IN THE HIGH COURT FOR ZAMBIA **2015/HPC/0477**

AT THE COMMERCIAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SAMFUEL LIMITED **PLAINTIFF**

AND

ALPHA ENTERPRISES LIMITED **1ST DEFENDANT**

SYDNEY CHISANGA **2ND DEFENDANT**

Coram: Before Hon. Madam Justice Dr. W. S. Mwenda at Lusaka on the 13th day of April, 2017.

For the Plaintiff: **Mrs. D. Findlay of D. Findlay and Associates**

For the Defendants: **Mr. G. Pindani of Chonta Musaila and Pindani Advocates**

JUDGMENT

Cases referred to:

1. *Hulme v. Bringham (1943) 1 ALL E.R. 204*
2. *Spyer v. Phillipson (1931) 2 Ch. 183.*
3. *Smith v. City Petroleum Company Limited (1940) 1 ALL E.R. 260.*
4. *Holland v. Hodgson 1872 LR 7 CP 328.*
5. *Base Chemicals Zambia Limited v. Zambia Air Force and Another (2011) Z.R. Vol. 2 page 65.*

6. *The Rating Valuation Consortium and Another v. The Lusaka City Council and Another (2004) Z.R. 133.*
7. *Holmes Limited v. Buildwell Construction Company Limited (1973) Z.R. 97.*
8. *Benedetti v. Sawiris and Others (2013) UK SC 50.*
9. *D.P. Services Limited v. Municipality of Kabwe (1976) Z.R. 106.*

Legislation referred to:

Section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia.

Publication referred to:

Mudenda, F.S. (2007) Land Law in Zambia: Cases and Materials (Lusaka: UNZA Press)

The Plaintiff commenced this action against the Defendants by Writ of Summons accompanied by a Statement of Claim filed on 3rd November, 2015. The pleadings were later amended by way of a Consent Order dated 2nd February, 2016. As listed in the Pleadings, the Plaintiff's claims are as follows:

1. ***An order for delivery and possession of the fuel pumps, canopy, fuel tanks and pylons erected and/or inserted on the 2nd Defendant's premises for the 1st Defendant's use pursuant to the Exclusive Dealership Agreement.***
2. ***An order that the 1st and/or 2nd Defendant refund the Plaintiff the sum of ZMK1,845,840,000.00 (unrebased currency) being the value of improvements on the 2nd Defendant's property at Plot 1320 Great North Road, Mkushi carried out by the Plaintiff aforesaid, at the instance and request of the 1st Defendant.***
3. ***Damages for breach of the Exclusive Dealership Agreement resulting in loss of business and other losses occasioned by the deliberate and willful act of the 1st Defendant in sourcing petroleum products from other suppliers contrary to the said agreement.***

4. ***Damages for loss of use of profit earning chattel against the Defendants.***
5. ***Payment of the sum of ZMK29,045,825.28 (unrebased currency) being in respect of the outstanding balance due and payable to the Plaintiff for petroleum products supplied by the Plaintiff to the 1st Defendant between the period of January 2011 to September 2011 plus interest thereon from the date the amount fell due to date of full payment thereof.***
6. ***Interest on all the amounts found to be due in this action.***
7. ***Further or other relief as the Court may deem fit.***
8. ***Costs of and incidental to this action.***

It is the Plaintiff's contention in the Statement of Claim accompanying the Writ, that by way of an Exclusive Dealership Agreement dated 2010, the Plaintiff and the 1st Defendant agreed that the Plaintiff would be the sole supplier of petroleum products to be sold by the 1st Defendant at the filling station to be constructed on the 2nd Defendant's property in Mkushi for a period of twelve (12) months subject to renewal by written mutual consent of the parties thereto. Further, that on or about the 24th May 2010 the Plaintiff, the 1st Defendant's agents and/or representatives and the 2nd Defendant entered into another agreement partly orally, partly in writing and partly by conduct, to facilitate the commencement and operations under the Exclusive Dealership Agreement.

The Plaintiff also contends that in furtherance of its obligation, the 1st Defendant secured the 2nd Defendant's property so as to facilitate construction works and development on the property. Further, that the Plaintiff at its own cost constructed and completed the development at the site of the filling station and convenience shop as per agreement at a total cost of K1,845,840.00 (rebased currency). The Plaintiff further asserts that it was permitted by the 2nd Defendant by his conduct and silence to undertake all the developments on his property.

It is the Plaintiff's contention that the 1st Defendant and the Plaintiff had further agreed that the Plaintiff would support the working cash flow capital of the business and that the 1st Defendant would purchase the fuel for cash from the Plaintiff. Additionally, that in accordance with the agreement, the Plaintiff supplied the 1st Defendant with various petroleum products and supplies for which the 1st Defendant failed and/or neglected to make payment to the Plaintiff and as at the date of filing of the writ, was owing the Plaintiff the sum of K29,045,825.28 (unrebased currency) for the supplies made to the 1st Defendant. The Plaintiff also contends that by reason of the 1st Defendant's failure to settle the amount due and remit the money to the Plaintiff, it has suffered loss and damage.

In terms of the claim for loss of investment, the Plaintiff contends that it was agreed that the 1st Defendant would carry on its operations under the Plaintiff's licence, which it did. Further, that it was a specific term of the Exclusive Dealership Agreement (hereinafter referred to as "EDA") that during the tenure of the agreement and for two (2) years after termination of the agreement, the 1st Defendant and its affiliates would not compete with the product business of the Plaintiff. It is further contended that despite the parties agreeing that the agreement would be for a period of twelve (12) months and thus expiring in 2011, the parties continued to trade on the same terms and conditions as it was intended that the terms of the aforesaid agreement would continue to bind them in their subsequent dealings.

The Plaintiff asserts that sometime in June 2011, the 1st Defendant wrongly and in breach of the aforesaid exclusive agreement, stopped taking deliveries from the Plaintiff for more than six (6) months without reason or justification and instead began to receive petroleum products from other parties, namely, Spectra Oil Company and Lake Petroleum Limited without the Plaintiff's knowledge whilst still trading under the Plaintiff's licence. Further, that the 1st Defendant continued to trade under the Plaintiff's licence and sold large

quantities of petroleum to its customers and failed, neglected and/or refused to declare the same to the Plaintiff.

