IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)
BETWEEN:

APPEAL No.183/2014
SCZ/8/225/2014

GEMISTAR ENTERPRISES LIMITED — APPELLANT

AND

AFGRI CORPORATION LIMITED — RESPONDENT

Coram : Hamaundu, Malila and Mutuna, JJS
On 11th July 2017 and 14th July 2017

For the Appellant : Mr. R. Mainza of Messrs Mainza & Co.

For the Respondent : N/A

J U D G M E N T

Mutuna, JS, delivered the judgment of the court.

Cases referred to:

1) Ratings Consortium & another v Lusaka City Council & another (2004) ZR 109
2) Craven Ellis v Canons Limited (1936) 2 ALL ER 1066
3) DP Services Limited v Municipality of Kabwe (1976) ZR 110
4) Base Chemicals (Z) Limited & another v Zambia Air-Force & another (2011) ZR volume 265
5) Zulu v Avondale Housing Project Limited (1982) ZR 172
6) The Attorney General v Achiume (1983) ZR 1
7) Mazoka and Others v Mwanawasa & Others [2005] ZR 138
8) William Carlisle Wise V E.F. Hervey Limited (1985) ZR 179

9) **Fibrosa Spolka Akcyjna v Fairbain Lawson Combe Barbour Ltd.**

Other authorities referred to:

1) **Firmston, Cheshire & Fifoot, The Laws of Contract, 15th edition [2007] Butterworths, London**
2) **Halsbury's Laws of England, by Lord Hailsham of St. Marylebone, 4th edition, volume 9, paragraph 9**
3) **High Court Act, Cap 27**
4) **Blacks Law Dictionary by Bryan A. Garner, eighth edition, West Group, USA.**
5) **Chitty on Contracts, volume 1, General Principles, by H.G. Beale, 2008, Thomson Reuters (Legal) Limited, UK.**

This appeal raises the fundamental issue of the effect of a warranty agreement and its enforceability. The appeal also questions certain finding of fact by the court below.

The backdrop to the appeal is that sometime in August 2010, the Appellant purchased a brand new John Deere, 5303, 2 WD, tractor from the Respondent at the cost of USD15,830.00 (or K78,358,500.00, un-rebased, in Kwacha terms). The reason for purchasing the tractor was to enable the Appellant cultivate various crops on its farm situate at Mkushi.

At the time of purchasing the tractor, the Appellant and the Respondent did not execute any contract of sale to evidence the sale and, as such, the sale was governed by five documents issued by the Respondent to the Appellant namely: tax invoice dated 24th August 2010; letter of change of ownership; John Deere New Equipment Warranty and Agreement (warranty and agreement); John Deere Delivery Acknowledgment; and operator's manual. The warranty and agreement set out the warranty period for free servicing and replacement of parts to the tractor, the spare parts it applied to and the obligations of the Appellant for purposes of enforcing the warranty agreement. On the other hand, the operator's manual is a guide to the Appellant as owner and operator of the tractor on the periods for, and nature of, the service required for the tractor. The extent of application and effect of these two documents, is the source of the dispute in this matter.

Sometime between August and September 2011, the Appellant's managing director noticed that the propulsion of the tractor was not responding to the foot pressure applied to the acceleration pedal. This prompted him to deliver the tractor to the Respondent's branch at Mkushi for purposes of the Respondent ascertaining the nature of the fault. Prior to this, the Appellant did not cause the tractor to be serviced at all as specified in the operator's manual.

Upon delivery of the tractor to the Respondent, the Appellant's managing director was informed by an officer of the Respondent that the warranty and agreement was no longer applicable and enforceable because: the tractor had exceeded the warranty period in terms of the hours it had clocked; and the Appellant did not comply with the terms and conditions of the operator's manual in respect of times for servicing the tractor. The Respondent proceeded to

diagnose the fault on the tractor and recommended an overhaul of the engine at a cost to be borne by the Appellant.

The Appellant's managing director did not agree that the warranty and agreement was no longer applicable and enforceable in view of the interpretation he gave to the warranty and agreement and the operator's manual. He, nonetheless, left the tractor in the custody of the Respondent who issued him with a quotation for the works to be carried out on it in the sum of USD1,984.12 excluding labour charges.

