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IN THE COURT OF APPEAL OF ZAMBIA APPEAL 155/2020
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MUWINDWA MUTEMWA MUFUNDI APPELLANT
(Married woman)

AND

MEANWOOD GENERAL INSURANCE RESPONDENT
LIMITED



Coram: Makungu, Majula and Siavwapa JJA
On the 22nd day of September and 2nd day of December, 2021

For the Appellant: Mr. M. Mutemwa of Messrs Mutemwa Chambers
For the Respondent: Mr. B. Masha of Messrs Masha & Co

JUDGMENT

Makungu JA, delivered the Judgment of the Court.

Case referred to:

1. *Lumus Agriculture Company Limited and Others v. Gwembe Valley Development Company Limited (In receivership) (1999) Z.R 1*
2. *Rainbow Tourism Group (Zambia) Limited v. Savoy Hotel Limited and Another (2017) Z.R 240 volume 1.*
3. *Philips v Copping (1935) 1 K.B 15*
4. *Zalawi Haulage Limited v. Goldman Insurance Limited CAZ Appeal No.45 of 2019*
5. *Indo Zambia Bank Limited v. Mushankwa Muhanga (2009) Z.R 266*
6. *Cornish v. Accident Insurance Company (1889) 23 Q.B.D 453*
7. *Arthur Nelson Ndhlovu and Dr Jacob Mumbi Mwanza v. Al Shams Building Materials Company Limited and Jayesh Shah SCZ Judgment No.12 of 2002*

Legislation Referred to:

1. *The Authentication of Documents Act, Chapter 75 of the Laws of Zambia.*
2. *The High Court Act, Chapter 27 of the Laws of Zambia*

Other works referred to:

1. *Hatchard, J & Ndulo M (2013). The Law of Evidence in Zambia: Cases and Materials. Southern Institute for Policy and Research, Lusaka.*
2. *R. Merkin, Colivaux's Law of Insurance, 6th Edition, (London, Sweet & Maxwell, 1999)*
3. *Halsbury's Laws of England, 4th Edition, Volume 5.*
4. *Mark Aider, Clarity for Lawyers: Effective Legal Writing, 4th Edition*
5. *Bryan A. Garner, Black's Law Dictionary, 8th Edition (Thomson West, 2004).*

1.0 INTRODUCTION

1.1 This appeal is against the judgment of Justice W.S. Mwenda of the High Court dated 28th May, 2020 in which she dismissed the appellants' claim to be paid the sum of K200,000.00 by the defendant arising from an insurance policy she had with them on grounds that the documents produced during trial were not authenticated in terms of the Authentication of Documents Act.

1.2 The claim arose as a result of an accident involving her motor vehicle GMC, Sedan registration number MUW1 which is alleged to have hit into cattle whilst being driven by her agent along N11 Road, in South Africa.

2.0 BACKGROUND OF THE CASE

2.2 On 15th March 2017, the appellant, who was then plaintiff commenced an action by way of writ of summons and statement of claim in the High Court against the respondent as defendant claiming the following reliefs:

1. *Payment of the sum of K200, 000. 00 less any excess, being the loss suffered by the plaintiff as a result of an accident involving her motor vehicle, GMC Sedan, registration number MUW1, in South Africa on 13th June, 2016 pursuant to a policy of insurance with the defendant dated 10th June, 2016.*
2. *In the alternative, an order for payment by the defendant of the cost of repairs to the said motor vehicle.*
3. *Costs and any other relief.*

3.0 EVIDENCE IN THE COURT BELOW

3.1 The plaintiff's case rested on the evidence of three witnesses. PW1 was Martin Chiwana Mufundi, the plaintiff's son. PW2 was Muwindwa Mutemwa Mufundi, the plaintiff herself, PW3 was Luis Fernando Lissetiane the plaintiff's agent who was driving the vehicle on the day of the accident. Their combined evidence was as follows:

The plaintiff, who is the owner of the motor vehicle GMC Sedan, black in colour, registration number BAE 2301 ZM with a private number MUW1, decided to take the vehicle to South Africa for service or repair sometime in June, 2016. The said vehicle was comprehensively insured with the defendant company in the sum of K200, 000.00 and the sum paid as premium was K8, 120. The period covered was 1st July, 2015 to 30th June, 2016.

