

**IN THE COURT OF APPEAL OF ZAMBIA**  
**HOLDEN AT LUSAKA**  
(Civil Jurisdiction)

**CAZ Appeal No. 065/2021**  
**CAZ/08/470/2020**

BETWEEN:

**NICO COULTLIS TRANSPORT LIMITED** **APPELLANT**

AND

**BUKS HAULAGE LIMITED** **RESPONDENT**



**CORAM : Kondolo, Chishimba and Sichinga JJAs**

**On the 16<sup>th</sup> June, 2021 and 27<sup>th</sup> October, 2021**

For the Appellant : Mr. Kearns of Messrs Willa Mutofwe &  
Associates

For the Respondent : Mr. B. Gondwe of Messrs Buta Gondwe &  
Associates

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## **J U D G M E N T**

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**Chishimba JA, delivered the Judgement of the Court.**

**CASES REFERRED TO:**

1. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
2. Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited (1915) AC 847
3. Attorney General v Sam Amos Mumba (1984) ZR 14
4. J.Z. Car Hire v Malvin Chala & Scirocco Enterprises Limited (2002) ZR 112
5. Finance Bank Zambia Limited v Simataa Simataa SCZ Appeal No. 11/2017
6. Teddy Puta v Ambindire Friday Selected Judgment No. 43/2017
7. Attorney General v. Rodger Masauso Chongowe appeal 122/2016
8. Savenda Management Services Limited v Stanbic Bank Zambia Limited Selected Judgment No. 10/2018

9. Josephine Limisa and Another v Hellen Labanya Appeal 55/2018
10. Afrope Zambia Limited v Attorney General & Others Appeal No. 160/2013
11. OTK v Amanita Zamibia
12. Zambia Electricity Supply Limited v Redlines Haulege Limited 1990-1992 ZR 170
13. T.G Travel and ZRA 2007 ZR.
14. Wise v E.F. Harvey (1985) ZR 179
15. Anderson Mazoka & Others v Levy Mwanawasa & Others (2005) ZR 138
16. Kunda v Konkola Copper Mines Plc SCZ Appeal No. 48/2005
17. Galaunia Farms Limited v National Milling Company Limited (2004) ZR 1
18. Nkhata & Four Others v The Attorney-General of Zambia (1966) Z.R. 124 (C.A.)
19. July Danobo T/A Juldun Motors v Chimsoro Farms Limited (2009) ZR 148
20. Southern Cross Motors Limited v Hu Chun Ling SCZ Appeal No. 138/2017
21. Fanwell Kabulwebulwe & Others v Zambia Pork Products & Others SCZ Appeal No. 30/2014
22. Lissenden v CAV. Bosch Limited (1940) 1 All ER 425

### **LEGISLATION CITED:**

1. The High Court Rules Chapter 27 of the Laws of Zambia.
2. Rules of the Supreme Court of England. 1999 Edition.
3. The Constitution of Zambia, Chapter 1 of the Laws of Zambia.
4. The Court of Appeal Rules Act Number 7 and Statutory Instrument 65 of 2016.

### **OTHER WORKS REFERRED TO:**

1. Peter Murphy. (2000). Murphy on Evidence. 5<sup>th</sup> Edition, Universal Publishing Company. New Delhi.
2. Halsbury's Laws of England. 4<sup>th</sup> Edition Re-issue. Volume 36(1). Butterworth's Publications.
3. Patrick Matibini. Zambian Civil Procedure: Commentary and Cases. Volume 2. Lexis Nexis.
4. Joseph Jacob. Civil Evidence for Practitioners. 3<sup>rd</sup> edition.

## **1.0 INTRODUCTION**

- 1.1 This is an appeal against the decision of the Hon. Mrs. Justice K. E. Mwenda-Zimba dated 26<sup>th</sup> November, 2020 in which she

held that the appellant had failed to prove its claims for an outstanding debt in respect of freight and haulage, and dismissed the case with costs to the respondent.

## 2.0 **FACTUAL BACKGROUND**

- 2.1 The facts leading up to the appeal are that the appellant and the respondent entered into an agreement for the provision of freight and haulage services by the appellant on behalf of the respondent's clients. According to the averments by the appellant, due to an increase in the volume of work, the respondent introduced the appellant to a company called Delta Auto and Equipment Limited to acquire further vehicles under a hire purchase agreement. The respondent allegedly represented to the appellant that it would pay the monthly instalments directly to Delta Auto and Equipment Limited, on behalf of the appellant, which payment would be deducted at source by the respondent, and the balance paid to the appellant.
- 2.2 In this regard, the appellant acquired six more truck horses from Delta Auto and Equipment Limited at US\$52,000.00 per horse. US\$312,000.00 for all the trucks under a Credit and/or Hire Purchase Arrangement.

- 2.3 Contrary to the alleged agreement that the payments would be remitted on or before the 15<sup>th</sup> day of each calendar month, commencing on 15<sup>th</sup> March, 2019, the respondent failed, refused and/or neglected to remit the payments to Delta Auto and Equipment Limited for the additional vehicles.
- 2.4 The appellant subsequently commenced an action by way of writ of summons and statement of claim, dated 14<sup>th</sup> May, 2020 seeking the following reliefs:

- 1) ***Payment of the sum of the Zambian Kwacha equivalent of US\$127, 266.59;***
- 2) ***Interest according to section 2 of the Judgment Act;***
- 3) ***Damages for loss of business and/or profits to be assessed by the court; and Costs.***

### 3.0 **EVIDENCE ADDUCED AT TRIAL**

- 3.1 When the matter came up for trial, the court expunged evidence paragraphs 3 and 4 of the appellant's witness statements relating to the claims in respect of demurrage and unauthorized fuel on the basis that they were not pleaded.
- 3.2 PW1, Joakim Whyson Mumba, a Financial Consultant employed by JWM Chartered Accountants, testified that he was engaged by the appellant to conduct a review of their financial records with a view to preparing their annual financial statement for the

year ending 31<sup>st</sup> December, 2019. Upon reviewing the accounts and receivable balances for selected clients, he discovered that as at 30<sup>th</sup> December 2019, there was a balance of US\$108, 274.68 which was due and pending settlement by the respondent to the appellant. As an example, he referred to pages 24 to 30 of the plaintiff's bundle of documents, i.e. the ledger accounts of transactions between the appellant and the respondent dated 12<sup>th</sup> January, 2019 to 20<sup>th</sup> March, 2020 at pages 120 to 126 of the record of appeal.