After the tractor was left in the custody of the Respondent, it proceeded to overhaul the engine and issued an invoice in the sum of USD6,466.17. The Appellant's managing director was then informed that the tractor was ready for collection upon payment of the USD6,466.17. His response was that he had instructed the

Respondent's mechanic to restrict the works on the tractor to repair of the fuel system and service of the engine in general. He accordingly refused to settle the invoice for the overhaul and demanded the return of the tractor. The Respondent indicated to him that it had acted in pursuance of his verbal instructions to its mechanic to overhaul the tractor and declined his request for the release of the tractor unless and until the invoice for USD6,466.00 was settled. The Appellant responded by taking out the action in the court below in which it claimed the following relief:

1) **An order for delivery of the tractor by the Respondent to the Appellant**
2) **Damages for loss of use of the tractor**
3) **Damages for loss of anticipated income**
4) **Interest in respect of the claims for damages**
5) **Costs.**

The basis of the Appellant's claim was that the warranty period had not expired as such the Appellant was

entitled to free repair and service of the tractor. It was also contended that the Appellant had left the tractor in the possession of the Respondent for purposes of repair to the fuel system and general service and that no instructions were given for the overhaul.

In its defence, the Respondent denied the claim and counterclaimed as follows:

1) **A declaration that it is entitled to exercise the right of lien over the Appellant's tractor for nonpayment of its repair and labour charges**
2) **An order for payment of the total sum of USD6,466.00 being repair and labour charges**
3) **Storage charges for the tractor from the time of demand for payment of repair and labour charges to time of payment**
4) **Interest thereon and costs.**

The contentions by the Respondent were that: at the time the Appellant delivered the tractor to the Respondent the tractor had exceeded the hours of service covered under the warranty; as such it was no longer entitled to free repair or service; the Appellant had breached the terms and conditions of the operator's manual because it had

neglected to service the tractor in accordance with the operator's manual; therefore, the warranty and agreement was no longer enforceable; at the time the tractor was delivered to the Respondent it required an engine overhaul because the Appellant had failed to service it in accordance with the operator's manual; and, the Appellant's managing director had given the Respondent verbal instructions to overhaul the tractor's engine.

Both parties led evidence during the trial which was in tune with the contentions made.

After the Learned High Court Judge considered the evidence and arguments by the parties she identified two issues for determination. These were: what is the effect of the warranty as to free servicing and repair to the tractor and, has the same been forfeited; and, whether there was an agreement by the parties to overhaul the engine. She then found as a fact that at the time of delivery of the

tractor to the Respondent by the Appellant its mileage had exceeded 1300 hours. According to her, the warranty period was twenty four months or 2000 hours (which ever accrued earlier).

In regard to the second issue, the Learned High Court Judge referred to the operator's manual and considered whether there was a breach committed by the Appellant. She found that the operator's manual provides for change of engine oil and the filter when the tractor clocked the first 100 hours and thereafter at every 250 hours. Further that, the evidence led by the Appellant revealed that it did not change the engine oil or filter when the tractor clocked 100 and 250 hours. Neither was it done at any point in the life of the tractor nor was the tractor serviced at all. She found further that the evidence led by the Appellant revealed that it was of the opinion that it was only obliged to change the oil and filter a minimum of once a year and was, as a

result, within the time limit of twelve months for servicing of the tractor and twenty four months for repairs.

The Learned High Court Judge went on to find that when the tractor clocked 100 hours the Appellant should have serviced the tractor as per the operator's manual. She found further that a breach of the terms of the operator's manual entitled the Respondent to refuse to bear the costs of repair or replacement of parts and forfeiture of the warranty agreement. The responsibility to bear the costs of repairs and replacement of parts would then shift to the Appellant. She, in this regard, relied upon clause D of the operator's manual which she said provides for termination of the Respondent's obligations if the operator's manual was not complied with in terms of servicing of the tractor. She concluded that there was lack of proper maintenance of the tractor on the part of the Appellant which resulted in

the breach of the operator's manual and forfeiture of the warranty agreement.

As regards the counter claim, the Learned High Court Judge entered judgment in favour of the Respondent against the Appellant in the sum claimed of USD6,466.17. The basis for this was that she found that the parties' conduct and communications revealed that there was a contractual relationship to overhaul the tractor. The Learned High Court Judge summarized the said conduct and communication as being: the communication given to the Appellant by the Respondent in respect of the problem that plagued the tractor; the request by the Appellant for a quotation for the repairs; the execution of the works; and subsequent issuance of the invoice. She relied upon a passage from the learned author of ***Firmston, Cheshire and Fifoot, The Law of Contract***,15th edition, that

parties are to be judged not by what is on their minds but what they have written down or done.