3.2 In readiness for the trip to South Africa, the plaintiff took out another insurance policy with the defendant company called "Extension of Cover to Other Countries" effective from 13th June, 2016 to 12th July, 2017. The sum insured under extension cover was K200, 000.00 and the premium paid was K836.36.

3.3 The plaintiff further secured the necessary temporary exportation authorisations for the motor vehicle in question from the International Criminal Police Organisation (Interpol) and the Zambia Revenue Authority.

3.4 On 12th June, 2016 she engaged Luis Fernando Lissetiane (PW3) a Mozambican national with a valid SADC driving licence to drive the said vehicle from Zambia to South Africa.

He left for South Africa with the plaintiff's son PW1 driving behind him.

- 3.5 On 13th June, 2016 around 02:00 hours whilst driving along N11 road, PW3 hit into a herd of cattle which were sleeping on the road resulting in extensive damage to the vehicle. The accident was reported to Gilead Police Station in Mokopane. On the same day of the accident, the accident was reported to insurance brokers.
- 3.6 Quotations for repair obtained from three different companies indicated that the estimated costs of repairing the vehicle would exceed 70% of the vehicle's insured value. Therefore, by virtue of section 1.1.3 of the comprehensive cover the plaintiff became entitled to indemnity to the insured sum of K200,000.00 plus interest, less applicable deductions.
- 3.7 The vehicle was not repaired but was still in South Africa at the time of the trial.
- 3.8 During trial, the plaintiff tendered in evidence the police report originating from the police in South Africa, pictures allegedly taken at the scene of the accident and the quotations for repairs.

4.0 THE RESPONDENT'S (DEFENDANT'S) EVIDENCE

- 4.1 The defence's case rested on the evidence of Caesar Silembo, an insurer by profession.
- 4.2 His evidence was that, the plaintiff failed to satisfy the defendant that the accident happened as claimed and that the requirements for compensation under the cover had been met. The plaintiff failed to satisfy the defendant on the inconsistencies between the plaintiffs claim and reports from the defendant's assessors. As a result the plaintiff's claim could not be processed.
- 4.3 Under cross examination, he admitted that the plaintiff was insured with the defendant company under a comprehensive insurance policy and she also took out an extension of cover to other countries insurance policy which extended to COMESA and SADC countries.
- 4.4 DW1 conceded that there was no evidence before the court that the vehicle was a non-runner on the date of the purported accident. He also agreed that they do not insure non-runners.
- 4.5 Concerning the police report, the defence witness in re-examination stated that the police report had no stamp of any

police authority and did not bear the signature of the person who prepared it neither did it have a notary public stamp.

4.6 With respect to the pictures of the damaged vehicle, the witness stated that there was no number plate of the vehicle involved in the accident and no date on which the picture was taken or time.

4.7 At the close of the defendant's case, the court granted them leave to make an application to have the unauthenticated documents expunged from the record but the defendant did not prosecute the application. As a result, the application was dismissed on 1st February, 2019.

5.0 DECISION OF THE COURT BELOW

5.1 After hearing the parties and reviewing the authorities on authentication of documents, the court below accepted the evidence of PW1, PW2 and PW3 in paragraph 3.1 to 3.4 above.

6. The trial Judge further found that, the extension of cover was valid on the date of the accident.

7. The court also found that the extension of cover applied to Luis Fernando Lissestiano as he had the plaintiff's permission to drive the motor vehicle to South Africa and was a holder of a

valid driving licence in accordance with policy note 2 on the Certificate of Motor Insurance.

8. After examining the documents produced by the plaintiff in support of her claim that her motor vehicle GMC Sedan registration number MUW1 which was being driven by Luis Fernando Lissetiane hit into three cows on 13th June, 2016 along N11 Road around 02:00 hours which resulted in extensive damages to the vehicle. The judge found that there was no evidence to substantiate the plaintiffs claim that the motor vehicle described by the plaintiff was the one in the photographs showing the damaged vehicle. She opined that since the pictures did not show the number plate of the damaged vehicle or day and time when the accident happened. The pictures could be of any other vehicle and could have been taken on any other day and time other than what was being claimed by the plaintiff.
9. Additionally, that the accident report and the pictures allegedly taken at the accident scene were not authenticated as required by law. Therefore, the same could not be used or relied upon as evidence in this case. The court concluded that there was no evidence on which it could base a finding that the motor vehicle in question was involved in an accident as alleged.

