which according to Counsel, show that all the transactions or sales were in

Zambian Kwacha. He also argued that none of the Respondent's witnesses gave evidence to justify the calculation of the amount claimed in United States Dollars.

The crux of Counsel for the Respondent's arguments in response was that the finding by the learned Judge was on firm ground as the mode of computation of the US$221,575.60 was provided on the delivery notes, the GRNs and the Schedule on Record. Further, that the Record also shows that the monies that were being collected by the Appellant in Kasumbalesa were in Dollars and were deposited in the Respondent's account in dollars and that the Appellant paid the admitted sum to the Respondent's advocates in United States Dollars. And that the Appellant's commission was also quoted in United States Dollars. Hence, the Appellant's argument that the court below fell into error in awarding the judgment sum in United States Dollars cannot be sustained.

We have considered the above arguments. We wish to state from the outset that having found under ground three that the Respondent delivered 715.45 tons of fertilizer to the Appellant, the question to be considered under ground four is whether the learned Judge was on firm ground when he awarded the sum of US$211,575.60 claimed by the Respondent as the

value of the unaccounted for fertilizer that was delivered to the Appellant by the Respondent.

It is not in dispute that the parties agreed that the Appellant would be entitled to the sum of US$30 per ton of fertilizer sold. The evidence on Record also shows that the Appellant withheld the sum of US$20,868.20 and K2,386,051.20 from what it received from the fertilizer sales as a setoff of a debt that the Appellant claimed the Respondent owed. In addition and as per evidence of DW2, the Appellant acknowledged owing the Respondent the sum of US$15,000.00 or K70,725.80 which the Appellant paid to the Respondent through its advocates. The payment was in United States dollars and not Zambian Kwacha.

From the above evidence, it can be inferred that payment for the fertilizer sold was to be in United States dollars and hence, the accepted or agreed mode of payment of the monies realized from the fertilizer sales was United States Dollars which was to be deposited in the Respondent's designated bank account. Therefore the learned trial Judge cannot be faulted for awarding the sum claimed by the Respondent in United States dollars.

As regards the argument by Counsel for the Appellant on how the conversion from Kwacha to United State Dollars was to be done and the

question as to the exchange rate the learned Judge applied to come up with the judgment sum, what we can decipher from the said argument, is that the Appellant is questioning the exchange rate to be applied on the judgment sum awarded or how this should be converted. Counsel argued that the sales were in Zambian Kwacha and not United States Dollars. And hence, the question raised is: - Which exchange rate is applicable? Is it the ruling rate that was applicable at the time of depositing the monies realised from the sales of the fertilizer or at the time of award of the judgment sum?

In **Zambia Exports and Imports Bank Limited v Mkuyu Farms Limited, Elias Andrew Spyron and Mary Ann Langley Spyron,**[9] we guided, on the exchange rate applicable in foreign currency Judgments that the rate of exchange applicable is the one ruling at the time of enforcement of the Judgment.

We understand where Counsel for the Appellant is coming from which is that, at the time the fertilizer sales were made, the applicable exchange rate may have been lower than it is now or at the time the judgment sum was awarded by the court below. However, it is a fact that the Appellant did not deposit or pay the money realized from the fertilizer sales into the Respondent's account at the time of the transaction. This money is still owing to the Respondent to date.

Therefore, as guided by the **Mkuyu**[9] case cited above, our firm view is that the applicable exchange rate is the ruling rate at the time of payment of the Appellant will pay the judgment sum and certainly, not at the rate that was applicable at the time when the fertilizer sales took place. What the Appellant was to pay is US$221,575.60.

For the reasons given above, ground four of this appeal fails on account of want of merit. We dismiss it.

Ground five, which the Appellant argued in the alternative, attacks the learned Judge for failing to take into account the sum of K1,433,390,950.00 that the Appellant claims to have deposited into the Respondent's account as the value for the 413.75 tons of fertilizer when he awarded the judgment sum of US$221,575.60 to the Respondent. In support of this ground, the gist of Counsel for the Appellant's argument was that the Appellant acknowledged receipt of 413.75 tons of fertilizer at its Ndola warehouse and paid the Respondent the sum of K1,433,390,950.00 for the acknowledged quantity of fertilizer. However, that the learned trial Judge did not taken into account this amount when he awarded the judgment sum to the Respondent.