The Learned High Court Judge found further that in any event works on the tractor had been carried out and as such the Respondent is entitled to payment on the basis of the principle of *quantum meruit.* She quoted a passage from ***Halsbury's Laws of England***, 4th edition, volume 9, that a Plaintiff who has rendered services under a void contract may be entitled to recover on *quantum meruit.* According to the Learned High Court Judge the cases of ***Ratings Consortium and another v Lusaka City Council***[1], ***Graven Ellis v Canons Limited***[2], ***DP Services Limited v Municipality of Kabwe***[3] and ***Base Chemicals Zambia Limited and another v Zambia Air-Force & another***[4] all espouse the principle of *quantum meruit* as she explained it.

In her further determination of the matter, the Learned High Court Judge considered whether the Respondent was entitled to exercise a lien over the tractor. She did this by initially defining lien by reference to an article by Paul Bugden (Forward Law) entitled ***Liens - Possessory Liens - General Liens - Analysis*** and found that one is not entitled to exercise a lien unless there is a debt due and payable to him. She concluded that since there was a debt due to the Respondent in respect of the cost of repair and labour for the tractor, it was entitled to exercise a lien over the tractor.

In concluding consideration of the counterclaim the Learned High Court Judge determined the Respondent's claim in respect of costs of storage of the tractor. She dismissed this claim on the ground that a right to a lien does not, in and of itself, entitle the lienee to charge for storage.

In the final analysis, she dismissed the Appellant's claim in its entirety with costs and upheld the Respondent's counterclaim except the claim for storage charges.

The decision has not pleased the Appellant, prompting it to launch this appeal on nine grounds as follows:

1) **That the learned trial judge misdirected herself in law when she held that the issue for determination is whether the Plaintiff did breach the terms of the agreement vis a vie (sic) the operator's manual to warrant the forfeiture of the warrant (sic) agreement between the parties;**
2) **That the holding by the learned trial judge that it is not in dispute that the Plaintiff took the tractor into the defendant (sic) for free service after it clocked 1,300 hours of work in August, 2011 is not supported by evidence;**
3) **That the learned trial judge misapprehended the terms of the John Deere New Equipment Warranty and Agreement relating to service of the tractor in question when she repeatedly held in her judgment that the Plaintiff was obliged to service the tractor when it clocked 100 hours as stipulated in guidelines of the Operator's manual;**
4) **The holding by the court below that there is evidence that upon reaching 100 hours, the Plaintiff did not inform the Defendant to enable them carry out free service of the tractor is not consistent with clause 1 of the John Deere New Equipment warranty and**

agreement which obliges the seller to suggest the most appropriate time for free inspection;

5) **The learned trial judge misdirected herself in law and in fact when she held that the Plaintiff breached the provisions of the John Deere New Equipment Warranty and Agreement warranting forfeiture of the Warranty Agreement to perform the service;**
6) **The finding by the court below that at the time of delivery the tractor had clocked over 1300 hours is not supported by evidence;**
7) **The holding by the court below that even if the Plaintiff was within the warranty period of twelve months it was obliged to service the tractor according to the operator's manual is in conflict with clause A of the John Deere New Equipment Warranty and Agreement;**
8) **The learned trial judge misdirected herself in law and in fact when she held that regardless of whether there is a contract between the parties in respect of the work done the Defendant is entitled to recover the sum of USD6,446.17 on a quantum meruit basis;**
9) **The evaluation of the evidence in support and against the Plaintiff's case by the court below was unbalanced.**

Before the hearing of the appeal, the parties filed heads of argument which they relied upon at the hearing. Further, although counsel for the Respondent was not in attendance, we nonetheless proceeded with the hearing because we were informed by counsel for the Appellant that he had indicated to him that he would not be in attendance

and would rely entirely on his heads of argument in opposing the appeal.

