IN THE COURT OF APPEAL OF ZAMBIA **APPEAL No. 152/2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MOHAMMED HANIF PATEL — **1ST APPELLANT**

AYSHA HANIF PATEL — **2ND APPELLANT**

AND

ZESCO LIMITED — **1ST RESPONDENT**

CAPITAL FISHERIES LIMITED — **2ND RESPONDENT**

CORAM: ***Sichinga, Ngulube, and Banda-Bobo, JJA***
On 21st April, 2022 and 19th July, 2022

For the Appellants:	*Mr. C. Maggubbwi of Messrs Tembo Ngulube and Associates*
For the 1st Respondent:	*Mrs. J. Kunda – Principal Legal Officer*
For the 2nd respondent:	*Mr. G.S. Cornhill of Messrs Wilson and Cornhill*

JUDGMENT

Sichinga JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises SCZ Judgment No. 4 of 1999***
2. ***Marius Blom and Another v Tshwane Metropolitan Municipality Council No. 8/2011***
3. ***Amon v Bobbet 2 Q.B.D 543***
4. ***Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66***
5. ***Dunlop v Selfridge (1915) AC 847***

6. ***General Nursing Council of Zambia v Mbangweta (2008) Vol. 2 ZR 105.***
7. ***Emmanuel Mutale v Zambia Consolidated Copper Mines Limited (1994) SCJ 67***
8. ***Michael Chilufya Sata v Zambia Bottlers Limited (2003) ZR 1***
9. ***Evereal Garage Limited and Autoforce Limited v Kalumbwa Kaputo and 23 others SCZ Appeal No. 112 of 2011***
10. ***Costa Tembo v Hybrid Farms Limited (2003) ZR 98***

Legislation referred to:

1. ***The Electricity Act No. 11 of 2019***
2. ***The High court Rules, Chapter 27 of the Laws of Zambia.***
3. ***The Rules of the Supreme Court, 1999 edition***
4. ***Court of Appeal Act No. 7 of 2016.***
5. ***Landlord and Tenant's (Business Premises) Act, Chapter 106 of the Laws of Zambia***

Other works referred to:

1. **Chitty on Contracts-General Principles, Volume 1, Sweet and Maxwell, 2004**
2. ***The ZESCO conditions of Supply No. 543 of 2012***

1.0 Introduction

1.1 The issue in this appeal is whether the 1st respondent, ZESCO Limited, a power utility company, was wrong to disconnect electricity power supply to the appellants' premises (the plaintiffs in the court below) on the ground that they were connected to a dedicated transformer. Majula J, as she then was, held that the transformer was dedicated to the 2nd respondent. In her judgment delivered on 18th March, 2020 she found that the plaintiffs had failed to prove that they were entitled to the declarations sought as well as damages for breach of contract. She dismissed their claims, and the 2nd respondent's (2nd defendant in the court below) counterclaim in the sum of

K122, 584.30 being 50% of the cost of the transformer and accessories it installed on its premises.

2.0 Background

2.1 The plaintiffs, Mohammed Hanif Patel and his wife, Aysha Hanif Patel were the owners of a property, Stand No. 9066, Chinika area, Lusaka, which comprised six warehouses rented out to tenants. In 2012, one of the tenants, Omars Investments Limited, applied for electricity power supply to ZESCO Limited for its premises. It could not afford to have a dedicated transformer installed at its premises. Therefore, it entered into an agreement with the 2nd defendant company, Capital Fisheries Limited, which was on an adjacent stand, to share electricity from its dedicated transformer. It was supplied with power by ZESCO Limited. Later, Capital Fisheries Limited sought to upgrade the electricity supply from its 500kva transformer to an 800kva transformer. Capital Fisheries Limited met the full cost of the upgraded transformer, and gave notice to Omars Investment Limited that it would disconnect supply to it. Omars Investment Limited was subsequently disconnected, allegedly by the 2nd respondent's contractor.

2.2 Omars Investments Limited and the plaintiffs took out an action by way of writ of summons and statement of claim against ZESCO Limited seeking the following reliefs:

(i) A declaration that the defendant's action to disconnect electricity power supply to the plaintiffs without notice or reason/cause is in breach of the express/implied conditions of the electricity supply Agreement;

(ii) General damages for breach of the said express/implied conditions of the electricity power supply Agreement;

(iii) Special damages for loss of rent for November and December, 2016 in the aggregate sum of USD 35,700.00 and loss of future earnings in rentals

(iv) Aggravated damages;

(v) Damages for mental distress and humiliation; and

(vi) Interest and costs.

2.3 By Consent Order executed on 26th April, 2017, Capital Fisheries Limited was joined to the action. By a Ruling dated 5th October, 2017, Omars Investments Limited was misjoined from the suit.

2.4 Capital Fisheries Limited also had a counterclaim against the plaintiffs contending that it had suffered loss as a result of the plaintiffs' failure to pay half the cost of the transformer, as well as failure to execute the draft agreement on the supply of power.