It is also the Plaintiff's claim that because of the 1st Defendant's illegal actions and breach of the agreement, it has suffered loss and damage. Further, that the 2nd Defendant knew well about the exclusive agreement entered into between the Plaintiff and 1st Defendant but wrongfully induced and procured the continuation of the 1st Defendant's breach of the agreement, so as to prevent the Plaintiff from recovering its investment on the 2nd Defendant's property.

In response to the claims enumerated above, the Defendants filed their Defence on the 23rd November, 2015, which was amended on 25th February, 2016 pursuant to the Consent Order aforesaid, wherein it contends that the Plaintiff repeatedly breached its obligation to promptly supply and deliver any ordered and paid for petroleum products by the 1st Defendant. Further, that the Plaintiff was obliged to consistently maintain and repair the pumps as well as the compressor for pressure at the filling station, which obligation the Plaintiff persistently breached.

The Defendants admit that a filling station and convenience shop were constructed on the 2nd Defendant's land but aver that the costs of the permanent structure were borne by the 1st Defendant, including all cement and concrete works on the filling station and the surroundings.

The Defendants contend that while it is true that the Plaintiff was to recover its investment, that was to be done within the 12 months' duration of the EDA and the parties were to be discharged of all their obligations at the expiry of the 12 months period. According to the Defendants, the parties never agreed to continue with the EDA beyond 12 months. They contend further that the business relationship between the Plaintiff and the 1st Defendant was restricted to the 12 months' duration of the EDA and all structures built on the 2nd Defendant's land became part of his land and cannot be removed.

The 1st Defendant denies owing the Plaintiff the sum of K29,045,825.28 (unrebased currency) for supplies made by the Plaintiff to it or at all.

It is the 1st Defendant's further contention that neither itself nor its affiliates deal in wholesale supply of petroleum products which is the line of business of the Plaintiff and that alternatively, it would be an unreasonable term of the agreement to bar the 1st Defendant as a separate entity licenced by the Energy Regulation Board (ERB) from trading in petroleum products; which business is in the public interest.

The 1st Defendant contends additionally, that the EDA terminated by effluxion of time after 12 months and was never renewed. Further, that the Plaintiff had informed ERB that the 1st Defendant was no longer under its licence. The Plaintiff consequently stopped supplying petroleum products to the 1st Defendant.

According to the Defendants, neither the 1st Defendant nor the 2nd Defendant renewed the expired EDA with the Plaintiff; that the Plaintiff tried to negotiate with the Defendants to start renting the premises at a monthly rental of K40,000 (rebased currency), but no agreement was reached.

The Defendants aver that the 1st Defendant was not obliged to get petroleum products from the Plaintiff following the expiry of the EDA. The Defendants claim that the Plaintiff sometimes supplied substandard fuel which was causing problems to motorists and the 1st Defendant used to receive several complaints and threats of legal action from motorists after purchasing the Plaintiff's fuel.

It is the Defendants' further assertion that the Plaintiff lamentably failed to maintain the compressors, pumps and other items despite receiving fault reports from the 1st Defendant and on several occasions the Plaintiff failed to supply petroleum products to the 1st Defendant, thereby frustrating customers who mostly used to harass the 1st Defendant's employees upon finding that there was no fuel.

The 2nd Defendant contends that he is the registered title holder to Plot No. 1320 Great North Road, Mkushi, where the filling station was built. He has cited section 33 of the Lands and Deeds Registry Act, Chapter 185 of the Laws of Zambia which stipulates that from the date of issue, a certificate of title is conclusive evidence of ownership. The 2nd Defendant argues that the erected structures and buried tanks have become part of his land and to that end relies on the Latin maxim "*quicquid plantatur solo, solo cedit*" meaning, whatever is attached to the land, becomes part of the land. Consequently, the Plaintiff is not entitled to any of the relief claimed.

At the hearing the Plaintiff called its sole witness John Steffano Samaras (PW), who is its Managing Director. PW stated that he recalled making a witness statement in this matter which he duly identified from the Plaintiff's Bundle of Documents and stated that he would rely entirely on the same.

In cross examination, PW stated that he started negotiating with Mr. Sydney Chisanga, a representative of Alfa Limited. When asked whether he had dealt with a company known as Alpha, he responded that according to his witness statement he had never dealt with such a company. When further asked as to whether he dealt with Mr. Chisenga as shown in the witness statement, he responded in the negative and added that he dealt with a Mr. Chisanga. When it was put to him that he had exhibited a tendency of being inconsistent, PW denied the allegation.

PW was further asked whether the company sued was different from the one in the witness statement. He answered that the name was wrongly spelt but that it was the same company. It was PW's evidence that according to the EDA exhibited at page 13 of the Plaintiff's Bundle of Documents, the correct spelling of the company he dealt with is "Alpha" Enterprises. Further, that he started his business discussions with Mr. Chisanga in 2010 after being introduced to him by a work colleague named Milan Tripovich who gave him Mr. Chisanga's phone number.

The witness was then referred to a document on page 1 of the Defendant's Bundle of Documents which showed a letter from Environmental Council of Zambia (ECZ) and asked whether according to the said letter he agreed that Alpha enterprises had submitted an environmental project brief on 14th December, 2009, that is, before he knew Mr. Chisanga. PW responded in the affirmative. When further asked if he was aware or believed from the said letter that Mr. Chisanga had plans of constructing a filling station even before he knew him, he responded in the affirmative and said that was the basis of their discussions.

Still under cross examination PW admitted being the author of the letter exhibited at pages 2 and 3 of the Defendants Bundle of Documents referenced "Mkushi Project Commencement". He also admitted having written the document at pages 4 to 7 outlining the obligations of the Plaintiff and 1st Defendant herein. He agreed when it was put to him that all civil construction works were at the 1st Defendant's cost and that the Plaintiff was to supply tanks and other accessories. PW also agreed that according to the letter, the Plaintiff and 1st Defendant were to be business partners.

When examined further, PW stated that the construction of the filling station involved a lot of money and that the 1st Defendant had spent a lot of money on the said project. He admitted in addition that the tanks were buried in the ground and the canopy and other accessories were fixed into the ground. He stated that the Plaintiff bore the cost of the Project Manager to oversee the construction. He also said that a Bill of Quantities was meant to be prepared, but admitted that it was not in the Bundle of Documents.