Under ground 1 the Appellant contended that the Learned High Court Judge erred at law when she identified the issue for determination as being whether the Appellant had breached the terms of the warranty and agreement as read with the operator's manual to justify the forfeiture of the warranty. According to Mr. R. Mainza, counsel for the Appellant, the issues that fell for determination were set out in the heads of each claim to the statement of claim and counterclaim as follows:

> "**(i) Whether the [Appellant] was entitled to an order for delivery up of John Deere, 5303, 2WD, Tractor Chassis No. PY5303C000760 by the [Respondent] to the [Appellant];**
>
> **(ii) Whether the [Appellant] was entitled to damages for loss of use of the tractor;**
>
> **(iii) Whether the [Appellant] was entitled to damages for loss of anticipated income;**

(iv) **Whether the [Respondent] was entitled to a declaration that it was entitled to exercise the right of lien over the [Appellant's] tractor for nonpayment of its repairs and labour charges;**

(v) **Whether the [Respondent] was entitled to an order for payment of the total sum of USD6,466.00 being repair and labour charges;**

(vi) **Whether the [Respondent] was entitled to storage charges for the tractor from the time of demand for payment for the repairs and labour charges, to time of payment.**

These issues, counsel argued, constituted the matters in controversy between the parties which the Learned High Court Judge was obliged to adjudicate upon in terms of section 13 of the ***High Court Act*** and our decision in the case of ***Zulu v Avondale Housing Project Limited***[5]. Section 13 of the ***High Court Act*** states as follows:

> **"In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently, and the court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any**

of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of common law with reference to the same matter, the rules of equity shall prevail".

On the other hand in the ***Zulu*** case we held that trial courts have a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined with finality.

In the light of the foregoing authorities, counsel submitted that it was a serious misdirection on the part of the Learned High Court Judge when she proceeded as she did in terms of identification of the issue in dispute.

In response, the Respondent argued that the Appellant's claim in the court below was anchored on the contention that the warranty and agreement had not been

breached, as such, the warranty was not forfeited. In her identification of the issue as she did, the Learned High Court Judge was, as a result of this, determining the claim as presented. The Respondent then set out the purpose of pleadings in accordance with our holdings in the cases of ***Mazoka & Others v Mwanawasa***[6] and ***William Carlisle Wise v E.F. Hervey Limited***[7] and ***Odger's Principles of Pleadings and Practice in Civil Actions in the High Court of Justice***, 22nd edition, which essentially is to define the issues of fact and law to be decided upon.

In regard to grounds 2, 3, 6 and 7 which Mr. Mainza argued together, the Appellant questioned the interpretation given by the Learned High Court Judge to the operator's manual and the warranty and agreement. The view taken by counsel was that the findings of fact made by the Learned High Court Judge were not supported by the evidence tendered. The findings of fact complained

of related to: which of the parties was responsible for servicing the tractor; the hours that the tractor had clocked when it was delivered to the Respondent; and the time for the first service of the tractor. It was counsel's argument that in view of the fact that the findings of fact were not supported by the evidence we should quash them in accordance with our decision in the ***Zulu*** case.

The Respondent's arguments in response were as follows: the record of appeal reveals that the issue as to whether the tractor had clocked 1300 at the time it was delivered to the Respondent was not a major issue in view of the finding by the Learned High Court Judge that the warranty period was for twenty four months or 2000 hours, whichever was earlier; the Learned High Court Judge did not misapprehend the terms of the warranty and agreement and the consequence of non compliance with clause D thereof; and that, the finding by the Learned High

Court Judge that the Appellant was obliged to service the tractor according to the operator's manual is not in conflict with clause A of the warranty and agreement.

As regard grounds 4 and 5, Mr. Mainza attacked the interpretation given by the Learned High Court Judge to clause I of the warranty and agreement and the finding that the Appellant did not notify the Respondent when the tractor clocked 100 hours for purposes of a free service. Counsel took the view that the effect of clause I of the warranty and agreement is that it placed an obligation upon the Respondent to suggest the most appropriate time for free inspection of the tractor, whilst the Appellant's obligation was merely to deliver the tractor when called upon to do so by the Respondent. He submitted that the Learned High Court Judge, therefore, misapprehend the effect of clause I and did not properly apply her mind to the evidence.