3.3 The witness further told the court below that as at 20<sup>th</sup> March, 2020, the audited outstanding ledger balance of monies owed by the respondent was US\$127, 266.59 which included demurrage charges, transport service invoices and unauthorized diesel claims less payment by swift and back charges.

3.4 In cross-examination, PW1 explained that the transport service claim of US\$ 15, 645.30 referred to invoice numbers 4136, 4137, 4146, 4149 and 4150 at page 126 of the plaintiff's bundle of documents.

3.5 The summary of the evidence of PW2, Hiren Ayathatha, the Accounts and Logistics Manager of the company, was that it was a term and condition of the agreement between the parties that

payments for services rendered were to be made by the respondent within seven days from presentation of the proof of delivery documents. The said terms were later changed unilaterally by the respondent purporting to terminate the existing arrangement between the parties, without notice nor providing a reason.

3.6 With respect to the acquisition of the truck horses from Delta Auto and Equipment Limited, Hiren Ayathatha testified that it was agreed between the parties that the appellant would be required to provide the respondent with five additional trucks bringing the total number of vehicles assigned to the respondent to 45 from 40. As a result of this, the appellant suffered and continues to suffer loss and inconvenience for which it claims the payment of US\$127, 266.55 with interest, costs and damages for loss of business or profits.

3.7 In cross-examination, PW2 stated that if the amounts claimed in relation to fuel and demurrage are removed from the total sum claimed, the amount that remains relates to invoices Nos. 4149 and 4150. He explained that of the amount claimed, there were two invoices pending payment for transport services by the

respondent and that the two invoices were part of the money that should have been paid to Delta Auto and Equipment Limited.

3.8 PW3, Nico Coutlis, the Chief Executive Officer and Managing Director of the appellant company testified that he met one Duncan Dukhie from the respondent company and Mr. Charalambous of Delta Auto and Equipment Limited in February 2019 following his being introduced on 15<sup>th</sup> January, 2019 to Delta Auto and Equipment Limited. The purpose of the introduction leading to the meeting was the acquisition of six trucks on a hire purchase agreement, and to permit the appellant to service the respondent's additional demands for their services. The six trucks were worth US\$312, 000.00.

3.9 Nico Coutlis maintained that prior to the entering of the agreement with Delta Auto and Equipment Limited, the respondent clearly represented to the appellant that they would directly pay the agreed monthly instalments to Delta Auto and Equipment Limited on behalf of the appellant. He insisted that there was an explicit agreement between the parties that the payments for the additional trucks would be deducted at source from the monies due and be paid by the respondent for the services rendered and provided by the appellant. The residue of

the balance of monies due and payable by the respondent to the appellant for services rendered after deducting monies due and payable to Delta Auto and Equipment Limited, would be paid to the appellant on or before the 15<sup>th</sup> of each calendar month commencing 15<sup>th</sup> March, 2019.

3.10 In cross-examination, Nico Coutlis stated that he had not produced the hire purchase agreement referred to in his witness statement and that the respondent was a party to it though it never signed the said hire purchase agreement. He alluded to a case in the High Court in which Delta Auto and Equipment Limited has sued the appellant.

3.11 He stated that the invoices on record do not show that payment were to go to Delta Auto and Equipment Limited as they do not indicate the details. He conceded that there was no document stating that the respondent was to pay Delta Auto and Equipment Limited. Coutlis alluded to emails and whatsapp messages to that effect which were not in his possession which his lawyers would sort out. The agreement with Delta Auto and Equipment Limited was made between himself and Duncan from the respondent.



- 3.12 Coutlis conceded that the letter dated 26<sup>th</sup> May, 2020 written by Delta Auto and Equipment Limited exonerates the respondent of any obligations to the company.
- 3.13 On behalf of the respondent, Dylan John Richard Bouwer, the General Manager testified that the agreement between the parties was discussed and concluded by Anthony Bell, the respondent's Operations Manager at the time and PW3. He referred to an email sent by Anthony Bell to PW3 and Duncan Dukhie dated 27<sup>th</sup> November, 2018.
- 3.14 He stated in the court below that the parties entered into a verbal subcontracting agreement in December 2018 to run up to 28<sup>th</sup> February, 2020. The respondent's understanding was that as at 28<sup>th</sup> February, 2020 when the agreement came to an end, all liabilities between the parties would come to an end with all the appellant's invoices having been received and offset against the respondent's invoices with the difference being paid in full.
- 3.15 As to the relationship between Delta Auto and Equipment Limited and the appellant, the respondent only became aware of its existence after the appellant served them the writ of summons and statement of claim. The respondent did not request the appellant to purchase more trucks from Delta Auto

and Equipment Limited or commit itself to paying the premium price for the six truck horses on behalf of the appellant. This fact was acknowledged by Delta Auto and Equipment Limited in its letter dated 26<sup>th</sup> May, 2020.

3.16 In cross-examination, Dylan Bouwer in respect of the WhatsApp messages referred to by PW3, stated that they relate to the appellant's payment to Delta Auto and Equipment Limited, and not the respondent's payment to Delta Auto. He maintained that to the best of his knowledge, the appellant had been paid by the respondent for the services rendered. He explained that Invoice Nos. 4136, 4137, 4146, 4149 and 4150, if offset from the payments made, would leave a balance of about US\$17, 000.00 owed to the appellant. This amount is according to the appellant's statement but that, according to the respondent's statement, they do not owe any money.

#### 4.0 **DECISION OF THE COURT BELOW**

4.1 Judge Mwenda-Zimba considered the evidence, submissions and authorities cited by the parties. The court began by commenting on the manner in which the pleadings and documents in the case were prepared. The appellant's claims for demurrage and unauthorized fuel had been expunged from

the witness statements following an objection that they were not pleaded. The court below observed that contrary to **Order 53 Rule7(3) of the High Court Rules Chapter 27 of the Laws of Zambia**, the appellant's witness statements did not refer to all the documents in their bundle of documents. In particular, the appellant's witnesses only referred to pages 14 – 16; 20, 23, 31, 33 and 24 – 30 of the appellant's bundle of documents. Thus the evidence led did not point to specific documents relied on as proof and that it was not the duty of the court to attach documents in a bundle to the evidence in the witness statement.