10. That even if the court had found evidence of the plaintiff's vehicle being involved in an accident, it still would not have passed judgment in favour of the plaintiff because she did not meet the mandatory requirement of the extension of cover of first meeting the cost of loss or damage to the motor vehicle in South Africa and then seeking reimbursement from the defendant.
11. As regards the issue of whether or not the vehicle was a non-runner at the time of the accident, the court found that the vehicle was a runner as the defendant did not successfully rebut the evidence that it was driven to South Africa on the material date.
12. In the premises, the case was dismissed with costs.

6.0 GROUNDS OF APPEAL

6.1 The appellant has advanced 5 grounds of appeal framed as follows:

- 1. The court below misdirected itself on points of fact and law when, having dismissed the respondents application to expunge documents from the record for want of prosecution, proceeded "suo moto" to make findings on the***

same when the said application was never brought before court or heard.

- 2. The learned trial judge misdirected herself on points of law and fact by finding that the police report and the pictures of the accident were not authenticated in accordance with the Authentication of Documents Act Chapter 75 of Laws of Zambia when the said documents did not require authentication.*
- 3. By non-direction or otherwise, the court below misdirected itself both on points of law and fact by finding that the accident did not happen as alleged when there was unchallenged evidence on record corroborating the accident.*
- 4. The court below misdirected itself on points of law and fact by finding that there were no pictures showing the number plate of the vehicle contrary to the evidence on record.*
- 5. The learned trial judge misdirected herself on points of law and fact by holding that the plaintiff should have first repaired the vehicle in*

RSA and then come to be reimbursed in Zambia when the vehicle was assessed as total loss.

7.0 ARGUMENTS BY THE PARTIES

7.1 At the hearing, learned counsel for the appellant, Mr. Mutemwa relied on the heads of argument filed on 21st August, 2020 in support of the appeal.

7.2 In opposing the appeal, learned counsel for the respondent Mr. Mosha relied on the heads of argument filed on 28th September, 2021.

8.0 APPELLANT'S ARGUMENTS ON GROUNDS 1 AND 2

8.1 In support of the first ground of appeal, which challenges the learned judge's findings on the issue of authentication after having dismissed the respondent's application to expunge documents from the record for want of prosecution, the appellant's advocate Mr. Mutemwa submitted that the court granted the respondent leave to file an application to expunge documents from the record when the issue was raised at the close of the respondent's case. However, by order dated 1st

February, 2019 the same was dismissed for want of prosecution.

8.2 According to counsel, the issue of authentication should have only be adjudicated upon if the court had allowed the application to be heard but the court proceeded to make findings on that issue without giving the appellant an opportunity to be heard.

8.3 Counsel therefore, urged us to overturn the lower court's decision with regard to non-authentication of documents as it was baseless.

8.4 In support of ground two, Mr. Mutemwa referred to the case of **Lumus Agriculture Company Limited and Others v. Gwembe Valley Development Company Limited (In receivership)**¹ to the effect that if a document is not authenticated, then it cannot be used in the country, which the court below relied upon in arriving at its decision. He submitted that, that case should be distinguished from the case of **Rainbow Tourism Group (Zambia) Limited v. Savoy Hotel Limited and Another**² where the Supreme Court found that the PSSA and MSA that were executed outside Zambia but not authenticated were valid between the appellants and

the respondents who were contracting parties to both documents.

8.5 He submitted that in *casu*, as in the Rainbow Case *supra*, the parties had agreed that the documents in issue be used in the proceedings. That evidence of acquiescence on the part of the respondent which the lower court ignored and failed to take into account was as follows:

1. At discovery and inspection, the respondent never objected to the production of the said documents.
2. At commencement of trial, the respondent confirmed that it would adopt the appellant's bundle of documents.
3. During cross-examination of the appellant's witnesses, the respondent variously referred to the said bundle of documents in support of its case and never at any time did the issue of authentication arise.
4. The issue of authentication only arose at the very last moment under re-examination of DW1, even though it was not one of the questions which the appellant raised under cross-examination.