In response, the core of Counsel for the Respondent's arguments was that the evidence on Record shows that the sum of US$221,575.60 was

arrived at by the Respondent after deducting the sum of K1,433,390,950.00 which the Respondent had already received when it computed the sum claimed.

We have considered the above arguments. Perusal of the Record and in particular, the final reconciliation done by the Respondent which the learned Judge relied upon when he awarded the judgment sum of US$221,575.60 to the Respondent shows that the sum of K1,434,052,800.00 was deposited into the Respondent's account by the Appellant. It is clear from the final reconciliation that the sum of US$221,575.60 claimed by the Respondent is/ was the price of the 715.45 tons of fertilizer delivered to the Appellant and/ or its agents which was not accounted for. This is the same figure claimed in the Respondent's Amended Writ of Summons and Amended Statement of Claim. The 715.45 tons of fertilizer valued at US$221,575.60, is reflected as the outstanding figure after final reconciliation.

Further, PW1's evidence was that the Respondent did a reconciliation which showed that it delivered a total of 715.45 tons of fertilizer to the Appellant out of which the Appellant paid the sum of K1,433,390,950.00 leaving a balance of US$221,575.60. The Appellant's own witness, DW3, who was its Finance and Administration Manager, told the court below that

he was tasked by the Appellant to reconcile the sales that were done by the Appellant on behalf of the Respondent and that the proceeds of the sales amounting to K1,433,390,950.00 were wrongly deposited into the Appellant's account. He also told the court that the reconciliation that he did was not a full reconciliation as it related to the sales of the fertilizer that was delivered to the Appellant's Ndola warehouse only. He further explained that he did not take into account the sales which were done by PW2 and Floyd Malembeka.

From the above, it is clear that while the Respondent did a full reconciliation of the quantity and the cost of the fertilizer delivered to the Appellant, the Appellant only did a partial reconciliation as no reconciliation was done for the fertilizer that was delivered to other places other than the Appellant's Ndola warehouse. It is therefore our firm view that the Appellant could/ cannot successfully challenge the Respondent's reconciliation on Record when it did not itself do a full reconciliation so as to rebut the Respondent's final reconciliation which the learned trial Judge relied upon to award the judgment sum of US$221,575.60 to the Respondent.

We are fortified in so holding by the settled principle of law discussed in a plethora of cases that he who alleges must prove. The onus was on the Appellant to rebut the Respondent's claim that the sum of

K1,433,390,950.00 was taken into account in arriving at the judgment sum of US$221,575.60.

Further, the finding made by the learned trial Judge that the Respondent was entitled to the sum of US$221,575.60 is a finding of fact which he made after evaluating the evidence on Record. We repeat here that as the appellate court, we cannot reverse the findings of fact made by the trial court unless we are satisfied that the finding was either perverse or made in the absence of any relevant evidence. We have outlined above the evidence which the learned Judge took into account in arriving at the judgment sum. He also stated that he did consider and carefully perused the documents on Record such as the delivery notes and the GRNs before he came to the conclusion that the judgment sum that he awarded was outstanding. We find no basis upon which we can interfere with the finding by the trial Judge that the Respondent had taken into account the sum of K1,433,390,950.00 deposited into its account by the Appellant as reflected in the final reconciliation before he awarded the judgment sum in question to the Respondent.

Therefore, we find no merit in ground five of this Appeal. We dismiss it.

All the five grounds of appeal have failed on account of want of merit, the sum total is that this Appeal has wholly failed. The same is dismissed with costs to the Respondent to be taxed in default of agreement.

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H. Chibomba
SUPREME COURT JUDGE

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E. M. Hamaundu
SUPREME COURT JUDGE

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M. Malila
SUPREME COURT JUDGE