4.2 The learned Judge found that the appellant's claim arose from the alleged failure of the respondent to pay Delta Auto and Equipment Limited and the balance to it for the freight and haulage services. Guided by the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** <sup>(1)</sup> and the learned author, **Peter Murphy, (2000), Murphy on Evidence, 5<sup>th</sup> Edition, Universal Publishing Company, New Delhi**, she stated that the appellant bore the burden of proving its claim that the respondent was obliged to pay Delta Auto and Equipment Limited directly as well as pay the outstanding debt for services.

- 4.3 In that regard, she found that it was not in dispute that the parties entered into an agreement for freight and haulage services. What was in dispute, was whether the respondent agreed to be part of the purchase of six truck horses from, and to pay the hire purchase instalments to Delta Auto and Equipment Limited. The trial court found that no evidence had been produced to support the assertion that the respondent was a party to the credit/hire purchase agreement. No copy of the agreement had been produced in the bundle of documents.
- 4.4 The lower court in reference to the case of **Dunlop Pneumatic Tyre Company Limited v Selfridge and Company Limited** <sup>(2)</sup>, stated that it is the general principle that a contract cannot confer rights or impose obligations arising under it on any person except the parties to it. That both parties stated that the respondent did not sign any agreement between the appellant and Delta Auto and Equipment Limited. The letter dated 26<sup>th</sup> May, 2020 addressed to the respondent and authored by Delta Auto and Equipment Limited showed that the respondent was not party to the hire purchase agreement.
- 4.5 The lower court considered the two emails and found that it was clear that the allegation that payments to Delta Auto were to be

made by the respondent was something which Delta Auto proposed had to the appellant. However, the two emails were not proof that the respondent agreed to make payments directly to Delta Auto. The court below held that there was no agreement between the parties that payments to Delta Auto and Equipment Limited would be made by the respondent.

4.6 With respect to the claim for US\$127, 266.59, the court found that the testimony of PW1 did not help the appellant as the **“Ledger-USD Transactions”** produced in the appellant’s bundle of documents at pages 120 – 126 of the record of appeal, were said to be **‘examples’** of what he did in reviewing the appellant’s account receivables. The lower court stated that proving a fact in dispute is different from giving examples.

4.7 The sum of US\$127, 266.59 claimed as special loss was included reduced because the lower court disallowed the charges for demurrage and unauthorized fuel, on account of not having been pleaded. As regards the claim for freight and haulage, the court below considered the evidence by the appellant, that Invoice Nos. 4136, 4137, 4146, 4149 and 4150 remained unpaid. However, none of these invoices was produced in court while the respondent, produced a financial statement showing

that all invoices upon which the appellant made its claims, were paid as they were offset between the invoices exchanged by the parties. The lower court found the respondent's evidence to be credible.

4.8 Further, the court found that the appellant did not produce invoices showing exactly what back charges were taken into account in arriving at the claim of US\$15, 645.30. On the other hand, the respondent exhibited invoices for back charges and how they were taken into account in arriving at the conclusion that the appellant was paid in full and actually over paid by US\$9, 119.30.

4.9 The lower court concluded that the appellant had failed to prove its claim of US\$127, 266.59 or US\$15, 645.30, being the lesser amount after deduction of the claims for demurrage and unauthorized fuel.

4.10 As regards the plaintiff's submissions in reply, contending that PW1 was an expert witness, the court below stated that the same was misleading because the evidence of an expert witness is treated differently in that at the scheduling conference, the party calling such a witness discloses the status of such a witness. This enables the other party to call its own expert witness or the

parties can agree to rely on a single expert who are also expected to prepare a report of their findings. That PW1 was called as an ordinary witness.

4.11 With respect to the claim for damages for loss of business, the court below stated that they have to be specifically pleaded as special damages, and proved as per the cases of **Attorney General v Sam Amos Mumba** <sup>(3)</sup> and **J.Z. Car Hire v Malvin Chala & Scirocco Enterprises Limited** <sup>(4)</sup>. The court below stated that the damages for loss of business were neither specifically pleaded nor was evidence produced to prove that the appellant had suffered damages.

4.12 The court below found that the appellant had failed to prove its claim for an outstanding debt for freight and haulage services and special damages on a balance of probabilities and dismissed the matter with costs to the respondent.

## 5.0 **GROUND OF APPEAL**

5.1 The appellant being dissatisfied with the above decision appeals on the following grounds:

- 1) *The learned trial Judge misdirected herself in both law and fact on the scope of the pleadings of the appellant before the Hon. Trial court below; and further by electing to expunge and/or decline part of the grounds of and quantum of the appellant's claim and by so doing, denying the appellant the*

*opportunity and right to fully prosecute their claim and thereby restricting and/or denying the appellant their inalienable constitutional right to a fair trial;*

- 2) Further or in the alternative, the learned trial Judge erred both in law and fact when she misdirected herself on the submission of the role and function of the appellant's witness, PW1 before the Hon. trial Court below and construed that the appellants had contended that he was an expert witness and as a consequence of this position went on to exclude the said unchallenged evidence contained in his evidence in chief, as more particularly set out and supported by PW1's Witness Statement; and*
- 3) The learned trial Judge misdirected herself both in law and fact when she misapplied the authorities cited in holding that the appellant had failed to prove its claim for an outstanding debt for freight and haulage on a balance of probabilities and dismissed the appellant's cause of action.*

## **6.0 APPELLANT'S ARGUMENTS**

- 6.1 The appellant filed amended heads of argument dated 14<sup>th</sup> May, 2021 pursuant to Order 8 of the Court of Appeal Rules, 2016.
- 6.2 In ground one, the appellant attacks the ruling of 30<sup>th</sup> September, 2020 in which the court below expunged certain paragraphs from the plaintiffs' witness statements, and the judgment. With respect to the ruling, the appellant contends that the learned Judge failed to consider that the pleadings spoke of a debt owed by the respondent to the appellant for



transport and haulage services provided at the instance of the respondent. The particulars were clearly set out in the statement of claim and yet the court below elected to disregard their content.