5. Having realised its dereliction, the respondent then applied for and was granted leave to formally file an interlocutory application to expunge documents from the record for want of authentication.
6. Despite being granted the opportunity to present its case, the respondent still disregarded the court's direction, prompting the court by order of 1st February, 2019 to dismiss the application for want of prosecution.

8.6 Mr. Mutemwa, further submitted that, the respondent having adopted the appellant's bundle of documents and having waived its right to challenge the said documents after being granted leave to do so, meant that the issue of authentication was no longer in contention and that the matter had been settled by the court order of 1st February, 2019. Therefore, it was a misdirection for the court to make a finding that the documents in issue were not authenticated when there was agreement to use the same.

9.0 RESPONDENT'S ARGUMENTS ON GROUNDS 1 AND 2

9.1 In response, the respondent's counsel argued grounds one and two together as follows: that in the two grounds of appeal the appellant is questioning the court's jurisdiction to preside over matters that are legally settled. Citing section 13 of the High Court Rules which provides inter alia that, the court can deal with all matters in controversy between the parties. Mr. Mosha, opined that by virtue of this provision the court below was empowered to address the issue of authenticity despite neither party to the proceedings making the requisite application. He further submitted that the Authentication of documents Act, is couched in mandatory terms and logically it would have been a matter in controversy. Therefore, the lower court was within the law to invoke the provisions of the existing law. He relied on the case of **Philips v. Copping**³ where it was stated that:

“It is the duty of the court when asked to give a judgment which is contrary to statute to take the point although the litigants may not take it. Illegality once brought to the attention of the court overrides all questions of pleadings, including any admissions made therein.”

- 9.2 He further relied on the case of **Lumus Agricultural Service Company Limited v. Gwembe Valley Development Limited¹** in support of the argument that a document executed outside Zambia cannot be used for any purpose if it is not authenticated in line with section 3 of the Authentication of Documents Act.
- 9.3 He went on to refer to the accident report at page 141 of the record of appeal and argued that the same was only evidence that an accident was reported to the authorities. However, it was not authenticated. Lack of authentication barred the court below from ascertaining the genuineness of the document or the signatures thereon for purposes of admitting it into evidence.

10.0 APPELLANT'S ARGUMENTS ON GROUND 3

- 10.1 In support of ground three, which challenges the lower court's finding that the accident did not happen as alleged. Mr. Mutemwa referred us to **The Law of evidence in Zambia: cases and Materials** on the definition of corroboration, which is defined as independent evidence which supports the evidence of a witness in a material particular.

- 10.2 He went on to submit that, even assuming that the police report is inadmissible on the grounds of non-authentication, there is on record unchallenged corroborating evidence of PW1 who was at the scene of the accident.
- 10.3 That, the respondent did not deny the occurrence of the accident but preferred to dispute the manner in which the accident happened. The respondent's version was that the accident happened as a result of a normal ramping with hills or a road and that the car was a non-runner at the time of the accident. The appellant's version was that the accident happened after PW3 hit into a herd which were sleeping on the road around 02:00 hours.
- 10.4 Since the trial judge had identified more inconsistencies in the respondent's case than the appellant's case. She was not justified in resolving the matter in the respondent's favour. Additionally, the respondent's evidence was thoroughly discredited under cross examination.

11.0 RESPONDENT'S ARGUMENTS ON GROUND 3

11.1 To counter ground three, the respondent's counsel submitted that the general rule on corroboration is that the court in both civil and criminal cases, can act on evidence of one witness though there are exceptions as to when the court is required to look for corroboration. The appellant has argued that the evidence of PW1 was unchallenged without showing the court independent evidence to confirm that the accident occurred. The evidence of the photographs adduced was properly adjudicated upon by the trial judge when she held that they were not dated and that the date and time of the accident were amiss. Additionally, the pictures and accident report form were not authenticated for use in Zambia as section 3 of the Authentication of Documents Act makes it mandatory for such documents obtained in the Republic of South Africa to be authenticated.