In further examination, PW stated that the EDA was signed in 2010 towards the end of April. He admitted that according to clause 20 of the same, any previous discussions or letters became of no effect after signing the exclusive agreement and that what was to be considered was the exclusive agreement only. He admitted that according to clause 1, the agreement was only valid for a period

of 12 months. He further agreed that a contract can come to end when the period of the said contract expires. He admitted that the 2nd Defendant's property had some developments on it even before the Plaintiff started constructing the filling station. Further, that the Plaintiff had contemplated that by investing in the project it would recoup its investments from sales of petroleum products.

In relation to the number of fuel tanks at the filling station, PW informed the court that there are six (6) fuel tanks at the filling station as indicated at pages 65 and 66 of the Plaintiff's Bundle of Documents but mentioned that two (2) of them were not installed on the project. He also confirmed that the figure of K1,845,840.00 (rebased currency), is the amount being claimed by the Plaintiff being the amount which the Plaintiff had invested in the project. He admitted that the monies generated from the time the filling station started operating were not taken into account when arriving at that figure. When asked as to whether the turnover of money generated from the business was more than the amount being claimed, PW answered in the affirmative.

When asked to clarify how the amount being claimed was arrived at, PW1 stated that K150,000.00 was for the canopy but that he did not have the invoice for the paving stones and large concrete pavings. He subsequently admitted that according to his letters, the paving stones and concrete pavings were part of civil works and added that it should have been the responsibility of the 1st Defendant. He went on to explain that in order to accurately estimate the cost for the items they went to the suppliers in Ndola and received indicative costs for the items that were provided on the site. Further, that the Plaintiff obtained the items in Ndola and that he was not aware that the 1st Defendant bought the paving stones in Kabwe.

As regards construction of the oil spillage drain, PW told the court that the Plaintiff did not supply a tank to hold the spillages, but that the cost for the oil spillage drain was split between the Plaintiff and 1st Defendant regarding

supervision and design and for the receivers, respectively. He went on to state that at the time of commissioning the filling station an air pressure pump compressor had been installed but was later taken for repair and that he did not know if it had been returned.

In relation to the generator, he indicated that it was bought and delivered brand new and he was not aware that it was not working as put to him. He however, stated that he did not have the invoice for the generator or for the display pylon pegged at K81,000,000.00 (unrebased currency).

Still under cross examination, PW informed the court that the Plaintiff supplied the oil spillage underground tank but that he did not have an invoice for the same in the Bundle of Documents. He admitted that the tax invoice at page 66 of the Plaintiff's Bundle of Documents represents the total cost of four (4) tanks at US$39,214.67, which when multiplied by the ruling exchange rate of K4,750 per US Dollar, added up to K186,269,682.50 (unrebased currency). He admitted that the costs at pages 34 and 66 of the bundle were different and that the figures at page 34 which were much higher than those at page 66 were from an independent valuer, and added that the valuation was done after the contract had ended.

Upon being referred to pages 77 and 78 of the bundle, PW admitted that there were inconsistencies between the figures indicated there and those at page 34, but denied that the Plaintiff was trying to claim more than it was entitled to. Further, that he did not have an invoice for K15,000,000.00 (unrebased currency) being the charge for the electrician and that the figure at page 74 of K37,500,000.00 (unrebased currency) for project supervision was different from what was being claimed at page 34 which was pegged at K43,000,000.00 (unrebased currency). He also told the court that he did not have an invoice for the architectural drawing and that he was not aware that it was the 1st Defendant that paid for the government assessor. He went on to state that he believed he had an invoice for the stones and referred to page 76 which he said

indicated that the stones moved from Samstone Crusher to Mkushi at a cost of US$7,365.58 and that at page 67 there was a Purchase Order for the same dated 21st September, 2010. He conceded that the Valuation Report at pages 149 and 150 does not state the specific site where the valuation took place.

PW went on to state in relation to page 32 of the witness statement that there was no document evidencing the allegation that the 1st Defendant had run out of capital and did not have sufficient capital to purchase fuel on cash basis. He further stated that he did not have a copy of the cheque which the 1st Defendant allegedly issued to the Plaintiff in the sum of K62,399.00 (rebased currency). PW was asked whether the amount of K26,818,021.40 (unrebased currency) which according to his witness statement, the 1st Defendant still owed the Plaintiff, was in the Amended Statement of Claim. His response was in the negative. He went on to state that as shown at page 96 of the Plaintiff's Bundle of Documents, cheque number 1856 issued by the 1st Defendant dated 19th May, 2010 bounced. He said there was a bank statement to that effect but he did not have it before court. He also indicated that he was not the one who operated the fuel statements and that the person who did was not being called as a witness.

PW admitted that the invoice exhibited at page 99 of the Plaintiff's Bundle of Documents allegedly issued by the Plaintiff was not signed. He also told the court that there was a credit limit of K70,000,000.00 (unrebased currency) but that a customer could get goods in excess of the limit. He further stated that during the subsistence of the EDA there were negotiations to rent the filling station which failed.

PW admitted further, that he had no proof before court to show that the 1st Defendant was illegally acquiring petroleum products from other suppliers. He agreed in further cross-examination that the fuel tanks supplied by the Plaintiff are buried underground and removing them would require the destruction of the ground. He however, stated that he did not know that anything attached to

land becomes part of the land. He added that he was aware that the Plaintiff and the 1st Defendant were partners in the joint business venture and that what the Plaintiff wants is the value of its investment in the form of assets or money. PW went on to state that even the licence from ERB was obtained using the Plaintiff's assets and that the Defendants profited from the said assets. PW admitted that the Plaintiff made similar claims to ERB against a company called Wada Chovu with which it was also dealing in the sale of fuel. However, he denied having problems with everybody.

In re-examination PW clarified that the correct spelling of the person he dealt with who is the proprietor of the 1st Defendant is Sydney Chisanga, the 2nd Defendant herein and also that the correct spelling of the enterprise the Plaintiff dealt with is Alpha Enterprise Limited. He went on to state that in accordance with the agreement, movables were tanks, pumps, the pylon and the canopy and all civil construction works were done at the 1st Defendant's cost. PW also stated that the Bill of Quantities that was exhibited was the final one used in the construction and was prepared by the Plaintiff's valuers and Accounts Department.