6.3 It was argued that PW1's witness statement alluded to and particularized the debt claimed, itemized the claims for demurrage and unauthorized fuel which were not specifically pleaded and yet formed the ingredients of the debt claimed in the appellant's pleadings. In this respect, the lower court misconstrued the procedure, the nature and content of pleadings, evidence, and the role and function of the testimony of the parties via the witness statements in commercial proceedings where they are treated as evidence-in-chief by virtue of **Order 53 Rule 6(2) and (3) of the High Court Rules**.

6.4 The appellant submits that pleadings need not be perfect: provided they set out the nature of the claim so as to enable a defence to be rendered by the responding party. This is because it is the function of the testimony of the witness to clothe the factual statements of pleadings with substance and support of evidence, as it is settled law, that pleadings are no substitute for evidence. For this, we were referred to the case of **Finance Bank**

**Zambia Limited v Simataa Simataa** <sup>(5)</sup> and other cases relating to the function of pleadings, as well as to paragraph 5 of **Halsbury's Laws of England. 4<sup>th</sup> Edition Re-issue. Volume 36(1)** on the function of pleadings.

- 6.5 It was contended that the appellant did make out the generality of the claim which was made known in the statement of claim that the appellant was seeking a monetary claim for a debt arising out of a contract for the provision of transport and haulage services which claim was liquidated and quantified, and further elaborated in the appellant's witness statements and bundle of documents.
- 6.6 It is argued that the appellant complied with the prerequisites of pleadings set out in **Order 18 Rule 6 of the Rules of the Supreme Court of England, 1999 Edition.**
- 6.7 Further, the appellant submits that the court below erred in permitting the respondent to object to the appellant's evidence without prior notice which resulted in prejudice being occasioned to it. In support of this, **Order 5 Rule 21 of the HCR** which provides that:

*21. In every case, and at every stage thereof, any objection to the reception of evidence by a party affected thereby shall be made at the time the evidence is offered:*

*Provided that the Court may, in its discretion, on appeal, entertain any objection to evidence received in a subordinate court, though not objected to at the time it was offered.*

- 6.8 In this regard, the appellant contends that the respondent ought to have lodged its formal objection or prior notice of its intention to object to the appellant's witness statements soon after being served. It was argued that the failure to do so was irregular and severely prejudiced the appellant when the objection was raised without prior notice at the hearing. This was a violation of the appellant's inalienable rights as enshrined in **Article 18(9) of the Constitution of Zambia, Chapter 1 of the Laws of Zambia.**
- 6.9 Citing the case of **Teddy Puta v Ambindire Friday** <sup>(6)</sup>, the appellant contended that when the lower court excluded paragraphs 3 and 4 of PW1's witness statement, paragraphs 6 to 9 of 2<sup>nd</sup> witness statement and paragraphs 10 to 12 of 3<sup>rd</sup> witness statement, it severely prejudiced the appellant's cause of action and denied them their right to a fair trial and effectively led to a mistrial. Reference was made to **Order 38 Rule 2A** of the white book which covers written statements of the oral evidence to be adduced on fact to be decided at trial aimed at elimination of any element of surprise before or at trial.

6.10 In ground two, the appellant contends in the alternative, that PW1, Joakim Mumba, was never, at any juncture portrayed or construed by the appellant as an expert witness, but was referred to as a professional witness with expertise and knowledge derived as Chief Finance Officer and Auditor, being a qualified accountant. The appellant submits that in its submissions in reply, it referred to PW1 as “... **an expert/professional independent witness ...**” and the author of the report on the financial standing of the transaction between the appellant and the respondent for services rendered who set out his evidence and professional opinion in that capacity alone.

6.11 In buttressing the argument, we were referred to the learned author, Dr. Patrick Matibini in **Zambian Civil Procedure: Commentary and Cases. Volume 2, page 1058** where he states:

*“In certain circumstances, an opinion can however acquire probative weight. For instance, a witness may base an opinion on knowledge, and such witness may be able to testify to those facts on which the opinion is based. Therefore, the very status of the witness may cause the court to give greater credence to an opinion. But even then, it is only the status as an expert that will allow that opinion to be heard in court. The net effect is therefore, that the key exception to the rule excluding opinion evidence is that regarding expert witnesses. The opinions of*

*expert witnesses are exempt from exclusion because such witnesses possess special skills or knowledge which the courts may not possess. Thus, an expert witness will be allowed to present technical information and express an opinion on its significance.”*

6.12 In ground three, the appellant submits that the trial court misapplied the authorities that it relied upon in finding that the appellant had failed to prove its case. It is contended that the lower court failed to apply its mind to the undisputed facts of the case that the appellant was contracted by the respondent to provide freight and haulage services.

6.13 According to the appellant, the singular issue for determination ought to have been: whether the respondent had discharged and settled its indebtedness in full for the fees charged under the verbal contract for services. The appellant contends that the lower court did not address this issue fully or at all in light of the evidence on record. The appellant took the view that the issue in controversy between the parties was the quantum of the liquidated claim due from the respondent to the appellant for the services rendered. This arose from the valid contract between the parties. The case of **Attorney General v. Rodger Masauso**

**Chongowe** <sup>(7)</sup> was cited on the elements of a legally valid and binding contract.

6.14 It was further submitted that in paragraph 5 of its statement of claim, the appellant simply sought for the recovery of a debt in the form of a liquidated claim against the respondent as elaborated at trial by the testimony of the three witnesses. As authority, the case of **Savenda Management Services Limited v Stanbic Bank Zambia Limited** <sup>(8)</sup> was called in aid where, the Supreme Court explained that a liquidated demand is in the nature of a debt and the expression '*liquidated damages*' must be understood to mean a specific amount contractually stipulated as a reasonable estimation of the actual damages to be recovered by the party if the other party breaches.

6.15 The appellant submits that the lower court failed to address its mind to the uncontroverted evidence of the financial analysis of the account as per evidence of PW1 relating to the agreement for services between the parties. Further that the respondent's witness admitted that it still owed the appellant monies for services rendered. The cases of **Josephine Limisa and Another v Hellen Labanya** <sup>(9)</sup> and **Afrope Zambia Limited v Attorney**

**General & Others** <sup>(10)</sup> were cited on evidence let in which is unobjected to, that it must be considered by the court.