11.2 Counsel submitted further that, the respondent's evidence on record to the effect that an investigation carried out on the motor vehicle revealed that there were no characteristics on the vehicle associated with collision with cattle such as fur and blood stains, suggests that the respondent disputes that the said vehicle was involved in an accident and the appellants

themselves failed to prove the alleged accident in the lower court.

12.0 APPELLANT'S ARGUMENTS ON GROUND 4

12.1 In arguing ground four, which challenges the court's finding that there was no number plate on the vehicle, it was submitted that the finding by the court below that there were no pictures showing the number plate of the vehicle was contrary to the evidence on record. That the appellant's supplementary bundle of documents filed on 13th March, 2018 showed pictures of the damaged vehicle taken by PW1 immediately after the accident. The picture at page 327 of the record shows the vehicle registration number MUW1.

12.2 It was therefore submitted that the court made an incorrect finding of fact which should be overturned.

13.0 RESPONDENT'S ARGUMENTS ON GROUND 4

13.1 In response to ground four, Mr. Mosha submitted that the court below was on firm ground when it found that the pictures did not show the day and time, therefore the pictures could have been taken on any other day.

13.2 Counsel contended that there was insufficient evidence for the court to arrive at a conclusion that the appellant's motor vehicle was involved in the alleged accident.

14.0 APPELLANT'S ARGUMENTS ON GROUND 5

14.1 On ground five which is that the court misdirected itself by holding that the plaintiff should have first repaired the vehicle in South Africa and then come to be reimbursed in Zambia when the vehicle was assessed as a total loss, it was submitted that the court below was faced with two conflicting documents; the respondent's motor comprehensive policy on one hand and the extension of cover to other countries on the other hand. Clause 1.1.3 of the respondent's motor comprehensive policy provided for constructive loss if the estimated repair costs exceeded 70%. The extension of cover to other countries which was supplementary provided for the insured to meet the costs of any loss or damage in the country the accident occurred and on return claim reimbursement.

14.2 He went on to submit that, the appellant prayed that clause 1.1.3 of the comprehensive policy be invoked but the court invoked the provisions of the extension of cover policy *suo*

moto. There was no evidence from the respondent suggesting that the document extending cover to other countries superseded the motor comprehensive policy.

14.3 Reference was also made to **Colinvaux's Laws of Insurance** which states as follows:

“A policy of insurance has to be construed like any other contract; it is to be construed in the first place from the terms used in it, which terms are themselves to be understood in their primary, natural, ordinary and popular sense. The meaning of a word in a policy is that which an ordinary man of normal intelligence would place upon it, it is to be construed as it is used in the English language by ordinary persons.”

It goes on to state that:

“In such cases the rule is that the policy, being drafted in a language chosen by the insurers, must be taken most strongly against them. It is construed contra proferentem, against those who offer it. The assured cannot put his own meaning upon a policy, but, where it is ambiguous, it is to be construed in

the sense in which he might reasonably have understood it.”

14.4 Counsel further made reference to **Halsbury’s Laws of England 4th edition** at page 237 paragraph 395, where it is stated as follows:

“When presented with a conflict between the parties as to the meaning of the policy, the court’s function is to interpret what the parties have in fact said in their contract, not to speculate as to what they may have intended when entering the contract.”

14.5 Counsel further cited the case of **Indo Zambia Bank Limited v. Mushaukwa Muhanga**,⁵ where the Supreme Court stated that:

“.... According to Black’s Law Dictionary, contra preferentum is the doctrine that in interpreting documents ambiguities are to be construed unfavourably to the drafter.”

“Mark Alder, in his book, clarity for Lawyers, described the contra preferentum doctrine as a commendable principle that ambiguity will be

construed against the interest of the party responsible for it. We might call it 'the careless drafting rule'. He cited the case of *Cornish v Accident Insurance Co (2)* which dealt with an exception clause in a policy of insurance. In that case, Lindley, L.J stated, inter alia, that:

"The real difficulty is to express the necessary qualification with which words must be taken. In a case on the line, in case of real doubt, the policy ought to be construed strongly against the insurers; they frame the policy and insert the exceptions. But this principle ought to be applied for the purpose of removing a doubt and not creating a doubt, or magnifying an ambiguity when the circumstances of the case raise no real difficulty."