3.0 **Decision of the lower court**

3.1 Upon analysing the evidence, Majula J, declined to grant any of the plaintiffs' claims as they had failed to prove them.

4.0 **The appeal**

4.1 Dissatisfied with the decision of the lower court, the plaintiffs appealed raising the following grounds of appeal:

> **1. That the learned trial Judge in the court below misdirected herself in law and fact, when she failed to understand and appreciate that at the material time when the 2nd respondent disconnected electricity power supply to the appellants' property, the transformer had ceased to belong to the 2nd respondent;**

2. **The learned trial Judge in the court below erred in law and fact, by holding that the 2nd respondent was entitled to unilaterally disconnect electricity power supply to the appellants' property on account of failure by the previous tenant, namely Omars Investment Limited, to pay the consideration price to the 2nd respondent for the use and joint ownership of the then dedicated transformer;**

3. **The learned trial Judge in the court below misdirected herself in law and fact, when she glossed over and disregarded the evidence adduced at trial by the 1st respondent which clearly showed that the 2nd respondent was not clothed with power and authority to unilaterally disconnect electricity power supply from the appellants' property;**

4. **The learned trial Judge in the court below erred in law and fact, when she held that the 1st respondent did not breach any express or implied conditions in the power supply Agreement when it refused, neglected and/or failed to reconnect electricity power supply to the appellants' property, despite the appellants having laid several complaints against the 2nd respondent's unlawful action;**

5. **The learned trial judge in the court below consequently misdirected herself in law and fact, by failing to award both general and special damages against both the 1st and 2nd respondents, despite the appellants having proved their case on a balance of probability;**

6. **The learned trial Judge in the court below erred in law, when she awarded costs of the entire proceedings to the respondents, when in fact, the 2nd respondent's counterclaim against the appellants had equally failed and dismissed.**

5.0 Appellants' submissions

5.1 Mr. Maggubbwi, learned counsel for the appellants, relied on the appellants' heads of argument filed on 17th August, 2020.

5.2 Prior to arguing the first ground of appeal, counsel begun by pointing out that at page 68 of the record of appeal, the amended statement of claim states that the appellants were directors in the then 1st plaintiff, Omars Investment Limited. That at trial, the 1st appellant clarified the position that

the appellants were not directors in the said company. (Per page 337 of the record of appeal).

5.3 It was submitted that since there was no objection to the evidence tendered, the pleadings should be construed that the appellants were not directors in Omars Investment Limited, but that instead the relationship that existed between the two parties was that of landlord and tenant.

5.4 On the substantive argument in ground one, counsel submitted that the fundamental question that remained to be determined is as regards the legal or proprietary ownership of the subject transformer. To answer this question, we were referred to the quotation for electricity supply at page 118 of the record of appeal where it states the following:

> ***"Please note that payments of the said amounts does not confer on you any ownership or other proprietary interest in any equipment, cable or apparatus so installed."***

5.5 In addition to the above, we were referred to the testimony of the 1st respondent's witness, DW1, who confirmed that the ownership of the transformer is retained by the 1st respondent. Page 354, line 8-15 of the record of appeal refers.

5.6 It was submitted that since the transformer belonged to the 1st respondent, it follows that the 2nd respondent could not exercise proprietary rights over it. Counsel argued that if the learned trial Judge had properly understood this point, she would not have found that the 2nd respondent was fortified in engaging its contractor to disconnect the cable as it did not want Omars

Investment Limited to continue to tap power from its dedicated transformer.

5.7 It was submitted that notwithstanding the fact that the 2nd respondent may have bought the transformer for its dedicated use, the fact that Omars Investment Limited was allowed to tap power from it, rendered it a shared transformer. Counsel repeatedly drove the point that the transformer belonged to the 1st respondent. That its use could be shared with a third party, provided there was consent to do so by the customer who procured it. It was submitted that the power and authority to disconnect power supply rest in the hands of the 1st respondent company. We were urged to allow the first ground of appeal.

5.8 The argument in respect of the second ground of appeal is that when the 2nd respondent agreed to share the use of the transformer with Omars Investment Limited, it ceased to be a dedicated transformer but a shared one. It was submitted that the argument is buttressed by the fact that the 2nd respondent went to the extent of charging Omars Investment Limited a refund of 50% of the cost of its capital contribution towards procuring the said transformer.

5.9 Counsel contended that whilst it is common cause that the parties did not sign the draft agreement for the common use and ownership of the transformer, the evidence none the less, shows that for the years that followed, the 2nd respondent allowed Omars Investment Limited and subsequently, the appellants to continue tapping power from the transformer at its premises. It was submitted that when the appellants'

property through Omars Investments Limited, begun to tap power from the transformer procured by the 2nd respondent, the former became legal and legitimate customers of the 1st respondent company and not the 2nd respondent company.