6.16 The appellant referred to the several invoices on record particularly 4136, 4317, 4149 and 4150 showing the running balance owed. In a nutshell the appellant contends that the court below did not address its mind to the documentary evidence on record. The cases of **OTK v Amanita Zamibia** <sup>(11)</sup> and **Zambia Electricity Supply Limited v Redlines Haulege Limited** <sup>(12)</sup> were cited in addition to others on reversal of finding of facts on evidence in contention or conflicting evidence and to the definition of circumstantial evidence and its application in civil proceedings as well as inferences to be drawn from conduct of parties. The appellant further contended that there was an unbalanced evaluation of evidence before the trial court, failure to evaluate and analyze the evidence before court. Reference was made to app messages earlier referred to. We were implored to uphold the appeal and reverse the judgment of the court below with costs.

## 7.0 **RESPONDENT'S ARGUMENTS**

7.1 Heads of argument dated 31<sup>st</sup> May, 2021 were filed on behalf of the respondent. With respect to ground one, the respondent

submits that the appeal is misconceived and irregular. The basis being that the aspect sought to be appealed against arose from an interlocutory one and the appellant required leave of court to appeal against the ruling.

7.2 The appellant was dissatisfied with the ruling of the court made on 30<sup>th</sup> September, 2020 at the commencement of trial. Therefore, it ought to have sought leave of court to appeal against the decision that expunged certain paragraphs from the witness statements of the appellant's witnesses. It was submitted that the appellant is thus estopped from seeking to raise this issue as it is contrary to the rules on appeal relating to interlocutory issues. Instead, the appellant submitted to trial and now seeks to appeal after the main judgment.

7.3 Reference was made to the provisions under **Order 59/1/93 of the RSC, 1999** on the requirement of leave to appeal in respect of interlocutory orders and judgments. We were further referred to **Order 59/1/139 of the RSC** on the effect of failure to obtain leave to appeal, namely that the appellate court will lack jurisdiction. See the case of **T.G Travel and ZRA** <sup>(13)</sup>.

7.4 In this regard, it was submitted that the appellant waived its right of appeal when it proceeded with trial based on the court's



ruling that demurrage and unauthorized fuel were not to be raised since they had not been pleaded.

7.5 The respondent further submits that ground one is also not tenable because having accepted the position and thereafter proceeding on the basis that they could not lead evidence with respect to demurrage and unauthorized fuel claims, the appellant cannot now expect the court to reopen those issues. Doing so would prejudice to the respondent who would have no basis of responding to any issues arising from the same. As authority, we were referred to the provisions of **Order 59/1/86 of the RSC:**

7.6 In any event, the respondent submits that ground lacks merit on the basis that in the statement of claim, the appellant claims amounts of money arising from freight services offered by them to the respondent which the parties allegedly agreed should be paid by the respondent to Delta Auto and Equipment Limited on behalf of the appellant on the 15<sup>th</sup> day of each month commencing 25<sup>th</sup> March, 2019 but which the respondent had not done. The payment, it was alleged, was for truck horses procured by the appellant at the instance of the respondent.

There was no claim that related to demurrage and/or unauthorized fuel.

7.7 The respondent contends that the function of pleadings in civil proceedings with respect to their significance, is well settled. In the cases of **Wise v E.F. Harvey** <sup>(14)</sup> and **Anderson Mazoka & Others v Levy Mwanawasa & Others** <sup>(15)</sup> it was held that the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. Once the pleadings have been closed, the parties are bound by their pleadings and the court has to take them as such.

7.8 Therefore, the court below properly excluded all evidence relating to demurrage and unauthorized fuel claims which the appellant sought to introduce in their witness statements. To anchor this view, paragraph 15.7 of **Zambian Civil Procedure: Commentary and Cases. Volume 1** was cited on pleadings where reference was made to the case of:

*“Kapembwa v Maimbolwa and Another (1981) ZR 127 (S.C.), in which the Supreme Court counselled that where a party refers to evidence not pleaded the proper course to take is for the other party to object immediately to the reference to such evidence. Thereupon, it is the duty of the Court to decide*

*whether or not to it is necessary to grant an adjournment to the other party, in order to facilitate an amendment of pleadings, subject of course to an order for costs.”*

7.9 Therefore, it was submitted that as the record will show, after the ruling of the court below on this aspect, all that the appellant asked for was a five minute recess instead of applying for an adjournment to amend its claim. The appellant, decided of its own volition to proceed with trial. A party is at liberty to prosecute their matter as they see fit, and omissions cannot be blamed on the respondent or the court but on the appellants themselves and their counsel.

7.10 In ground two, the respondent submitted that the argument relating to PW1 and whether he should be considered as an expert witness do not have merit as the court below was on firm ground in holding that expert witnesses are dealt with differently from ordinary witnesses. To this end, we were referred to **Order 38 Rule 4 of the RSC** and the explanatory notes at **Order 38/4/2** on expert witnesses.

7.11 In this regard, the respondent submits that the learned trial Judge properly directed herself and if the appellant wanted to call an expert witness, appropriate orders needed to have been

made during the scheduling conference. We were urged to find no merit in ground two and to dismiss it.

7.12 In response to ground three, the respondent contends that the appellant clearly failed to prove its liquidated claim. It was argued that there were inconsistencies in the testimony of all three appellant's witnesses in relation to the amounts alleged to be outstanding. PW1 told the court that the outstanding amount was US\$15, 645.30, while PW3 said it was US\$27, 637.00 and PW2 said two invoices were outstanding which did not add up to the amounts provided by PW1 and PW3.

7.13 The respondent argued that the court below considered the disparities in position as presented by the parties and hence arriving at the conclusion that the appellant had failed to prove its case. In view of these inconsistencies, the lower court cannot be faulted for holding as it did. It was incumbent upon the appellant, having asserted, to prove the case. The cases of **Wilson Masauso Zulu v Avondale housing Project Limited** <sup>(1)</sup>, **Kunda v Konkola Copper Mines Plc** <sup>(16)</sup> and **Galaunia Farms Limited v National Milling Company Limited** <sup>(17)</sup> were cited for the elementary principle of law that he who alleges, must prove the allegations.