PW stated further that there were subsequent discussions after the EDA. In relation to page 34 of the Plaintiff's Bundle of Documents relating to Mkushi Buildup costs, PW stated that he based the schedule thereon on valuations and current pricing of assets that the Plaintiff invested in the project. PW stated further that the amount of K2,299,407,588.50 (unrebased currency) at page 97 of the same bundle was the wholesale price which excluded the profit realised by the 1st Defendant and that he believed the total profit is less than two percent. He further stated that page 77 showed an invoice for aluminium fittings valued at the sum of US$55,368. PW clarified that page 151 in the bundle which forms part of the Valuation Report, shows Stand No. 1320 situated in Mkushi where the filling station was built.

In further re-examination, PW stated that the Plaintiff and the 1st Defendant had an EDA which governed the operations of the filling station but that there was a verbal agreement between the Plaintiff and the 2nd Defendant to the effect that the fuel should be paid in cash and also concerning investments. He stated further that the exclusive agreement was breached by the 1st Defendant's continued trading under the Plaintiff's licence and assets with no value or benefit generated to the Plaintiff. Further, that no fuel was purchased from the Plaintiff after the end of December and that they were competing with the Plaintiff and payments were being delayed significantly contrary to the agreement. He testified that the Defendants did not give the Plaintiff any formal notice until 21st January, 2012 when they received a letter from the Defendants' advocates referring to termination of the agreement.

On this note, the Plaintiff closed its case.

The Defence also called one witness (DW).

DW was Sydney Chisanga, the 2nd Defendant herein. His evidence was based on the Defendants' Bundle of Documents filed on 24th February, 2016 and witness statement filed on 17th May, 2016.

In cross examination, DW disputed the Plaintiff's claim for the sum of K29,045,825.28 (unrebased currency). He stated that he had not exhibited any proof of payment to the Plaintiff because the proof was not there. He, however, insisted that he had exhibited proof that the Defendants settled their liabilities in full for the fuel supplied by the Plaintiff but later retracted this and stated that the transactions were on cash basis and he had not been asked to exhibit the evidence. He also admitted that he had not exhibited a reconciliation statement. Further, he did not dispute the Plaintiff's claim that an investment was made by constructing the filling station on his property. However, he disputed the claim that the investment consisted of the items listed at page 34 of the Plaintiff's Bundle of Documents but admitted that he had no proof to

show to the court that he had paid for the said items or contributed financially to the construction of the filling station.

When asked as to whether he had exhibited a schedule of value of works which the Plaintiff had invested in the construction, DW responded in the negative. When further asked whether the operations began in March, 2011, he responded in the negative and said that operations began somewhere in October, 2010. When asked how possible it was that the filling station was completed in December, 2010 while operations began in October, 2010, DW's response was that the filling station was completed somewhere between September, and October, 2010, after which business commenced. He was then referred to page 95 of the Plaintiff's Bundle of Documents and asked to confirm whether the document did state that the construction works were completed in December, 2010. He confirmed that the document stated accordingly.

DW was further asked about the date of commencement of operations by the 1st Defendant. His response was that it was towards the end of 2010 but admitted that he did not have evidence before court. He stated that according to paragraph 9 of his witness statement the Plaintiff was to recoup its investment within a period of 12 months ending on 30th April, 2011. When asked as to whether the Plaintiff had recouped its investment since the filling station began operating after December, 2010, DW responded that it did. When further asked if there were 12 months between December, 2010 and April, 2011, his response was that there were not.

DW went on to state that according to page 2 of the EDA, there was no agreement that the investment would be recouped. He also said that the Defendants obtained the licence to trade on 30th November, 2012 as shown at page 55 of the Defendants' Bundle of Documents. When asked how they were trading before obtaining the licence since the agreement terminated on 30th April, 2011, DW responded that they were trading illegally but later explained that ERB carries out investigations and gives applicants a window period before

granting a licence. He further stated that they obtained consent from ERB but he did not have the evidence before court.

DW was referred to a letter from ERB addressed to the 1st Defendant dated 10th July, 2012 exhibited at page 133 of the Plaintiff's Bundle of Documents referenced "Cessation of Dealership Agreement with Samfuel Limited" wherein ERB notified the 1st Defendant that they were in receipt of a letter from the Plaintiff notifying them that the 1st Defendant was no longer operating under the Plaintiff. Upon being queried as to whether it indicated that they had permission to trade before December, 2012, DW responded in the negative.

He confirmed in further cross examination that his lawyers notified the Plaintiff on 11th June, 2012 that the EDA would not be renewed. The witness was then referred to clause 1 of the EDA and asked whether he had proof that the Plaintiff was notified in writing 60 days prior to the Defendants' stopping to purchase from the Plaintiff as required by the agreement, he responded in the affirmative but added that the proof was not before court. He admitted that the Plaintiff and 1st Defendant were the only parties to the EDA.

In further cross-examination, DW stated that the land on which the filling station was constructed belonged to him but that he had not benefited from the investment on his land. He however, admitted that the value of his land had improved by virtue of the construction of the filling station on it. He also admitted that he benefited from the investment in terms of rentals but that there was no agreement between himself and the Plaintiff. He also informed the court that he had not compensated the Plaintiff for his investment as there was no relationship between the Plaintiff and himself although he had consented to the development.

DW testified that the tanks, generators, pumps and canopy were still on the property and being used by the 1st Defendant in its trade. He conceded that the Defendants had not paid the Plaintiff for these items. He also stated that the Defendants had not procured and delivered to the Plaintiff the items equivalent

to the tanks and other items which they had undertaken through their advocates to do and had continued to trade with the items up to the date of trial.

In re-examination DW said that he disputed the K29,450.00 (rebased currency) being claimed by the Plaintiff because fuel business is cash-based, meaning that payments are made upon delivery and there is no credit, and that if at all you are given credit its only for 7 days and it has to be in writing. He added that the reason he earlier stated that he had no proof that payments were made for all the fuel supplies was because the business was on cash basis. Payments were made by cheque. He also informed the court that he had reconciliation statements regarding the fuel purchases but that he did not have them before court.

DW further told the court that he did not have a schedule of the works that the 1st Defendant did but went on to state that the 1st Defendant did everything in terms of construction of the filling station. He explained that the 1st Defendant did all civil and cement works and the Plaintiff bought the movable assets. In relation to page 95 of the Plaintiff's Bundle of Documents, the witness explained that the letter was addressed to the Board Secretary of ERB and there was no copy to the 1st Defendant to bring to their notice the completion period indicated in the said letter. DW confirmed that the first fuel purchases were made on 22nd April, 2010 and 19th May, 2010. He also confirmed that according to his statement, the expiry date of the EDA was 30th April, 2011 and therefore, the 12 months were supposed to end in April, 2011.