5.10 The second question posed by the appellants is – *Did the 2nd respondent have the power and authority to disconnect the appellant's property from the 1st respondent's grid through the transformer located at its premises?* It was submitted that the answer was in the negative because the transformer belonged to the 1st respondent. That since the 2nd respondent had granted the appellants or their tenants consent to tap power, it did not have the power and authority to decide on its own volition, to disconnect a third party without the authority of the 1st respondent.

5.11 It was further submitted that the 2nd respondent had its hands tied the moment it agreed to share the transformer with the appellant's property through Omars Investment Limited, notwithstanding, the fact the latter had not honoured its contractual obligations as provided in the draft agreement.

5.12 We were referred to the learned authors of ***Chitty on Contracts volume 1, General Principles, 2004*** where they state at page 1423, paragraph 26-001 that:

> ***"Subject to a few controls, the parties to a contract may themselves specify in their contracts the remedy available to the innocent party following the other's breach. In the absence of any such 'tailor made' clause on the remedy, the law on damages fills the gap with standard form provisions***

on the assessment of the money compensation which apply to all types of contracts."

5.13 It was submitted that even though the draft agreement was not executed by the parties, it was acted upon by them when the 2nd respondent allowed the appellants' property to tap power through its then dedicated transformer. That since there was no tailor made provision in the draft agreement on consequences of breach, it follows that common law principles of damages should be allowed to kick in on the facts of this case. Counsel contended that this amplifies the fact that the only remedy or recourse available at the material time was for the 2nd respondent to sue for recovery of damages and not resort to self-help.

5.14 We were referred to the case of ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises***[1] in which the appellant locked the business premises of the tenant on account of rental default, the Supreme Court said in *obiter dicta* as follows:

> ***"The respondent was in occupation of more or close to 7 months before the office was locked. It was incumbent upon the appellants to comply with the provision of the Act by giving the respondent a proper notice terminating the lease and if the notice was not complied with, to commence proceedings for possession of the office and recovery of mesne profits. This they did not do. They therefore acted at their own peril by locking the office and detaining the respondent's goods."***

5.15 It was submitted that the above authority illustrates that a party to a contractual relationship has no authority to resort to self-help, a practice which is frowned upon by the courts to discourage lawlessness in society. It was argued that in the instant case the 2nd respondent should either have commenced proceedings against the appellants for recovery of 50% of their

capital contributions towards the purchase of the dedicated transformer, or wait upon the 1st respondent to take appropriate action, if any.

5.16 It was submitted, in sum, that the 2nd respondent had no legal authority and power to unilaterally disconnect the appellants' property from the transformer located at its premises and by extension from the 1st respondent's national grid. We were urged to uphold the second ground of appeal.

5.17 The third ground of appeal was abandoned for substantially raising the same issue as the second ground of appeal.

5.18 The argument raised in the fourth ground of appeal is whether, on the facts and circumstances of the case, the 1st respondent had the legal authority to reconnect power to the appellants' property upon discovering that an illegal disconnection occurred following complaints by the appellants and whether, failure or default in doing so, constitutes breach of the electricity supply agreement.

5.19 It was submitted that the 1st respondent had the legal authority and mandate to reconnect electricity supply to the appellants' property and that their failure to do so constitutes breach of contract between the electricity supplier and the consumer as contemplated by ***section 39 (5) (a) of the Electricity Act***[1] which provides that:

> ***"A licensee shall, on approval of an application for the supply of electricity – (a) enter into a contract of supply with a retail consumer."***

5.20 It was submitted that in the instant case the facts show that the 1st respondent was legally obliged to reconnect the power supply because the 1st respondent did express displeasure at the 2nd respondent for disconnecting power supply to the appellant's property in the manner it did without its knowledge. We were referred to the letter at page 140 of the record of appeal, from the 1st respondent to the 2nd respondent. We were also referred to the 1st respondent's witness' (DW1) testimony at page 354 of the record of appeal to the effect that the 1st respondent only disconnects customers when they are in arrears.

5.21 It was submitted that in the instant case, the appellants' service status remained active and they continued to receive a fixed charge because the account was active since the disconnection was not normal.

5.22 It was argued that the 1st respondent company breached its implied duty to the appellants to maintain power supply on account that they neither failed to pay for the bills nor request the 1st respondent to disconnect power supply. In support of this submission reliance was placed on ***section 39 (5) (a), (b) and (c) of the Electricity Act*** *supra* which provides as follows:

> ***"(5) A licensee shall, on approval of an application for the supply of electricity -***
>
> ***(a) enter in to a contract of supply with a retail consumer;***
>
> ***(b) provide electricity lines or an electrical plant or electrical equipment to the successful applicant for the purposes of supplying electricity;***
>
> ***(c) ensure continuous supply of electricity; and..."***