7.14 Further, that for an appellate court to reverse finding of facts, it must be shown that the finding of the court below was either perverse or are such that a reasonable court could not have made. Reliance was placed on the case of **Nkhata & Four Others v The Attorney-General of Zambia** <sup>(18)</sup> on instances where findings of facts may be set aside on appeal.

7.15 The respondent further contends that in fact, this whole appeal is flawed and should be dismissed in its entirety as it is clear that the appellant has failed to prepare and file a proper record of appeal so as to enable the court determine or decide the appeal. It is submitted that the appellant has not complied with the provisions of **Order 10 Rule 9(5) of the Court of Appeal Rules, 2016** with respect to the compilation of the record of appeal, particularly, paragraphs (a), (c), (i) and (m). With respect to ground one, it was submitted that paragraph (h) had not been complied with.

7.16 In particular, the respondent submits that though it had filed a bundle of documents in the court below which is referred to at pages 305 – 306 of the record of appeal, the appellant excluded the said bundle of documents which spanned 329 pages. Instead, the appellant only filed the list of documents at pages

138 – 148, and the supplementary list of documents at pages 161 – 163 of the record of appeal. Thus, counsel for the appellant cannot stand by the certificate of the record at page 1 of the record of appeal made pursuant to **Order 10 Rule 9(5) of the CAR.**

7.17 To buttress this point, the respondent referred us to the case of **July Danobo T/A Juldan Motors v Chimsoro Farms Limited** <sup>(19)</sup> where the Supreme Court on the issue of a record of appeal stipulated what it must contain and the effect of failure to compile a record in the prescribed manner, namely dismissal.

7.18 Therefore, the appeal ought to be dismissed with costs as it has not been prepared in the prescribed manner.

#### 8.0 **APPELLANT'S ARGUMENTS IN REPLY**

8.1 The appellant filed heads of argument in reply dated 11<sup>th</sup> June, 2021. With respect to ground one, the appellant submits that on 10<sup>th</sup> December, 2021, it did in fact apply for leave to appeal before the learned trial Judge pursuant to **Order 47 of the High Court Rules** as amended and as read with **Orders 10 Rule 2(1), 12(1) and 13(1) of the CAR.** However, the process was returned to the appellant on 14<sup>th</sup> December, 2021 and the learned trial Judge stated as follows;

***“There is no need to obtain leave to appeal for a matter heard in open court.”***

8.2 Therefore, the appellant submits that it did not fail and/or neglect to seek leave against, in part of the alleged interlocutory order or judgment of the lower court. Rather, the appellant acted upon the said order of the court below and was bound to follow the same when delivered by the trial court. As authority, the case of **Southern Cross Motors Limited v Hu Chun Ling** <sup>(20)</sup> was cited where the Supreme Court guided that once a judge grants leave to amend the statement of claim, the order takes effect immediately and that it is immaterial that the formal order was never drawn up or filed.

8.3 Therefore, as directed there was no need to seek leave to appeal.

8.4 With respect to the pleadings, the appellant submits that witness statements are not pleadings. As authority, the learned author, **Joseph Jacob’s** book, **Civil Evidence for Practitioners, (3<sup>rd</sup> edition)** at page 24 was referred to where he states that:

***“Every pleading must contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his or her claim or defence, as the case may be, but not the evidence by which those facts are to be proved,***

***and the statement must be as brief as the nature of the case admits: RSC Ord 18, r 7(1).”***

- 8.5 The appellant submits that the pleadings, had complied with the prerequisites set out under the provisions of **Order 18 Rule 6 of the RSC** and do not contain evidence. This is different with regard to witness statements that contain evidence and must comply with the rules of evidence-in-chief taken orally. The respondent did not object to the witness statement based on the rules of evidence but instead elected to address it based on the procedural requirement for drafting pleadings.
- 8.6 Consequently, the appellant submits that the lower court misconstrued the procedure and authorities regarding the nature and content of pleadings and evidence, and further misapplied the role and function of the testimony of PW2 via his witness statement, which ought to have been treated as evidence-in-chief.
- 8.7 In response to ground two, the appellant submitted that at no point did PW1’s witness statement nor the appellant in its submissions before the lower court imply or infer that he was an expert witness. The witness in issue clearly stated that he was a certified public accountant engaged by the appellant to provide



accounting services through JWM Chartered Accountants. It was submitted that in its alternative argument, the appellant merely sought to portray the witness as a professional engaged to review the accounts and receivable balances for selected items, and not as an expert.

8.8 In respect of contentions raised in response to ground three, the appellant submits that it did not fail to prepare and file the record of appeal as per the provisions of **Order 10 Rule 9(5) of the CAR**. Further that any oversight in the preparation of the record of appeal is not so grave as to render the record incomplete and incompetent. The alleged flaws cited were not fatal but are merely procedural regulations. Reliance was placed on the case of **Fanwell Kabulwebulwe & Others v Zambia Pork Products & Others** <sup>(21)</sup> which held that rules must be followed but the effect of the breach will not always be fatal where the rule is merely regulatory or directory. The appellant prayed that the entire appeal be upheld and that the decision of the lower court be reversed with costs to it.

#### 9.0 **THE DECISION OF THIS COURT**

9.1 We have considered the appeal, the heads of argument and authorities cited by the parties. We shall deal with each ground

separately. The facts not in issue are that the parties entered into a verbal agreement for the appellant to provide the respondent with freight and haulage services for its clients from Namibia and DRC in November 2018. This was on a sub contractual basis payable in Kwacha currency at an agreed exchange rate to the dollar currency. It is not in dispute that six truck horses were acquired by the appellant as an addition to their fleet of vehicles.

9.2 The facts in dispute being the allegation that arising from increased volume to freight and haulage, the appellant was required to provide additional vehicles for the services requested by the respondent. Further that the respondent introduced the appellant to Delta Auto to acquire more vehicles under a hire purchase credit agreement. This was done on the basis of alleged representations made by the respondent to the appellant that it would pay the agreed monthly instalments directly to Delta Auto. Premium payments would be deducted at source every 15<sup>th</sup> of the month by the respondent who would also remit the balance on invoices to the appellant.