14.6 In light of the aforementioned authorities, counsel contended that, as the respondent was responsible for formulating the two insurance policy documents it should be construed against it. Had the learned trial judge carefully analysed the two documents in line with the guidance provided in the above

authorities, she would have come to the conclusion that the respondent's two documents were inconsistent with each other and she would have resolved the inconsistency contra preferentum against the respondent.

15.0 RESPONDENT'S ARGUMENTS ON GROUND 5

15.1 In response to ground five, the respondent's counsel submitted that the court below made reference to the documents individually. He submitted that, the accident report is unclear and a reasonable man cannot be expected to decipher which motor vehicle it relates to. As for the pictures, the lower court found that they did not show the number plate of the damaged vehicle or the day and time when the accident happened and that the said pictures could have been of any other vehicle and could have been taken on any other day.

15.2 Counsel submitted that there was insufficient evidence for the court to arrive at the conclusion that the damage to the plaintiffs vehicle was as a result of the purported accident.

15.3 Counsel for the respondent finally stated that a major difference between the case of **Rainbow Tourism Group (Zambia) Limited v. Savoy Hotel Limited and Another** ² and

the current one is that, the respondent denies liability as it asserts that the purported accident did not occur owing to the fact that there was no third party claim issued against the appellant. Additionally, the accident scene had no characteristics of an accident such as blood neither was there evidence of fur from the cows on the insured motor vehicle.

16.0 APPELLANT'S ARGUMENTS IN REPLY

16.1 The appellant's arguments in reply were a repetition of the main arguments.

17.0 OUR DECISION

17.1 We have carefully considered the record of appeal as well as the arguments made by the parties.

17.2 We shall consider grounds one and two together as they are inter-related. These two grounds, raise the questions (a) whether the appellant could rely upon unauthenticated documents originating from South Africa namely; the accident report, repair quotations and pictures allegedly taken at the scene of the accident. (b) Whether the court could determine the question of authentication *suo moto*.

17.3 Section 2 of the **Authentication of Documents Act** defines “document” as any deed, contract, power of attorney, affidavit, or other writing, but does not include an affidavit sworn before a Commissioner of the High Court. The same section defines **authentication** as the verification of any signature or signatures on a document.

17.4 Black’ Law Dictionary defines authentication as;

“Broadly, the act of proving that something (as a document) is true or genuine, especially so that it may be admitted as evidence; the condition of being so proved.”

17.5 The general position of the law is that any document that is produced or executed outside Zambia must be authenticated for purposes of use in Zambia. This is contained under section 3 of the Authentication of Documents Act, which provides as follows:

3. “Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if-

(d) in the case of a document executed in any place outside Her Britannic Majesty's dominions

(hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office-

(i) of a British Consul-General, Consul or Vice-Consul in such foreign place; or

(ii) of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be duly authorised under the law of such foreign place to authenticate such document."

17.6 The Supreme Court of Zambia had occasion to interpret the above provisions in the case of **Lumus Agricultural Company Limited and Others v. Gwembe Valley Development Company Limited**,¹ where it was held that:

(i) If a document executed outside Zambia is authenticated as provided by the Authentication of Documents Act, then it shall

be deemed or presumed to be valid for use in this country and if it is not authenticated the converse is true that it is deemed not to be valid and cannot be used in this country.

17.7 The Supreme Court went on to state the exception to this rule as follows:

(i) That an instrument which is not authenticated is valid between the parties and ineffective against third parties.”

17.8 The second exception to the rule was applied in the case of **Rainbow Tourism Group Zambia Limited v. Savoy Hotel Limited and Another²** in which a claim arose out of a Management Service Contract (MSC) and a Preferential Share Subscription Agreement (PSSA), entered into by the parties outside Zambia. When the shares became redeemable, the appellant demanded payment but the respondent defaulted.