5.23 It was submitted that the import of the above provision is that it mandates or obligates a supplier of electricity, such as the 1st respondent, to ensure a continuous supply of electricity, unless, there is a disconnection occasioned by non-payment of tariffs or the consumer requests for such disconnection or indeed there is power interruption as contemplated by ***section 39 (8) and (9)*** of the said *Act.*

5.24 We were urged to allow ground four of the appeal.

5.26 In ground five, the appellants contend that they proved their case on a balance of probability. First, it was submitted that they proved that the 2nd respondent's action of disconnecting power supply to their property was illegal because it did not own the transformer to which power was connected since it belonged to the 1st respondent. Secondly, the appellants contend that they proved that the 1st respondent breached its implied duty to ensure that they had power to their property provided their service account was not owing and that the appellants did not give instructions to have the power disconnected to their property. We were referred to the South African case of ***Marius Blom and Another v Tshwane Metropolitan Municipality Council***[2] where it states:

> ***"Before me, there is absolutely nothing in principle which bars recovery of damages by plaintiff for loss of income. It is therefore consequential that submission made on behalf of the defendant has to fail. The plaintiff is entitled to be placed in the position in which it was, but for the unlawful conduct, depriving the plaintiff's benefit of the supply of electricity."***

5.27 It was submitted that the appellants are entitled to recover both general and special damages against the respondents for their unlawful conduct of depriving power supply to the appellants' property.

5.28 Turning to the final ground of appeal, it was submitted that the learned trial Judge did not apply the law in exercising the discretion whether or not to award costs or on how to apportion costs. Reference was made to ***Order 40 Rule 6 of the High court Rules[2].***

5.29 It was submitted that the 2nd respondent commenced a counterclaim against the appellants which failed and was dismissed. Therefore, the 2nd respondent cannot be seen to benefit from the failure of another independent claim. We were referred to ***Order 15/2/4 of the Rules of the Supreme Court[3]*** on the definition of a counter claim and the case of ***Amon v Bobbet[3]*** on the requirement to treat a counter claim as an independent claim.

5.30 It was submitted that since both the appellants' claim and the 2nd respondent's counter claim failed, the most just and fair order that the trial court should have directed was that, as between the appellants and the 2nd respondents, each party should have borne their own costs. That only the 1st respondent was entitled to costs as against the appellants. The appellants' submissions ended on this note.

6.0 1st respondent's submissions

6.1 In response to the appellants' heads of argument, the 1st respondent filed heads of argument on 4th September, 2020. Mrs. Kunda, learned counsel

for the 1st respondent, relied on the same, which are specific to grounds one, four, five, and six.

6.2 In response to ground one, counsel begun by pointing out that the appellants' arguments as regard the relationship between the 1st appellant and the 2nd respondent do not depict the grounds that are set out in the memorandum of appeal. Having brought this observation to the fore, counsel submitted that the issues emanating from the first ground as set out in the memorandum of appeal are as follows:

> ***-Whether or not at the material time when the 2nd respondent disconnected the electricity supply to the appellants' property, the dedicated transformer had ceased to belong to the 2nd respondent?***

6.3 Before setting out to respond to ground one, counsel rebutted the appellants' position regarding the status of the parties. It was submitted that whilst the 1st appellant alleged, in his testimony, that Omars Investment Limited was a tenant on his premises, which statement was objected to as unpleaded, there was no amendment to the pleadings to reflect that status. Counsel relied on the case of ***Christopher Lubasi Mundia v Sentor Motors Limited***[4] on the functions of pleadings. It was submitted that the appellants did not amend their pleadings, and the Court of Appeal is not the correct forum for amendment of pleadings.

6.4 On the substantive response to ground one, it was submitted that it was a notorious fact from the pleadings on record that the 2nd respondent applied to the 1st respondent for electricity supply and was granted permission to purchase and install a 500 KVA transformer for a dedicated electricity

power supply to its property, stand no. 9066 Katanga Road, Lusaka and subsequently procured and installed the transformer at a cost of K245,168.20.

6.5 On the meaning of a dedicated transformer, we were referred to the testimony of DW1, where he stated that it is one that the 1st respondent cannot connect to another customer from that installation as the capacity is paid for and dedicated to a particular customer. It was submitted that the witness stated that 1st appellant was issued with a quotation by the 1st respondent to be connected to different transformers, but he said he had no money to bring power to his premises.

6.7 It was submitted that the 1st respondent was bound by any agreement entered into for dedicated power supply. That the 1st respondent could only connect a third party to a dedicated transformer with its client's consent.

6.8 It was contended that the 1st appellant was connected to the dedicated transformer on a temporal builder's supply at the instance of the 2nd respondent, after a consented agreement on grounds that the appellants paid the 2nd respondent K122,584.10 in order to be allowed to tap electricity power supply from its dedicated transformer which they verbally agreed to. Reference was made to page 240, line 5-25 of the record of appeal.