9.3 The parties have raised a number of issues ranging from pleadings, expert witness and the issue of the record of appeal

being incompetently before court on the basis of failure to comply with the prescribed rules pursuant to **Order 10 Rule 9 (5)** of the Court of Appeal Rules (CAR).

9.4 Before we proceed to the substantive issues for determination, we shall start by addressing the issue of the alleged incompetence of the appeal before the court. We note that the respondent is raising this issue after responding to the substantive appeal as an alternative argument in its heads of argument as a basis to dismiss the appeal. We wish to state that it is desirable to raise such issues as a preliminary issue by way of motion prior to the hearing of the main appeal and not raising it as an alternative argument in the heads of argument opposition to the appeal. Heads of arguments cannot be a substitute for a formal application.

9.5 Regardless of the above view, we have considered the contentions therein. It is trite that a record of appeal must be prepared as stipulated under **Order 10 Rule 9 (5)** of the Court of Appeal Rules and of relevance to this appeal, it must contain complete documents in the case, a notice of appeal, documents necessary for the proper determination of the appeal, list and

copies of exhibits including correspondences relevant to matters in controversy.

9.6 The respondent argues that its' bundle of documents has been excluded from the record. This would render us incapable of proper determination of the appeal.

9.7 We are of the view that we are able to properly determine the appeal on the basis of the record and the judgment of the court below which made extensive reference to the documents by the parties and the evidence adduced. We are also at a loss to comprehend why the respondent did not simply file a supplementary record to rectify the issue pursuant to **Order 10 (1) of CAR**. The said order provides that if the respondent consider that the record filed by the appellant is defective, the respondent may file a supplementary record of appeal containing copies of any further documents which in its opinion are required for the proper determination of the appeal.

9.8 The other issues raised in any event by the appellant of repeated documents, incomplete submission of arguments, highlighted submissions and non- paginated documents in the record of appeal are all curable defects which cannot be the basis for dismissing the appeal.

9.9 We as a court have a duty to determine the matters on merit. As an officer of the court seeking proper determination of the appeal, the respondent's advocate should have considered its duty to aid the court by simply filing a supplementary record. We are alive that the provisions of **Order 10 Rule 10 (1)** of CAR on filing of a supplementary record of record is not mandatory on a respondent.

9.10 We accordingly find no merit in the arguments pertaining to the failure to comply with **Order 10 Rule 9 (5)** by the appellant.

9.11 In ground one, the appellant challenges the ruling of the lower court expunging certain paragraphs of PW1's witnesses statements in respect of the claims on demurrage and unauthorized fuel. The contention being that the appellant was claiming a debt and that the claims with respect to demurrage and unauthorized fuel are the ingredients that constitute that liquidated debt; and further that any objection to the evidence therein ought to have been made soon after service of the witness statements.

9.12 The respondent has opposed this ground from three angles: first, that the appellant ought to have obtained leave to appeal against the interlocutory ruling that expunged the paragraphs from the

witnesses statements; second, that the appeal is untenable in that the appellant accepted the ruling and proceeded with trial as opposed to applying for an adjournment so as to seek leave to appeal against the ruling; and third, that the statement of claim relates to an alleged agreement for the purchase of trucks and not for demurrage and unauthorized fuel claims.

9.13 In responding to the issue of failure to obtain leave to appeal the interlocutory ruling expunging the demurrage and unauthorized fuel claims, the appellant submitted that leave was obtained in a ruling/order granted by the lower court on 14<sup>th</sup> December, 2020.

9.14 The issue raised in ground one is whether the court erred by expunging the claims sought in respect of demurrage and unauthorized fuel on the basis that they were not pleaded but let in evidence in the witness statement, by Joakim Mumba which was objected to. Before we delve on the issue of pleadings, we shall address the side argument by the appellant that the objection to the witness statement of PW1 subject of exclusion of the stated evidence in paragraphs 3 and 4 was irregular. That it ought to have been raised earlier before trial and by way of a formal objection.

9.15 We do not agree with the above contentions: the respondent was within its right to object to the said evidence at trial when the evidence by PW1 was being tendered into court.

9.16 The starting point as we revert back to the issue above are the pleadings on record namely the statement of claim and defence on record. The appellant in its writ and statement of claim sought the payment of the kwacha equivalent of US\$ 127,266.59 and damages for loss of business profit. In the statement of claim, the plaintiff averred that it acquired truck Horses (additional vehicles) at total cost of US\$ 312,000 under a credit purchase agreement after alleged representations of payment deductions at source by the respondent. The respondent failed to remit the payments to Delta for the additional vehicles and a letter of demand was subsequently written. It was averred that as a result of the respondent's actions and conduct, the appellant suffered loss in the aforementioned sum of US\$ 127,266.59.

9.17 The defendant (respondent) disputed the pleading which claimed that the agreement under a credit/hire agreement was between the appellant and Delta Auto & Equipment Limited. The Reply on record essentially contains averments of correspondences

and meetings between the parties regarding the offset arrangement for payment.

9.18 Clearly, the pleadings contained no averments in respect of the demurrage expenses and unauthorized diesel claim. These came in the witness statement settled by Pw1 Joakim Mumba who was retained as a Financial Consultant to review the financial records of the appellant company in the preparation of the 2019 Annual Financial Statement. The witness stated that the sum of US\$127,266.59 outstanding as at 20<sup>th</sup> May 2020 was broken down to include demurrage charges of US\$ 56,150 and unauthorized diesel claim of US\$ 53,088.64.

9.19 At trial the respondent objected to the production of the PW1's witness statement particularly paragraphs 3 and 4, in relation to the demurrage and unauthorized claims for diesel on the basis that **"it was not the case which the plaintiff has pleaded"** before the court. The court below in its ruling expunged paragraphs 3 and 4 relating to demurrage and unauthorized claim for diesel.

9.20 Thereafter, Counsel for the appellant sought five minutes recess to consult his client on the ruling. When the court resumed proceedings, the witness was handed over for cross examination.



No appeal was lodged against the interlocutory ruling expunging the claims aforestated. Further, no application to amend the pleading was sought by the appellant.

9.21 It is trite that a claim not pleaded will generally not be considered by the court. The issue of pleadings is a point of law which we have to determine.