In further re-examination, DW stated that after the Plaintiff revoked the licence, the Defendants were called by ERB and told to apply for a trading licence, which they did and were issued with a licence to operate. In relation to the letter from ERB, he maintained that they had permission to trade but had to normalise the situation within 14 days of receipt of the letter by seeking approval from the Board. He confirmed that the validity period of the

dealership agreement was 12 months and that the Defendants had not compensated the Plaintiff as it was not in the agreement and further, that the Plaintiff bought those items for the purpose of doing business for 12 months, which it did. He informed the court that there was no agreement to the effect that after 12 months the equipment was to be returned to the Plaintiff. He further explained that when the Plaintiff stopped supplying fuel to the Defendants, they had to run around to get a licence so that they could start trading.

This marked the close of the Defendants' case.

The parties filed their submissions at the close of their cases. I am grateful to them for the same. In arriving at my decision, I have considered the submissions together with all pleadings and evidence tendered. I have not found it necessary to reproduce the parties' submissions, but have instead referred to relevant portions thereof.

It is common cause that the Plaintiff is a limited liability company involved in the import, distribution and sale of petroleum products and holds a licence issued by ERB. It is also common cause that the 1st Defendant is a limited liability company, while the 2nd Defendant is an individual and businessman who is also the sole owner of Stand No. 1320, Mkushi, which is the land on which the 1st Defendant's business is operated. It is also not in dispute that the Plaintiff and the 1st Defendant agreed to jointly finance the construction of a filling station on the 2nd Defendants' property. This agreement was with the apparent consent of the 2nd Defendant who did not object to the project.

It is also on record that the Plaintiff and 1st Defendant entered into an exclusive dealership agreement which, despite being undated, was duly executed by the parties. That the Plaintiff contributed to the construction of the filling station on the 2nd Defendant's property is also not in dispute. What is in dispute, however, is the quantum of the investment.

It is incontrovertible that following the execution of the EDA, the 1st Defendant became operational as a filling station and traded in petroleum products by virtue of the Plaintiff's licence. It is also not in dispute that the Plaintiff invested in the filling station in the form of movables, that is, petrol pumps, canopy, pylons, tanks and a generator. What is apparent from the evidence before court is that the 1st Defendant bore the cost of all cement and concrete works.

Therefore, arising out of the claims, the issues for determination in this matter are, in my view, the following:-

(i) Whether the Plaintiff is entitled to an order for possession or replacement value for the fuel pumps, canopy, fuel tanks and pylon erected on the 2nd Defendant's property;
(ii) Whether the 1st Defendant breached the EDA between itself and the Plaintiff by procuring petroleum products from third parties while still trading under the Plaintiff's licence;
(iii) Whether the Plaintiff is entitled to the sum of K1,845,840,000.00 (unrebased currency) which it claims as being the value of improvements it carried out on the 2nd Defendant's property at Plot No. 1320, Great North Road, Mkushi;
(iv) Whether the Plaintiff is entitled to damages for loss of use of a profit earning chattel against the Defendant; and
(v) Whether the Plaintiff is entitled to payment of the sum of K29,048,825.00 (unrebased currency) for petroleum products allegedly supplied by the Plaintiff to the 1st Defendant between January, 2011 and September, 2011.

I will now consider the above issues in the order in which they appear.

(i) Whether Plaintiff entitled to order for possession of fuel pumps, canopy, fuel tanks and display pylon

An examination of the evidence adduced reveals that the Plaintiff did in fact supply fuel pumps, canopy, fuel tanks and a display pylon which were erected on the 2nd Defendant's premises. What is in controversy is whether the Plaintiff is entitled to an order of possession of the same. The 2nd Defendant claims that the said items cannot be removed from the premises because they have become fixtures, and to support his claim, has cited the Latin maxim "*quicquid Plantatur solo, solo cedit"* which translates to "whatever is annexed to the land becomes part of the land." The 2nd Defendant has argued that both the purpose and degree of annexation of the fuel tanks, canopy, pylons and fuel pumps show that they were intended to be a permanent improvement to the property, hence became part of the land and attempting to remove them would cause destruction to his property.

The Defendants have further cited Mudenda, F.S., the learned author of *Land Law in Zambia: Cases and Materials (2007)* at page 55 where he states as follows:

> *"From the Legal point of view, land means not only the ground but also the subsoil and all structures and objects such as buildings, trees and minerals standing or lying beneath it. This concept of land is often expressed in the Latin maxim "quicquid Plantatur solo, solo cedit" which translates to "whatever is annexed to the land becomes part of the land". If a chattel has not become a fixture, it is known as a fitting. Once a chattel or object has become part of the land it cannot generally be removed. In determining whether a chattel has become a fixture, a combination of two tests is applied; viz, the degree of annexation and the purpose of annexation."*

In addition, the Defendants have cited the case of ***Hulme v Bringham (1)*** where it was held as follows:-

> *"A test often applied is whether an item can be removed without causing damage or injury to land. Where a chattel merely rests of its own weight on the land, it is not prima facie a fixture unless it is clear that the object was intended as a permanent improvement of the land as part of the architectural design."*

The case of ***Spyer v Phillipson (2)*** was further cited in support of the Defendants' contention. It was held in that case at pages 209 – 210 that:

> *"The more securely an object is affixed and the more damage that would be caused by its removal, the more likely it is that the object was intended to form a permanent part of the land."*

Relating the above position of the law to the case in *casu*, the Defendants have argued that the fuel pumps were fixed to the ground and were meant to be an architectural design and permanent improvement to the 2nd Defendant's land as a filling station; that the same applied to the canopy and fuel tanks which are buried underground. The Defendants have further contended that the pylons were also meant to be a permanent improvement to the land and that removing them would cause severe damage or injury to the ground to the prejudice of the owner. They have argued in addition that there is no clause in the EDA providing for the removal of any chattel from the land after the expiry of the agreement.