The Respondent argued in response that there was no misdirection on the part of the Learned High Court Judge when she interpreted clause I. It was argued that the Respondent would have been able to suggest an appropriate time for free inspection only upon being notified by the Appellant that the tractor had clocked 100 hours. This, it was argued, is an implied term of the warranty and agreement which we were urged to infer from the contract in accordance with ***Chitty on Contracts***, Volume 1 which states as follows:

> **"In many cases, however, one or other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature may be made in two situations: first, where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties".**

Under ground 8 the Appellant attacked the finding by the Learned High Court Judge that the Respondent was entitled to payment of the sum of USD6,446.17 on the basis of *quantum meruit*, notwithstanding the fact there was no contract between the parties in respect of execution of the works done to the tractor. Mr. Mainza argued that the principle of *quantum meruit* is not applicable because there was already an obligation placed upon the Respondent by virtue of clause A of the warranty agreement to service or repair the tractor and to replace any part covered under the agreement without charging the Appellant. He accordingly argued that the authorities relied upon by the Learned High Court Judge were not relevant to the present case due to the distinguishing factor that in this case there was in place provision for free servicing and repair to the tractor.

In response, the Respondent argued that it was entitled to reimbursement of the amount spent on repairs and labour to the tractor, as such, the Learned High Court Judge did not misdirect herself. The Respondent went on to define the phrase *quantum meruit* with reference to ***Blacks Law Dictionary*** eighth edition as *"the reasonable value of services, damages awarded in the amount considered reasonable to compensate a person who has rendered services in a quasi contractual relationship"*. Reference was also made to the English case of ***Craven Ellis v Cannons Limited***[2] in which it was held in part as follows:

> **"... the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not by an inference of fact arising from the acceptance of service or goods.**

It was argued further that the principle of *quantum meruit* is akin to the principle of unjust enrichment. Our attention, in this regard, was drawn to the case of ***Fibroso***

Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd[8] which sets out the rationale for the principle of unjust enrichment as being to prevent a man from retaining money or benefiting for a service which is against conscience that he should keep.

Ground 9 alleged that the evaluation of the evidence by the Learned High Court Judge was unbalanced. Counsel argued that the Learned High Court Judge focused on the breaches committed by the Appellant and ignored those committed by the Respondent. According to counsel, the unbalanced evaluation of the evidence related to: the court's failure to comment on the omission by the Respondent to initiate a free inspection of the tractor despite the admission by the Respondent's witness of the Respondent's omission to do so; and, the failure by the court below to comment on the Respondent's witness's evidence on his omission to indicate the hours that the

tractor had clocked when it was delivered to the Respondent's workshop.

Counsel urged us to overturn the findings of fact by the Learned High Court Judge and relied on our decision in the case of ***The Attorney General v Achiume***[6] where we held that **"an unbalanced evaluation of the evidence, where only the flaws of one side but not of the other are considered, is a misdirection which no court should reasonably make, and entitles the appeal court to interfere".**

In response, the Respondent merely denied the contention by the Appellant and argued that the Learned High Court Judge only considered the breaches which were important for the determination of the dispute and other matters relevant to the matter at hand.

In determining this appeal we are of the considered view, that grounds 1, 3, 5 and 7 question findings of fact relating to the interpretation made by the Learned High

Court Judge of the warranty and agreement and the operator's manual. We shall, as a result of this, consider them together. The grounds question: the issues that the court below identified as being in dispute; her interpretation of the warranty and agreement in relation to when the tractor should have been serviced; her finding that the Appellant had forfeited its rights under the warranty and agreement as a consequence of the breach thereof; and her finding that upon the tractor clocking 100 hours the Appellant should have serviced the tractor in accordance with the operator's manual.

In regard to the identification of the issue in dispute, the Appellant has listed a number of issues which it feels were the issues in dispute which the Learned High Court Judge should have considered. The Respondent has argued that the issue she identified was in line with the pleadings before her.

We are of the firm view that a trial court, as indeed any other court, is at large in identifying the issues in dispute in a matter as long as it leads to the determination of a matter with finality. A court is, therefore, not bound to consider issues that the parties feel are in dispute and neither can parties direct the court in this regard. Further, we have demonstrated in the latter part of this judgment that in determining the issue that the Learned High Court Judge identified she did determine all the matters in contention in this matter with finality as they related to the interpretation of the provisions of the warranty and agreement and operator's manual.