6.9 It was submitted that the 1st respondent was not privy to the agreement between the appellants and the 2nd respondent. That the 1st respondent had a power supply agreement with the 2nd respondent, and therefore the

latter was the correct party to bring an action against the 1st respondent. Reliance was placed on the case of ***Dunlop v Selfridge***[5] where it was held that *"only parties to a contract can sue on it."*

6.10 It was submitted that the 1st respondent only had proprietary right to the physical asset, but the capacity in terms of the KVAs, which is the power carried in the transformer, is dedicated to the client. That the capacity of the transformer was fully dedicated to the 2nd respondent only. From this explanation, it was submitted that the learned Judge did not misdirect herself in law and facts. We were urged to dismiss the 1st ground of appeal for want of merit.

6.11 With respect to ground four, counsel raised two questions to be answered:

i. Was there an existing power supply agreement between the appellants and the 1st respondent?

ii. Did the 1st respondent breach any express or implied conditions in the said power supply agreement?

6.12 It was submitted that the appellants did not have any existing supply agreement with the 1st respondent as they never executed a formal application form. Further, that they neither paid a capital contribution as required under the ZESCO conditions of supply, nor did they pay for the quotation to provide them with power. It was contended that the ingredients to form a valid agreement were missing. In support of this submission reliance was placed on ***sections 1 and 2 of the ZESCO conditions of Supply No. 543 of 2012*** on the requirement to complete an application form and to pay a capital contribution within a stipulated timeframe.

6.13 Counsel submitted that none existence of a power supply agreement between the appellants and the 1st respondent discounts in totality the claim of breach of express or implied conditions. We were urged to dismiss this ground of appeal for lack of merit.

6.14 In ground five, we were asked to consider the following questions:

i. *Whether or not the learned trial Judge misdirected herself in law and fact, by failing to award both general and special damages against both the 1st and 2nd respondents? And*

ii. *Whether or not the appellants proved the case on a balance of probabilities.*

6.15 Counsel submitted that the appellants relied on the case of ***Maurius Blom and Another v Tshwane Metropolitan Municipality Council*** *supra* which states in part that:

> ***"The plaintiff is entitled to be placed in the position in which it was, but for the unlawful canduct, depriving the plaintiff benefit af the supply of electricity."***

6.17 It was submitted that the 1st respondent neither conducted itself in an unlawful manner nor did it deprive the appellants the benefit of supply of electricity. Reference was made to the 1st respondent's witness (DW1) testimony on record, to the effect that the 1st respondent received a report from the appellants that they were not receiving power to their premises. That upon investigation, it was discovered that the cable supplying power to the appellants' premises was removed. It was submitted that, at the time of the upgrade, the 1st respondent worked together with the 2nd respondent by connecting the cable identified by the 2nd respondent to the

feeder pillar. That this was consistent with DW2's testimony who stated that at the time of the upgrade, the 2nd respondent determined the cables which were to run to the feeder pillar, and as later seen, the cable taking power to the appellants' premises was not among the cable identified by the 2nd respondent.

6.18 It was submitted that DW2 conceded in cross-examination that, at the time of the upgrade, the 2nd respondent gave its contractor, who was working on the upgrade, the power sharing agreement between it and Omars Investments Limited, and the notice of disconnecting the cable supplying power to the appellant's premises. That in cross-examination, DW2 admitted that the intention of giving the said documents to the 2nd respondent's contractor was to cut power from its dedicated transformer to the neighbour, as it required full capacity. That DW2 further stated that the 2nd respondent was responsible for showing the 1st respondent which cables to connect to the feeder pillar.

6.19 It was submitted that the evidence on record shows that the appellants were advised by the 1st respondent to apply for a permanent supply since the initial application that connected them to the 2nd respondent's dedicated supply was temporal, and for building purposes only. We were urged to dismiss the fifth ground of appeal for lack of merit.

6.20 In response to the final ground of appeal, it was submitted that the settled position with respect to costs is that they are awarded at the discretion of the court. That this position is articulated in a plethora of authorities including ***General Nursing Council of Zambia v Mbangweta***[6]. That in

considering the question of costs, a Judge must adhere to certain principles as was explained in the case of ***Emmanuel Mutale v Zambia Consolidated Copper Mines Limited***[7] as follows:

> ***"With regard ta the argument as ta casts, the general rule is that a successful party shauld nat be deprived af his casts unless his canduct in the caurse af the praceedings merits the caurt's displeasure ar unless his success is mare apparent than real, far instance where anly naminal damages are awarded."***

6.21 It was submitted that the lower court correctly applied its mind in awarding the costs to the 1st respondent.

6.22 Counsel contended that the appellants have admitted this at page 18 in paragraph 10 of their heads of argument where they state as follows:

> ***"... in all this the anly party that was entitled ta casts as against the appellants was the first respandent campany and shauld the appellants appeal fail against 1st respandent, save far the casts af the appeal praceedings, the High Caurt Judgment shauld be varied sa that casts are anly payable by the appellants ta the 1st respandent and nat the 2nd respandent."***

6.23 It was submitted, going by the appellants' submissions, that the learned trial Judge did not err in law when she awarded costs of the entire proceedings to the respondents.