In response the Plaintiff has argued that the maxim "*quicquid Plantatur solo, solo cedit*" is not applicable in the circumstances because the parties never intended that the said items form part of the land and be regarded as permanent fixtures, but instead were to be used to carry out the trade and business of a filling station. In that regard they cited the case of ***Smith v City Petroleum Company Limited (3)*** where it was held that:

"...petrol pumps affixed to tanks embedded in the ground were tenant's fixtures, and were removable within a reasonable time after the determination of the term and if not so removed, the property in the pumps passed on to the landlord and a subsequent tenant takes no interest in them..."

The Plaintiff also referred this court to the case of ***Holland v Hodgson (4)*** where Blackburn J, held, *inter alia*:

"There is no doubt that the general maxim of the law is, that what is annexed to the land becomes part of the land; but it is very difficult, if not impossible, to say with precision what constitutes an annexation sufficient for this purpose. It is a question which must depend on the circumstances of each case, and mainly on two circumstances as indicating the intention, viz., the degree of annexation and the object of the annexation. When the article in question is no further attached to the land, then it is generally to be considered a mere chattel. But even in such a case, if the intention is apparent to make the articles part of the land, they do become part of the land. On the other hand, an article may be firmly fixed to the land and yet the circumstances may be such as to show that it was never intended to be part of the land, and then it does not become part of the land ..."

The Plaintiff finally submitted that whether or not the items became fixed on the 2nd Defendant's land and therefore not removable, the 2nd Defendant is nevertheless liable to the Plaintiff under the principle of "*quantum meruit*" for services rendered or work done, whether or not the contract materialised. They added that it is trite law that the circumstances of this case give rise to the claim by the Plaintiff for restitution in respect of the benefit conferred on the Defendants in pursuance of the contract between the parties.

Another authority which the Plaintiff referred to is the case of ***Base Chemicals Zambia Limited v Zambia Air force and Another (5)*** where the Supreme Court held that:

"... our conclusion on grounds one and two is that a contractual relationship existed between the parties and that there was no abuse of offices; it follows that we must uphold ground three, and hold that on the evidence on record, supported by signed completion certificates of works ... it is clear to us that works were done at the request of the defendants of which the defendants benefitted. We therefore, find and hold that even if there had been no binding contract between the parties, the plaintiff would have been entitled to recover on a quantum meruit basis..."

Yet another case which the Plaintiff cited in support of its claim is ***The Rating Valuation Consortium and Another v The Lusaka City Council and Another (6)*** where the court held that:-

"... even assuming that no express contract ever existed, the only inference that could reasonably be drawn from all the circumstances of this case, was that there was, at any rate, an implied contract to pay for services to be rendered...These legal principles are rested in Cheshire and Fifoot. The learned authors' views are that, in the case where one accepts the fruits of another's labour, in circumstances where payment would be expected, he must pay for it ..."

It is the Plaintiff's contention that in the circumstances, the Defendants cannot benefit unjustly at the expense of the Plaintiff.

In response, the Defendants distinguished the case of ***Smith v. City Petroleum Company Limited*** from the case before this court because, according to the Defendants, in the former case the parties were in a landlord and tenant relationship and one of the exceptions to the classification of fixtures/fittings and removal of a chattel from land is for trade fixtures by a tenant. The Defendants argued that in the present case, the Plaintiff was not a tenant but a business partner for profit. They submitted that the EDA and pre-contractual negotiations documented on pages 2-6 of the Defendant's Bundle of Documents

outline the understanding of the parties. The Plaintiff was not a tenant and therefore, cannot remove the said items.

As the Defendants correctly submitted, the understanding of the parties is evident from pages 2 – 6 of the Defendant's Bundle of Documents. Thus, it is clear from page 5 of the said documents, which forms part of the Minutes of the Mkushi Project Review Meeting held on 24th May, 2010, attended by, amongst others, the managing directors of the Plaintiff and 1st Defendant, that the tanks, pumps, pylons and display canopy provided by the Plaintiff were considered movables and not permanent fixtures. It is also evident that the said items were not intended to become permanent fixtures once erected on the land and therefore, it can be concluded that they did not form part of the 2nd Defendant's land and can be removed from the land. With regards to the Defendants' argument that there was no clause in the EDA providing for the removal of any chattel from the land after the expiry of the agreement, it is my considered view that such a clause was not necessary because the parties made it clear that the chattels were meant for carrying out their trade and business. In the circumstances, the chattels could be removed by the party that provided them.

Further, the fact that the Defendants were willing to refund the Plaintiff for the items as evidenced at page 101 of the Plaintiff's Bundle of Documents attests to the fact that they realised that they had benefited from the investment and that the Plaintiff deserved to be compensated for the same. Under cross-examination, PW admitted that the investment by the Plaintiff was done with his consent, that the items were still on his property and the 1st Defendant was still trading using the same; that the Defendants had neither paid the Plaintiff for using them nor refunded it for the same.

The Defendants have expressed concern that removal of the said items would occasion irreparable damage to the 2nd Defendant's land. My take on this is that

the concern could be addressed by leaving the items intact and instead refunding the Plaintiff for the same.

It is therefore, this court's finding and holding that this claim has been proved. The 1st Defendant shall surrender possession of the movable items claimed in the pleadings namely, fuel pumps, canopy, four (4) fuel tanks and display pylon to the Plaintiff or in lieu thereof, pay the Plaintiff replacement value for the same.

(ii) Whether 1st Defendant breached EDA between itself and Plaintiff

It is the Plaintiff's contention that the 1st Defendant breached the EDA between the 1st Defendant and the Plaintiff by procuring petroleum products from third parties whilst still trading under its licence.

The 1st Defendant denies the Plaintiff's claim of breach of the EDA and asserts that the Plaintiff failed to adduce evidence to prove this claim. The 1st Defendant claims that the Plaintiff is fully aware that the EDA was terminated by effluxion of time after the 12 months provided for in the agreement came to an end; that effluxion of time is a legal way of terminating an agreement. The 1st Defendant contends that it is trite law that any agreement can terminate by the expiry of the period for which it is intended to run. It is the 1st Defendant's further contention that following the expiry of the EDA, the 1st Defendant was no longer obliged to buy petroleum products from the Plaintiff.

Further, the 1st Defendant argues that there is evidence on record that the Plaintiff wrote to ERB to remove the 1st Defendant as one of its affiliates; that ERB issued a retail licence to the 1st Defendant to sell petroleum products in its own right after the expiry of the EDA and therefore, the 1st Defendant was at liberty to procure petroleum products elsewhere after the expiry of the EDA. The 1st Defendant claims in addition, that the filling station would stay for long periods without fuel and this used to anger motorists. Further, that if at any point it traded without a licence it was up to ERB to take action against it, which

it had not done, and not the Plaintiff. Therefore, the claim for relief under this head is misplaced.