17.9 The respondents did not dispute having signed both agreements or that the debt was owed to the appellant by the 1st respondent, but claimed that the original agreements were not capable of enforcement in Zambia as they were not

authenticated in terms of the Authentication of Documents Act as the agreements were executed outside Zambia. The trial judge concluded that since the agreements were not authenticated as required by the act, they were incapable of enforcement in Zambia and dismissed the claim. On appeal, the Supreme Court held that:

“While it was mandatory under section 3 of the Act that a document executed outside Zambia be authenticated in order for it to be enforced by Zambian courts, the Lumus case, should be distinguished, because the respondent in that case was not a party to the document that was sought to be enforced, whereas in the current case, the appellant and the respondents were contracting parties to both the unauthenticated agreements.

The issue of the rationale for authentication did not arise as the validity of the signatures of the parties and the genuineness of the two agreements did not arise in the court below or before the Supreme Court. Consequently, although the PSSA and MSA were not authenticated, they were valid between the

appellant and the respondents as contracting parties.”

17.10 The appellant has relied on the Rainbow case to argue that the present case falls within the exception to the rule on authentication. The thrust of their argument is that since the respondent in this case agreed/acquiesced to the use of the documents in issue, there was no need for authentication of the same. According to counsel for the appellant acquiescence is evidenced by the fact that; the respondent did not object to the production of the said documents at discovery and inspection stage, the respondent referred to the said documents in support of its case at trial and neglected or failed to prosecute its application to have the documents expunged from the record. This led to the court dismissing the application for want of prosecution.

17.11 It is the appellant's further contention that the court below misdirected itself when, having dismissed the respondent's application to expunge documents from the record for want of prosecution, it proceeded *suo moto* to make findings on the same.

17.12 On the other hand, the respondent's argument is simply that the accident report, quotations for repair and pictures could not be relied upon as they were not authenticated in accordance with the law. That the court below had the power to address the issue of authentication despite neither party to the proceedings making the requisite application.

17.13 We pondered over the issues raised in this appeal. In the **Lumus and Rainbow** cases the documents in contention were agreements between the parties and the genuineness of their signatures were not disputed during trial.

17.14 In this case, we are faced with documents that are not agreements between the parties but a South African police report, quotations for repair of vehicle from South Africa and pictures of the accident taken by the appellant's son.

17.15 The present case can be distinguished from the case **Zalawi Haulage Limited v. Goldman Insurance Limited**⁶ where the challenged document was an admission of guilt form prepared by the Zimbabwean Police. The undisputed facts were that a truck belonging to the appellant transporting generators was involved in an accident allegedly occasioned by the negligence of appellant's driver. He was arrested and charged for the

offence of negligent driving. He admitted the offence and paid an admission of guilt fee.

17.16 The appellants argued that their driver did not sign the admission of guilt form prepared by the Zimbabwean police which they challenged for not being authenticated. They also argued that they were not privy to the documents.

17.17 On the facts of the case, we found the appellant's argument untenable as it was not in dispute that their driver, one Brian Katebe, was involved in an accident in Zimbabwe and he admitted guilt by paying an admission of guilt fee. The appellants could therefore not seek to extricate themselves from the actions of their driver. We therefore held that the appellants were not strangers to the challenged documents and that these documents fell within the exceptions to the rule on authentication and the respondents could rely on them.

17.18 On the contrary, the respondents in this case can be said to be strangers to the police report form and the quotations for repair of the vehicle from South Africa produced in this case, as they were not involved in making them and did not endorse them. However, we hold that the pictures do not fall in the purview of the Authentication Act as they require no signature

photographs are not writings and do not therefore require authentication. It is enough for the person who took them to verify the same through sworn evidence as the appellant's witness did.

17.19 Since, issues of authentication should be determined on the merits of each case. In the present case we find nothing that could make the present case fall within the above stated exception to the rule on authentication. We accept the submissions by counsel for the appellant that because the respondent did not object to the production of the police report and quotations for repair at inspection and discovery stage and trial and did not prosecute the application to expunge the same from the record, it meant that they had acquiesced to the use of the documents. Nevertheless, the law on authentication of documents is quite clear and one cannot just waive the requirements of a statute in the manner proposed by the appellants. That is because there can be no estoppel against the provisions of a statute; the case of **Arthur Nelson Ndhlovu and Dr Jacob Mumbi Mwanza v. Al Shams Building Materials Company Limited and Jayesh Shah**⁷ refers.