6.24 We were urged to dismiss the appeal in its entirety on the strength of the 1st respondent's submissions and authorities cited, with costs to the 1st respondent.

7.0 2nd respondent's submissions

7.1 Mr. Cornhill, learned counsel for the 2nd respondent, relied on the 2nd respondent's heads of argument filed on 4th September, 2020. With respect to the sixth ground of appeal, counsel also relied on the provisions of ***section 23 (1) (d) of the Court of Appeal Act***[4].

7.2 With respect to the first ground of appeal, counsel begun by stating that that appellants amended their statement of claim twice. That initially they averred that they are directors of Omars Investment Limited, and as such they manage the warehouse on stand No. 9066 Chinika, Lusaka. That in examination in chief, PW1 testified that the appellants were never directors of Omars Investment Limited, but leased the property to them. That in reliance upon the case of ***Jere v Shamayuwa and Another*** *supra* invited the Court to accept the version presented in chief.

7.3 It was submitted that whilst the Court is entitled to consider this evidence because it was not objected to, ***Order 18 Rule 7/11 Rules of the Supreme Court*** *supra* provides as follows:

> ***"Where the evidence at trial establishes facts different from those pleaded... which are not just a variation, modification or development of what has been alleged, but which constitute a radical departure from the case pleaded, the action will be dismissed."***

7.4 It was submitted that the facts given in evidence on the relationship between the appellants and Omars Investment Limited being landlords and tenants amounts to a radical departure from the relationship presented by the statement of claim of being directors. It was argued that the appellants

could not have prevailed in litigation due to this material difference between the pleadings and the evidence.

7.5 It was submitted that the appellants' arguments on the ownership of the transformer are not supported by record. That the documents at page 127 and 137 of the record of appeal show that the agreement was between the respondents.

7.6 Counsel contended that the evidence of DW1 shows that the cable conveying power to Omars Investment Limited was terminated on the day the 800 KVA transformer was commissioned. That pursuant to the letter from the 1st respondent at page 131 of the record of appeal, the transformer would only pass to the 1st respondent after one year. It was submitted that the 800 KVA was the property of the 2nd respondent on the day power supply to the appellants was terminated. We were urged to dismiss the first ground of appeal for being misconceived.

7.7 The 2nd respondent's response to the first argument in ground two that the transformer was not dedicated was that the appellants misapprehended DW1's testimony. That the supply is what was dedicated, and not the transformer. It was argued that since the supply was dedicated to the 2nd respondent, the 1st respondent could only connect Omars Investment Limited, and not the appellants, with consent of the 2nd respondent.

7.8 It was submitted that the supply to Omars Investment Limited was a product of a contract between it and the 2nd respondent. That the appellants, who were neither shareholders nor directors in Omars Investment Limited, were not privy to the contract. That it was therefore, a

contractual right for the 2nd respondent to procure the disconnection of the supply to Omars Investment Limited. It was argued that although the appellants benefitted from the arrangement, they were not privy to the contract between Omars Investment Limited and the 2nd respondent, and as such could not claim any damages arising from the contract.

7.9 It was submitted that the alleged illegality committed in disconnecting the supply line to Omars Investment Limited lacks particularity. That illegality is the contravention of statute, and it cannot arise by implication. Counsel contended that a party alleging illegality must specify which statute has been contravened. It was submitted that the statute provides the consequence or sanction.

7.10 In distinguishing the case of ***Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises*** *supra*, relied upon by the appellants, it was submitted that that case is premised on the ***Landlord and Tenant's (Business Premises) Act***[5], which provides for modes of termination of leases of business premises. That its ratio cannot be extended to apply to all contracts.

7.11 Counsel submitted that the law recognises an innocent party's right to treat a contract as discharged on account of breach. It was contended that there is no authority that the innocent party requires a court order to pronounce a breach and guide him on his remedies. Counsel argued, it would be tantamount to saying that an employer can only terminate an employment contract after obtaining a court order to that effect, which rule would belabor the court.

7.12 It was submitted that it had not been denied that Omars Investment Limited breached the contract. That apart from defaulting on the payment, it left the building supplied. Counsel contended that the 2nd respondent was within its rights to procure that power be terminated.

7.13 With respect to ground four, no submissions are advanced.

7.14 In response to ground five, we were referred to the case of ***Michael Chilufya Sata v Zambia Bottlers Limited***[8] in which case the appellant sought damages for personal injuries and consequential loss and damage caused by the negligence and/or breach of statute by the respondent in the manufacture and bottling of one of the sprite beverage.