Manifest from the available evidence is the fact that from about June, 2011 the 1st Defendant did not obtain supplies of petroleum products from the Plaintiff but continued operating the filling station. The document exhibited at page 55 of the Defendant's Bundle of Documents, which is a provisional licence to retail petroleum products, shows that ERB issued the licence to the 1st Defendant on 30th November, 2012. It should be noted that exhibit 133 in the Plaintiff's Bundle of Documents which the 2nd Defendant referred to in cross-examination as being permission from ERB is in reality a letter dated 10th July, 2012 informing the 1st Defendant that the Board had received a letter from the Plaintiff notifying them that the 1st Defendant was no longer operating under the Plaintiff. That letter gave the 1st Defendant fourteen (14) days in which to normalise the situation.

In my view, normalisation of the situation, by inference, meant obtaining a licence. Thus, the 1st Defendant normalised the situation on 30th November, 2012 by obtaining a licence to deal in petroleum products. What this in effect means is that from June, 2012, with the exception of the fourteen-day grace period, until 30th November, 2012 the 1st Defendant was operating without a retail licence while using the property invested by the Plaintiff in the business. This evidence was not controverted by the Defendants.

The Plaintiff further claims that the 1st Defendant breached the EDA by failing to provide the requisite written notice to terminate in accordance with clause 1 (ii) of the Agreement which provided that the agreement could be terminated by either party upon at least 60 days' prior written notice to the other party. On the other hand the Defendants argue that the Plaintiff failed to adduce evidence to prove this claim. They claim that the 1st Defendant was issued with a retail licence to deal with petroleum products in its own right after the expiry of the EDA and following the Plaintiff's notification to ERB to remove the 1st

Defendant from the list of licenced filling stations under its name. It is the Defendants' contention therefore, that there was no breach of the EDA whatsoever by the 1st Defendant.

I am of the opinion that the question which needs to be determined in order to deal with this claim is whether there was indeed a breach of the EDA by the 1st Defendant which would entitle the Plaintiff to damages. It is noteworthy that although not fully dated, the agreement clearly stated in clause 1 that it was for a period of twelve (12) months. It did not give the day and month of commencement but provided in the first paragraph that it was entered into in Two Thousand and Nine. The explanation given by PW in his evidence was that the agreement was not dated because it was needed for the purpose of facilitating ECZ approval and also because it was not intended that it should be for a period of one (1) year as the Plaintiff's return on the investment would not be achieved and lastly, because the agreement was prepared before the construction works were completed.

As the Plaintiff rightly submitted, It is indeed trite law that once parties have embodied the terms of a contract in a written document, extrinsic evidence is generally not admissible to add, vary, subtract from or contradict the terms of the written contract as per the principle laid down in the case of ***Holmes Limited v. Buildwell Construction Company Limited (7).*** Therefore, applying this principle strictly to the case at hand, no evidence can be admitted to show that the agreement was not meant to be for a period of one (1) year or twelve (12) months.

The evidence on record shows that the parties entered into the EDA in or about April, 2010, and going by the terms of the agreement, it was meant to expire twelve (12) months later, that is, in April, 2011. However, since the parties to the agreement continued to trade on the same terms and conditions, as the evidence before this court attests, after the expiry of the said agreement, it can be presumed that the parties intended that the terms of the agreement would

continue to bind them in their subsequent dealings and therefore, the agreement is deemed to have been renewed for a further term of twelve (12) months from the expiry date. The conduct of the parties in this case leads to the inescapable conclusion that they had the intention of continuing to trade beyond the 12 months provided for in the agreement and did in fact do so.

In other words, after its expiration in April, 2011, the EDA was deemed to have been renewed by conduct of the parties for a further term of twelve (12) months and expired in April, 2012. It was again renewed by conduct of the parties for a further term of twelve (12) months from April, 2012 and continued to be in effect until 11th June, 2012 when the 1st Defendant's advocates wrote to the Plaintiff informing them that the 1st Defendant would not be renewing the same and would instead be at liberty to lawfully deal with other oil marketing companies (refer to exhibit 51 in the Defendants' Bundle of Documents, being a letter written by the advocates for the Defendants to the Plaintiff dated 11th June, 2012). The Plaintiff formally suspended its trading licence for Mkushi on 18th June, 2012 as per exhibit 52 in the Defendant's Bundle of Documents.

There is evidence on record that from about June, 2011 the 1st Defendant did not obtain supplies of petroleum products from the Plaintiff but continued trading. Therefore, the only logical conclusion is that after it stopped taking deliveries from the Plaintiff, the 1st Defendant started getting its petroleum supplies from some other sources. This conclusion is buttressed by the 1st Defendant's argument that it was at liberty to procure petroleum products elsewhere after the expiry of the EDA. The letter from the Defendants' advocates to the Plaintiff dated 11th June, 2012 (exhibited at page 51 of the Defendant's Bundles of Documents) clearly states that the 1st Defendant was at liberty to lawfully deal with other oil marketing companies after 12 months since it had expired. However, this is contrary to the court's finding that the EDA was still in effect following its renewal by conduct of the parties.

It is therefore, my considered view that by obtaining supplies from other oil companies whilst the EDA was still in effect, the 1st Defendant breached the terms of the agreement. I also find that the 1st Defendant breached the provision on giving of 60 days' notice of termination to the other party since it did not follow that provision when it informed the Plaintiff that it would no longer be renewing the EDA and thereby effectively terminating the agreement.

I accordingly award the Plaintiff damages for breach of the EDA to be assessed by the Deputy Registrar.

(iii) Whether Plaintiff entitled to claim of K1, 845,840,000.00 (unrebased currency) for improvements carried out on 2nd Defendant's property.

It is not in contention that the Plaintiff made an investment towards the construction of the filling station on the 2nd Defendant's property. Indeed, the court record shows that DW is not disputing that fact. What is being disputed is the claim by the Plaintiff that the investment consisted of the items listed at page 34 of the Plaintiff's Bundle of Documents.