As regards when the tractor should have first been serviced and whether the failure to service it resulted in forfeiture of the warranty, the Appellant argued that clause A of the warranty and agreement placed the responsibility of servicing the tractor on the Respondent and not the

Appellant. It was also argued that there was an obligation placed upon the Respondent to inspect the tractor and re-commend when it would be suitable to bring it in for service.

In response the Respondent contended that he Learned High Court Judge did not misapprehend the effect of the warranty and agreement.

Clause A of the warranty and agreement which is titled *"General Provisions"* stipulates as follows:

> **"The warranties below are provided by the seller to purchase of each item of New John Deere agricultural equipment, through the "Basic equipment warranty". Seller will repair or replace, at its option any part covered under warranty which is found to be defective in material or workmanship during the applicable period of warranty. The warranty service must be performed by an authorized John Deere dealer or service centre, both of which will use only new or re-manufactured parts or components furnished and approved by John Deere. Warranty service will be performed without charge to purchaser for labour and/or parts. Purchaser will be responsible however, for any service call and/or transportation of equipment to and from the dealers or service centre's place of business, for any premium charged for overtime labour requested by purchaser, and**

for any maintenance service and/or maintenance items not directly related to any defect covered under the warranty below".

Below clause A is clause B which sets out the warranty period within which the service was to be performed free of charge and, in relation to the tractor it stipulates twelve month.

We are of the firm view that clause A places the obligation to service the tractor upon the Respondent and not the Appellant as the Learned High Court Judge found. Further, the clause compels the Appellant to deliver the tractor to the dealers in John Deere equipment or designated service centres for such service and within the warranty period of twelve month. To the extent, therefore, that the Learned High Court Judge found that it was the Appellant's responsibility to service the tractor within the warranty period, she misdirected herself. The matter, however, does not end here. Clause D of the warranty and

agreement sets out the conditions that would render it terminated as follows:

D. "UNAPPROVED SERVICE OR MODIFICATION

All obligations of seller under this warranty are terminated:

- **If service other than normal maintenance is performed by someone other than authorized John Deere dealer or service centre, or if equipment is modified or altered in ways not approved by John Deere, including, but not limited to, setting injection pump fuel delivery above Factory specifications.**
- **If services are not done according to and set out in the operator's manual".**

For purposes of this appeal, the relevant bullet is the second bullet which should be read with the operator's manual. The said manual under *"service intervals"* sets out the various maintenance stages the tractor was required to undergo and specified service after the first 100 hours and, thereafter, every 250 hours. The evidence on record reveals that the Appellant did not cause the tractor to be serviced at all in the first one year of its life and that at the time its

officer, PW, was delivering it to the Respondent's premises he was informed that the Appellant was in breach of the warranty agreement for failure to service the tractor when it clocked 100 hours. As a consequence of this, we cannot fault the Learned High Court Judge for finding that the warranty agreement was forfeited or in other words terminated.

In making the foregoing finding, we are alive to the fact that the warranty and agreement is for a period of twelve months, hence the argument by the Appellant that since it delivered the tractor for service prior to the expiry of twelve months it was entitled to a free service. However, as we have demonstrated earlier, the warranty period was subject to the Appellant complying with the provisions of the operator's manual.

The effect of our findings in the preceding paragraphs is that ground 1,3,5 and 7 of the appeal are destined to fail and we so find. They are accordingly dismissed.

Turning to grounds 2, 4 and 6 which questions the finding by the Learned High Court Judge that at the time of delivery of the tractor to the Respondent by the Appellant it had already clocked 1300 hours; and that, there was evidence upon clocking 100 hours, the Appellant did not inform the Respondent to carry out the free service. The suggestion with respect to the latter contention is that the Respondent should have suggested to the Appellant the most appropriate time for the free inspection in accordance with clause I of the warranty and agreement. Mr. Mainza re-emphasized this point in his verbal arguments.

The Respondent did not attach great importance to the finding made by the Learned High Court Judge on the tractor clocking 1300 hours.

In regard to the Learned High Court Judge's finding that at the time of delivery of the tractor to the Respondent it had clocked over 1300 hours, the evidence on record reveals that the Respondent's second witness one Willen Carl Bothma testified that he checked the hour meter on the tractor and discovered that it had clocked a total of 1398 hours without any service as stipulated in the operator's manual. This evidence was not shaken in cross examination. On the other hand, the record reveals that the Appellant's witness evidence made no reference whatsoever to the hours that the tractor had clocked when it was delivered to the Respondent. He was evasive on the issue and insisted on referring to the number of months the tractor had been in the Appellant's possession as opposed to the hours.