7.15 On the strength of this case, it was submitted that ground five is devoid of merit and should be dismissed.

7.16 Turning to ground six, we were referred to the case of ***Evereal Garage Limited and Autoforce Limited v Kalumbwa Kaputo and 23 others***[9] which approved earlier Supreme Court decisions in ***Costa Tembo v Hybrid Farms Limited (2003)***[10] and ***General Nursing Council of Zambia v Ing'utu Milambo Mbangweta*** *supra* where it was held as follows:

> ***"It is trite law that costs are awarded in the discretion of the court, such discretion is however to be exercised judiciously. Costs usually follow the event."***

7.17 It was submitted that whilst it is trite that the counterclaim constituted a separate claim, it was a claim against Omars Investments Limited. That its rejection by the court cannot be the reason to set aside the costs awarded against the appellants, whose claim was dismissed.

7.18 We were urged to dismiss the appeal with costs.

8.0 The decision of the Court on appeal

8.1 We have carefully considered the spirited submissions of counsel on the grounds of appeal. The appellants abandoned ground three as it substantially raises the same issues as in ground two. Further, we are of the view that grounds one and two are interrelated. We shall address them in concert. Grounds four, five and six will be dealt with separately.

8.2 In grounds one and two, the appellants' contention is that the learned Judge misunderstood and failed to appreciate that at the material time when the 2nd respondent disconnected electricity power supply to their property, the ownership of the transformer had ceased to belong to the 2nd respondent. Further, that by that failure to understand the ownership of the transformer, the lower court erred when it held that the 2nd respondent was entitled to unilaterally disconnect power to Omars Investments Limited. The assailed finding of the court is at page 23 of the record of appeal (page J16 of the Judgment). From lines 16 to 25, it reads as follows:

> ***"My examination of the contract between Omar Investment and the 2nd defendants to tap power from their dedicated transformer reveals that it was dependent on the fulfillment of condition that they pay 50% of the cost of the transformer. Having failed to make the requisite payment, the 2nd defendant, through their contractor, who was working on the upgrade, gave Omars notice to disconnect the cable supplying power to the plaintiffs' premises. The view I take is that they were fortified in engaging their contractor to disconnect the cable as they did not want Omar Investment to continue to tap power from their dedicated transformer."***

8.3 The 1st respondent, through its witness, DW1, in his detailed testimony on record (from pages 350 to 359) explained that ZESCO sells the capacity and not the transformer. The transformer remains the property of ZESCO. DW1 explained to the trial court that a customer had the option to have a dedicated supply or a shared supply. He stated that *"Dedicated means that on that installation you cannot connect other customers. A customer therefore pays more for a dedicated supply other than shared supply."*

8.4 At page 352 of the record of appeal, DW1 went on to state what transpired at the material time when the 2nd respondent disconnected electricity power supply to the appellants' property. He stated as follows:

> ***"At the time of changing tronsformers, the cable going to Omars premises wos left out of circuit. Zesco received o complaint through one of the customer services centres I manage. The complaint was that Omars was disconnected. As Zesco, we went with a team of technical people to go ond investigate and when they went ta site they discovered that the cable was left out of the circuit. Capital Fisheries indicated they would take up the entire capacity. We advised Omars to opply far their own transformer."***

8.5 Further, at page 116 of the record of appeal is an agreement for ZESCO power distribution between the Capital Fisheries Limited and Omars Investment Limited, by which terms the latter agreed to reimburse the former 50% of the construction and equipment cost of a ZESCO sub-station.

8.6 Having considered the merits of the appellants' claims and the evidence on record, the learned trial Judge found as a fact that Omars Investment Limited breached the terms of the agreement by failing to pay 50% of the cost of the transformer. Since it was a dedicated transformer as was

explained by DW1, the learned Judge took the view that the 2nd respondent was entitled to disconnect the cable supplying power to Omars Investment Limited.

8.7 We cannot fault the learned Judge for the findings she made because she evaluated the evidence as presented and strictly construed the agreement between Omars Investment Limited, of the one part and the 2nd respondent, of the other part, in relation to the conditions contained therein. She referred to the learned authors of ***Chitty on Contracts*** on the requirements for the formation of a contract before making her findings.

8.8 In endorsing the position taken by the lower court we note Mrs Kunda's submission that the 1st respondent was not privy to the agreement between the appellants and the 1st respondent with the 2nd respondent. That the correct party to bring an action against the 1st respondent would be the 2nd respondent. However, a perusal of the agreement at page 116 of the record of appeal reveals that in fact neither the appellants nor the 1st respondent were privy to the agreement between Omars Investment Limited and the 2nd respondent.

8.9 From the evidence on record, what we decipher is that the agreement between Omars Investment Limited and the 2nd respondent, met with the 1st respondent's approval. We say so because when the 1st appellant reported to the 1st respondent about being disconnected after the upgrade transformer was installed, the latter's reaction, as per DW1's testimony, was as follows:

"We had advised the client to apply for a transformer, had they paid they could have continued enjoying Zesco services. They should come back to ask for permanent supply at which point we could have quoted them for a transformer on the basis that the other transformer is a dedicated one."