9.22 The word '*pleadings*' is defined as a statement of claim, defence, reply and subsequent pleadings and does not include witness statements which are evidence in chief. The function of pleadings is to identify the issues, the resolution of which will determine the outcome of the proceedings and to appraise the opposite party of the case to be met. They must give such particulars of any claim, defence etc as are necessary to enable the opposite party to identify the case that the pleading requires them to meet. Pleadings and particulars have other functions such as enabling the relevance and admissibility of evidence to be determined at trial. They meet the basic requirement of procedural fairness, the conduct of litigation and prevent injustice that may occur when a party is taken by surprise and even saves expense by keeping the case within due bounds.

9.23 In *casu*, the claims in respect of demurrage and unauthorized fuel were not pleaded. All that was pleaded was the sum of US\$127,266.59.

9.24 We are therefore of the view that the court below cannot be faulted for expunging the evidence in respect of the claims for demurrage and unauthorized fuel, the same having not been pleaded. Allowing it would not only take the respondent by surprise/ambush but would defeat the purpose of pleadings and particulars. We find no merit in the ground. Fairness in the conduct of a case goes both ways i.e right to fair trial, and right to defend a claim as pleaded. The court below was on firm ground in refusing to permit the appellant to go beyond his pleadings as the evidence sought to be adduced had no foundation in the pleadings, a power it had to discard such evidence of the claims.

9.25 Ground two, assails the holding by the court below that PW1 was called as an ordinary witness and therefore his evidence must be treated as such. The appellant vehemently contends that PW1 was never at any juncture portrayed or construed as an expert witness but was referred to as a professional witness

with expertise and knowledge delivered as Chief Financial Officer and Auditor as he was a qualified accountant.

9.26 The court below stated that Counsel for the plaintiff in the submissions in reply sought to mislead the court by contending that PW1 was an expert witness. Evidence of an expert witness is treated differently and a report of his findings would have been prepared. The appellant contends that the lower court misdirected itself in law and misconstrued the appellant's submissions by holding that PW1, Joakim Mumba is not an expert witness.

9.27 We have perused the 'plaintiff's submissions in reply' to the defendant's submission' dated 9<sup>th</sup> November, 2020 filed in the lower court by the appellant. At page 255 of the record of appeal, paragraph 2.7, the appellant submits as follows:

***"My Lady, the record shows that the Plaintiff called PW1 as an expert and/or professional witness, who was an independent certified public accountant, engaged to conduct a financial analysis of the account ("the analysis report") relating to the material agreement (contract for services) between the parties ..."*** (underlining for emphasis)

9.28 It is clear in our minds that by stating that PW1 was called “*as an expert and/or professional witness*”, the appellant was in fact presenting or holding out PW1 and his evidence as an expert witness whose evidence must be treated as an expert opinion. The lower court had to address this issue raised by the appellant in its submissions and was of the view that counsel for the appellant sought to mislead the court.

9.29 We entirely agree with the views expressed by the learned Judge in her judgment as to how an expert witness and his evidence is dealt with, and we cannot fault her. Pw1 was not an expert witness. An expert witness is one with knowledge or experience of a particular field or discipline beyond that of the layman. Whose duty is to give impartial opinion on particular aspects of matters within his expertise which are in dispute. As a rule of practice an expert witness should always be qualified in court before giving evidence. This is done by asking questions to determine expertise and failure to properly qualify an expert may result in exclusion of his evidence. Accounting to us is an exact science. We hold the view that Joakim Mumba was not called as an expert witness but an ordinary one. We dismiss the arguments raised in ground two.

9.30 Ground three assails the holding by the court below that the appellant had failed to prove its claims for an outstanding debt for freight and haulage on a balance of probabilities. Further that the court misapplied the authorities relied upon in that respect. The issue is whether the appellant had proved its claims in respect of freight and haulage charges. The claims in respect of demurrage and unauthorized fuel were disallowed on the basis of not having been pleaded.

9.31 We have perused the evidence both documentary and oral adduced before the lower court. The invoices alleged to be outstanding namely 4136, 4317, 4146, 4149 and 4150 though not produced before court appeared in the defendant's financial statement as offset between the parties. PW1 in his witness statement stated that when reviewing the appellant's accounts receivable balances, he discovered that a balance of \$108,274.68 as at 30<sup>th</sup> Dec 2019 was due and pending from the respondent. As an example, he made reference to the ledger USD transaction at pages 120 – 126 of the record.

9.32 This in our view, do not prove the claimed sum. Further, the balance brought forward as at 1<sup>st</sup> January 2020 in the account analysis prepared by PW1 does not stipulate what they were in

respect of and to which invoices they co relate or relate. In addition, from the evidence adduced on record, the said claimed sum of US\$127,266 was also said to include unremitted sums by the respondent to Delta Auto for the alleged hire purchase agreement.

9.33 The lower court correctly held that there was no contractual agreement between Delta Force and the respondent to the effect that payment due by the appellant would be paid at source by the respondent to Delta Force. The court below correctly held that there was no agreement between the parties that payments to Delta Auto would be paid by the defendant. The evidence of the appellant in the court below was contradictory, hence the court's finding that the defendant's evidence on the invoices in issue having been offset was more credible. Even the back charges alleged were shown to have been paid by the respondent.

9.34 We have also perused the string of electronic whatsapp messages passing between the appellant and respondent on several follow ups on payments, the period 15<sup>th</sup> February 2019 to 18<sup>th</sup> February 2020 and general delays in effecting payment. The said messages do not state the amounts due and

acknowledged as outstanding no do they indicate the pertaining invoice numbers.

9.35 Therefore, we cannot fault the court below for holding that the appellant had failed to prove its case on a balance of probabilities. We further are of the view that the court below did not misapply the authorities relied upon. That the lower court had addressed the issue of whether the respondent had discharged its indebtedness to the appellant. The court below in respect of the alleged claim of UDD 127,266.59 found that the appellant had failed to prove its claims. We uphold the holding by the court below for the earlier reasons advanced.

**CONCLUSION**

9.36 For the forgoing reasons, we find no merit in appeal and accordingly dismiss it, with costs to the respondent to be taxed in default of agreement.

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M. M. Kondolo S.C  
**COURT OF APPEAL JUDGE**

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

.....  
D. L. Y. Sichinga  
**COURT OF APPEAL JUDGE**