In view of what we have said in the preceding paragraph we see no reason to upset the Learned High

Court Judge's finding on the hours the tractor had clocked when it was delivered to the Respondent. Further and as argued by the Respondent, the decision made by the Learned High Court Judge that the warranty was terminated was not based on her finding that the tractor had clocked over 1300 hours but rather the breach of the operator's manual on times for servicing the tractor.

As regards the findings by the Learned High Court Judge in relation to the alleged failure by the Appellant to inform the Respondent to carry out the free service upon the tractor clocking 100 hours, counsel for the Appellant anchored his argument on clause I of the warranty and agreement. He suggested that the Learned High Court Judge's finding was wrong because it ignored the fact that the Respondent was obliged conduct a free inspection of the tractor within the warranty period after indicating to

the Appellant a suitable time for delivery of the tractor for this purpose.

Clause I of the warranty agreement stipulates as follows:

> **"In order to assure that purchaser is receiving satisfactory service, the selling dealer will perform a free inspection of New John Deere equipment within the warranty period after the equipment has been "run-in". Since the "run in" period will vary between different items of equipment, the seller will suggest the most appropriate time for such inspection. It is purchaser obligation to deliver the equipment to the sellers service shop for this inspection or to reimburse seller for any service call involved in making the inspection at another location when so requested by purchaser".**

We have already held that the court below was on firm ground when she found that the Appellant forfeited the warranty and agreement by failing to abide by its terms and the operator's manual in terms of times for servicing the tractor. We also set out the clauses in the two documents that were breached. To this extent we cannot fault the Learned High Court Judge for making the finding

of fact that she made. This is re-emphasized by the fact that we hold the view that clause I is limited to the Respondent's obligation to inspect the tractor during the warranty period for purposes of ensuring that the Appellant was satisfied with the service it was rendering. The provisions of the clause are not a condition precedent to the free service the Appellant was entitled to during the warranty period such that if it was not adhered to by the Respondent, the Appellant was incapacitated in claiming the free benefit. Further, we agree with the arguments advanced by the Respondent that it was an implied term of the contract that the Appellant as custodian of the tractor would notify the Respondent that it had clocked 100 hours and invite it to inspect the tractor. We also endorse the authority of ***Chitty on Contracts*** that was relied upon in articulating the said argument.

As a result of the findings we have made in the preceding paragraphs, grounds 2, 4 and 6 have no merit and we accordingly dismiss them.

We now turn to consider ground 8 of the appeal which questions the finding by the Learned High Court Judge that the Respondent is entitled to payment of USD6,446.17 on *quantum meruit* basis, regardless of whether there was a contract to overhaul the engine of the tractor.

In the case of ***Base Chemicals Zambia Limited and another v Zambia Air Force and Another*** we found and held "**... that even if there had been no binding contract between the parties, the Plaintiff's would have been entitled to recover on quantum meruit.**" The rationale for our holding can best be summed up in the words of Lord Wright in the case of ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd***[9] as follows:

"It is clear that any civilized system of law is bound to provide

remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English Law are generally different from remedies in contract or tort, and are now recognized to fall within a third category of the common law which has been called quasi contract or restitution".

The undisputed facts, in particular, the fact that the Appellant's tractor was repaired at the Respondent's costs, vindicate the Learned High Court Judge's order that the Appellant pay the Respondent the sum of USD6,446.17 in line with Lord Wright's reasoning. Ground 8 is, therefore, doomed to fail and we accordingly dismiss it.

Coming to ground 9 which alleges an unbalanced evaluation of the evidence by the Learned High Court Judge. We are of the firm view that since we have found that the determination of this appeal by and large challenged the findings of fact by the court below, which findings we have not faulted, this ground cannot succeed.

We accordingly find no merit in the ground and dismiss it.

All the grounds of appeal having failed, the appeal is dismissed and we uphold the decision of the Learned High Court Judge. In doing so we award costs to the Respondent, to be taxed in default of agreement.

.....

E. M. HAMAUNDU
SUPREME COURT JUDGE

.....

Dr. M. MALILA, SC
SUPREME COURT JUDGE

.....

N. K. MUTUNA
SUPREME COURT JUDGE