8.10 The fact that the appellants were not privy to any agreement between Omars Investment Limited and the 2nd respondent was confirmed by the 1st appellant himself. In cross-examination, he told the trial court:

"I was not privy to the discussion between Omars Investment and the 2nd Defendant with regards to connection of power. Power flowed to the premises without me paying anything"

8.11 We find that by all accounts, the appellants were strangers to the agreement in dispute. In sum, the point that the transformer belonged to Zesco is not in dispute, notwithstanding that it was paid for by the 2nd respondent. ZESCO accepted that the 2nd respondent had a dedicated transformer, which could only be used by it. The usage of the transformer by a third party required the consent of the 2nd respondent because the transformer was dedicated to it. Grounds one and two are bereft of merit and are accordingly dismissed.

8.12 The appellants' contention in ground four is that ZESCO breached express or implied conditions in the power supply agreement when it refused or neglected and/or failed to reconnect electricity supply to the appellants' property. They refer to a letter dated 28th November, 2015 by the 2nd respondent to the Omars Investment Limited giving notice to disconnect electricity power supply.

8.13 In light of our findings on the previous ground of appeal, we are at pains to grasp the essence of this ground which is equally grounded on the point of law of privity of contract. The question put forward for our consideration was whether the 1st respondent had the legal authority to reconnect power to the appellants' property upon discovering that an illegal disconnection occurred following complaints by the appellants, whether failure or default in doing so, constitutes breach of the electricity supply agreement. What the appellants have skillfully avoided to do, in their submissions, is to point us to the electricity supply agreement to which they were a party. In cross-examination at page 347 of the record, the 1st appellant conceded that there was no power agreement between himself and the 1st respondent. He went on to state there was equally no agreement between himself and the 2nd respondent.

8.14 Having admitted that he did not have any power supply agreement with the 1st respondent, this ground of appeal cannot be sustained. We uphold the findings of the lower court. Ground four is dismissed for lack of merit.

8.15 In the fifth ground of appeal, the argument is based on the alleged unlawful conduct by the 1st respondent, which entitles the appellants to general and special damages. What is clear from the circumstances of this case is that the appellants seek to ride on the breached agreement entered into between Omars Investment Limited and the 2nd respondent. We have already established that the appellants, did not have a subsisting power supply agreement with the 1st respondent, which the latter breached to entitle them to general or special damages. On the circumstances of this

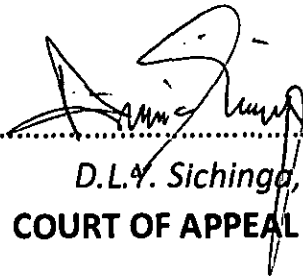
case we do not find that the 1st respondent conducted itself in an unlawful manner. We have also established that the transformer by which they sought to be joined was paid for by the 2nd respondent for its exclusive use. Ground five is without merit and it accordingly fails.

8.16 Turning to the final ground of appeal, it is trite law that costs are in the discretion of the court. Further, that as a general rule, a successful party should not be deprived of his costs, unless his conduct in the course of the proceedings merits the court's displeasure, or unless his success is more apparent than real. In casu, the appellants' displeasure is that they should not have had to bear the costs of the respondents because the 2nd respondent had a counterclaim, which equally failed. They contend that they and the 2nd respondent ought to have borne their own costs. That the lower court's Judgment should be varied so that the appellants are only liable for the 1st respondent's costs.

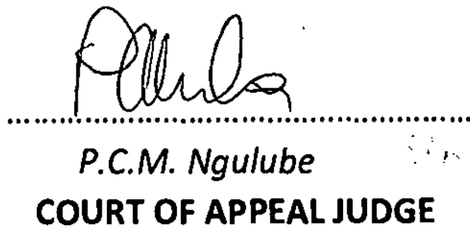
8.17 We agree that ordinarily costs follow the event. In other words, a successful party should not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it. In justifying its position, the learned Judge ought to have made it clear that in this action, it is the appellants that took the respondents to court, notwithstanding that there was a counterclaim. We therefore see no good reason to vary the lower court's Judgment. Ground six is accordingly dismissed.

9.0 Conclusion

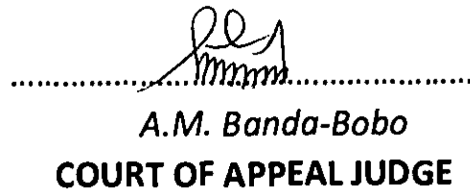
9.1 Having considered all the grounds of appeal, we find that they lack merit. The appeal is accordingly dismissed with costs to the respondents.



D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE



P.C.M. Ngulube
COURT OF APPEAL JUDGE



A.M. Banda-Bobo
COURT OF APPEAL JUDGE