17.20 It is our considered view that the said police report form and quotations for repair which are indeed writings as defined by the Authentication Act required authentication. Since they were not authenticated in accordance with the Act, the appellants could not rely on them. We therefore uphold the lower court's finding that the said documents were not valid for use in Zambia for lack of authentication.

17.21 Nevertheless, we hold that the pictures do not require authentication as they are not writings.

17.22 With respect to the court proceeding to determine the issue of authentication *suo moto*, our view is that since this was a matter of law, the court was under a duty to determine the issue of illegality. The case of **Philips v. Copping** *supra* applies.

17.23 In light of the foregoing, we find no merit in grounds one and two.

17.24 Coming to the third and fourth grounds of appeal, which assail the court's finding that the accident did not happen as alleged and that there were no pictures showing the number plate of the vehicle in question, we are of the view that PW3's evidence that he hit into a herd of cattle which were sleeping

on the material night was corroborated by PW1, the eye witness whose testimony went unchallenged.

17.25 Apart from PW1 and PW3's evidence, the photographs, one of which shows the number plate of the vehicle in issue, support the fact that the said vehicle was involved in an accident. PW1's and PW3's cogent evidence that the pictures were taken on the night of accident suffices. The fact that the respondent did not dispute that an accident occurred but only disputed the circumstances under which it occurred, means that the lower court misdirected itself as its finding that the occurrence of the accident was not proved was not in accordance with the evidence. PW1 and PW3 were eye witnesses whose evidence should have been given the weight that it deserved. Properly directing itself, the lower court would have found that there was evidence that an accident occurred under the circumstances stated by PW1 and that the pictures tendered into evidence were of the same vehicle. So we set aside that finding and find as stated above. Therefore, we find merit in grounds 3 and 4.

17.26 On the fifth ground, the appellant has argued that between the two insurance policies, she was relying on the comprehensive

policy and not the extension of cover to other countries. That it was the court below that invoked the extension of cover policy *suo moto* instead. The appellant has relied on a number of authorities to support the argument that the ambiguities in the two policy documents should be construed against the respondent who drafted them (contra preferentum rule).

17.27 We take note that the appellant took out the extension of cover policy to other countries to cover the vehicle while it was in other countries like South Africa and she adduced evidence that she did not have the vehicle repaired because the repair cost would exceed 70% of the sum assured. Therefore, she actually relied on clause 1.1.3 of comprehensive insurance policy to claim for the sum assured.

17.28 We have examined the extension of cover policy which reads in part as follows:

“It is declared and agreed that the geographical area is extended to include COMESA and SADCC....”

17.29 In light of the above, we hold that the appellant’s extension of cover to other countries policy supplemented the comprehensive insurance policy especially that there was no evidence from the respondent to the effect that the

supplementary policy superseded the comprehensive insurance policy. Therefore, the second policy simply extended the appellant's cover to the said geographical areas.

17.30 However, since the appellant could not prove that the repair costs would exceed 70% of the insured sum as the quotations for repair tendered into evidence were unauthenticated and therefore not valid for use in Zambia, it means that there is no proof that the cost of repairing the vehicle would be more than 70% of the insured sum. Under that policy, she was required to meet the cost of loss or damage to the vehicle and then seek reimbursement from the respondent company on her return. We therefore uphold the lower court's finding that the appellant was bound by the extension of cover policy while the vehicle was in South Africa and find no merit in ground five as well.

18.0 CONCLUSION

18.1 In conclusion, although there was evidence that an accident involving the appellant's vehicle registration number MUW1 occurred on 13th June, 2016, the documents tendered into evidence which originated from South Africa namely; the police

report and the quotations for repairs are not valid for use in Zambia due to lack of authentication. Therefore the appellant could not rely on the said quotation to prove that the repair cost would exceed 70% of the insured sum.

18.2 Furthermore, while the vehicle was in South Africa, the appellant was bound by the extension of cover which required her to first meet the cost of loss or damage to the vehicle and then claim reimbursement from the respondent on her return but she failed to fulfill this condition.

18.3 Therefore, the sum total of this appeal is that it fails. Costs are awarded to the respondent, to be taxed in default of agreement.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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B.M. MAJULA
COURT OF APPEAL JUDGE

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M.J.SIAVWAPA
COURT OF APPEAL JUDGE