The Defendants claim that the Plaintiff failed to produce a Bill of Quantities from a qualified quantity surveyor to show the scope of works done; cost of materials and receipts for what was purchased as well as labour. On the other hand, the Plaintiff has submitted that its investment is supported by various documents on the court record, particularly Minutes of the meeting between the parties as evidenced at pages 81 to 83 in the Plaintiff's Bundle of Documents.

The Minutes of the meeting referred to which took place on 24th May, 2010 and was attended by, amongst others, the Managing Directors of the Plaintiff and 1st Defendant; the Technical Manager for the Plaintiff and Construction Manager for the 1st Defendant, clearly show that land preparations and civil works were to be carried out by the 1st Defendant. Further, that construction of the

permanent structure was be at the 1st Defendant's cost; which works were to encompass the cement works and construction of the permanent structures. The Minutes also state that movable parts consisting of tanks, pumps, pylon and canopy were to be supplied by the Plaintiff.

The evidence adduced reveals that the agreement relating to the Plaintiff's investments was not reduced into writing. However, that fact alone does not negate the existence of an agreement between the parties as the law sanctions oral contracts as well as implied ones. The action by the 2nd Defendant of allowing the construction of a filling station on his premises is indicative of his approval to the arrangement. Indeed, in cross-examination, DW admitted that the investment was done with his consent. Therefore, notwithstanding the 2nd Defendant's claim that there were no discussions for an agreement relating to the Plaintiff's investments on his land, the existence of the contract can be implied from his conduct. The said agreement is further evidenced by documents such as the Minutes exhibited at pages 81 to 83 in the Plaintiff's Bundle of Documents.

I concur with the submission by the Plaintiff that even if there was no contract regarding the Plaintiff's investment on the 2nd Defendant's land, the Plaintiff would still be entitled to compensation on the basis of the principle of *quantum meruit.* According to that principle, where services have been performed but there is no written contract, the court will resolve a *quantum meruit* claim by examining whether the Defendant has been unjustly enriched. See the case of ***Benedetti v. Sawiris and Others (8).*** A perusal of the pleadings shows that the Plaintiff has not made a claim of *quantum meruit.* However, the case of ***D.P. Services Limited v. Municipality of Kabwe (9)*** provides that even if a party has not specifically pleaded *quantum meruit,* the party is not debarred from obtaining judgment based on the principle.

From the evidence before me, I am left in no doubt that the Defendants benefited and are still deriving benefits from the investment by the Plaintiff

since the invested property is still being used by the 2nd Defendant for income generation. The Defendants have argued that the Plaintiff and 1st Defendant were business partners for profit and that in a partnership the parties can make a profit or loss and one partner cannot make a claim for reimbursement when there is no wrong doing on the part of the other partner.

While agreeing with the Defendants' submission that the parties were business partners, it can also be concluded that where there is wrong doing on one partner's part, the other partner is entitled to reimbursement. In this case the court has found that there was a breach of contract on the part of the 1st Defendant. Therefore, the Plaintiff is entitled to reimbursement.

All in all, I am satisfied that the Plaintiff did invest in the filling station constructed on the 2nd Defendant's premises. However, the quantum of the investment is in dispute and the Plaintiff has not adduced sufficient evidence to support its claim that the investment amounted to K1,845,840,000.00 (unrebased currency). Therefore, while this claim is successful, it is referred to the Deputy Registrar for assessment of the amount payable. I therefore, order accordingly.

(iv) Whether Plaintiff entitled to damages for loss of use of profit earning chattel

In my view the claim for damages for loss of profit earning chattel is unsustainable. This is so because, as the Defendants rightly submitted, the Plaintiff did not lease any of the movables at the filling station to the 1st Defendant or hire them out for them to sustain a claim of damages for loss of use of profit earning chattel. Having succeeded on its claims for possession of the movables it invested in the Defendant's filling station and improvements on the 2nd Defendant's property, it is my view that the Plaintiff will be adequately compensated. Therefore the claim for damages for loss of profit earning chattel fails.

(v) **Whether Plaintiff entitled to K29,048,825.00 (unrebased currency) for petroleum products allegedly supplied to 1st Defendant between January, 2011 and September, 2011.**

It is the Plaintiff's contention that it is not in dispute that the 1st Defendant did not obtain supplies from the Plaintiff from about June, 2011. However, the Plaintiff is claiming for the sum of K29,045,825.28 (unrebased currency) for outstanding balance due and payable to the Plaintiff for Petroleum products supplied by the Plaintiff to the 1st Defendant between the period January, 2011 to September, 2011 plus interest thereon. If that is the case it is baffling that the claim has been extended to the period when no supplies were obtained by the 1st Defendant, that is, from June, 2011 to September, 2011.

This observation notwithstanding, as the Defendants correctly submitted, the fuel statement tendered in evidence by the Plaintiff is computer generated and no evidence of orders, delivery notes or invoices from which information was extracted to be posted on the fuel account has been produced. For these reasons, I find that this claim has not been proved on a preponderance of probabilities and is therefore, dismissed.

Summary of Findings

For the avoidance of doubt, I find the following claims to have been proved by the Plaintiff on a balance of probabilities, namely:

(i) Order for possession of fuel pumps, canopy, four (4) fuel tanks and display canopy or replacement value in lieu thereof;

(ii) Refund for improvements effected by the Plaintiff on the 2nd Defendant's property being Plot No. 1320, Great North Road, Mkushi; quantum of refund to be assessed by the Deputy Registrar; and

(iii) Damages for breach of the Exclusive Dealership Agreement to be assessed by the Deputy Registrar.

The following claims have not been proved to the required standard, namely:

(i) Damages for loss of use of profit earning chattel; and

(ii) Payment of the sum of K29,045,825.28 (unrebased currency) being in respect of outstanding balance for petroleum products supplied by the Plaintiff to the 1st Defendant between January 2011 and September, 2011 plus interest from the date the amount fell due to date of full payment.

Having found as above, I award interest on all amounts due to the Plaintiff at average short-term deposit rate from the date of issue of the writ until judgment and thereafter at current lending rate as determined by the Bank of Zambia until full payment of the judgment sum.

Costs ordinarily follow the event. However, since in this case the Plaintiff has succeeded in some claims and failed in others, the parties shall bear their own costs.

Leave to appeal is granted.

Delivered at Lusaka the 13th day of April, 2017.

W. S. Mwenda (Dr.)
HIGH COURT JUDGE