IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.16/2019**
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

ZAMBIAN BREWERIES PLC **APPELLANT**

AND

MARITIME FREIGHT AND FORWARDING LIMITED **RESPONDENT**

Coram : Hamaundu, Kaoma and Mutuna, JJS
On 5th April, 2022 and 30th August, 2022

For the appellant : Mr A. Tembo, Messrs Tembo, Ngulube & Associates

For the respondent : Mr E.K. Mwitwa, Messrs Mwenye, Mwitwa Associates

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JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court

Cases refereed to:

1. **Mohammed v Attorney General (1982) ZR 49**
2. **Zulu v Avondale Housing Project Limited (1982) ZR 172**
3. **Mhango v Ngulube & ORS (1983) ZR 61**
4. **Kunda v The Attorney-General (1993-1994) ZR 1**
5. **Collet v Van Zyl Brothers (1966) ZR 87**
6. **YB and F Transport Ltd v Supersonic Motors Ltd (2002) ZR 22**
7. **Mutale v Zambia Consolidated Copper Mines (1993/1994) ZR 94**
8. **John Richardson Computers v Flanders (No.2) [1944] F.S.R.1 44**

Rules referred to:
The Rules of the Supreme Court (1999 edition), Order 62/3/5

Works referred to:
Phipson On Evidence: 17th Edition: 2006: London: Sweet & Maxwell/Thomson Reuters

1.0 INTRODUCTION

1.1 *General*

1.1.1 The appellant, Zambian Breweries Plc, appeals against the decision of the Court of Appeal. The respondent also cross-appeals against it. The matter started in the High Court where the respondent launched, essentially, a liquidated money action arising from the performance of a contract between the two parties.

1.1.2 Being unhappy with the outcome of the trial at the High Court, the respondent appealed to the Court of Appeal which rendered the decision which is now in issue.

1.1.3 As will be seen later in the judgment, however, our decision will deal with the judgments of both Courts.

1.2 *Background facts*

1.2.1 The pleadings and testimony at the trial revealed the following facts:

1.2.2 The respondent, and other transporters, were contracted by the appellant to transport beer and soft drinks to the appellant's distributors around the Country. The contract also involved bringing back empty bottles from the distributors or retailers to the appellant's plant. In the case of the respondent, the first contract was for one year, from September, 2007.

1.2.3 One important fact that came out from the pleadings and testimony was that during the movement to and from the distributors/retailers bottles would break, or would be stolen. The Transporters would then be charged for the broken and missing bottles. The money so charged would be deducted from the remuneration paid to the transporters for the transportation.

1.2.4 In 2007, the appellant decided to give some relief to the transporters from the deductions on broken and missing bottles by introducing a clause in the contract. By this

provision, the appellant brought in a certain level of tolerance to bottles that were broken, or went missing, while in transit to their destinations. This involved the appellant allowing a certain number of bottles in a load to be broken or go missing without charging the transporter for the cost. The number was expressed as a percentage of the load.

1.2.5 Later, however, there was subsequent disagreement between the parties as to what constituted a load: that is, the respondent, on one hand, contended that a load constituted each and every load, both for the outward trips to the distributors/retailers and for the return trips to the appellant's plant; and also, that for the purposes of calculating the allowance both the loads which had broken or missing bottles and those which had not should be applied. This is the main issue on which the respondent's claim is based.

1.2.6 Another aspect of the provision was the number of cases that each load would consist of. The contract appears not to have specified the number of cases in a load,

except to give an example of 1,500 when demonstrating how the allowance would be arrived at.

1.2.7 Yet another aspect of the provision was the percentage that was to be applied in arriving at the allowance. The initial figure was 0.1%. In the demonstration that was given in the contract, this figure was applied on a load of 1,500. This produced a figure of 1.5 cases, or one and a half cases, as the number of bottles that the appellant would tolerate the transporter to lose in a load comprising 1,500 cases, without penalizing the transporter. The percentage was later increased to 0.25%, in 2009.

1.2.8 We must point out at this juncture that, later in the course of the proceedings, the respondent raised a contention that when a transporter did not incur broken and missing bottles, or when these fell below the number allowed, then the whole allowance or the balance thereof, as the case may be, was payable in cash to the transporter. The contention was strongly disputed by the appellant.

1.2.9 The first contract between the appellant and the respondent came to an end in June, 2008, and was immediately replaced by another one.

1.2.10 The parties then performed their obligations in the contract, in apparent harmony, until about 2010 and 2011 when, according to the appellant's employee, Annabelle Degroot (DW5), the appellant became suspicious that the respondent company was claiming even for return trips. Annabelle Degroot also said that a forensic investigation showed that the respondent had consistently invoiced trucks that were purportedly used more than once on the same day, when this was not physically possible given the distances travelled.

1.2.11 Further, according to Annabelle Degroot, the appellant also discovered that certain deductions which ought to have been made over time, such as advances that the respondent had obtained, had not been effected.

1.2.12 It is then that the appellant started recovering those sums of money from the invoices that the respondent was submitting for payment for the carriage of the

bottles. It is unclear whether the deductions extended to those payments where the appellant felt that it had been billed twice, or that the respondent had claimed for return trips. But, whatever the case, those deductions started the dispute herein.

1.2.13 The respondent decided to sue the appellant while the contract was still running; the appellant, in turn, decided to terminate the contract.

2.0 The Action

2.1 *The respondent's case*

2.1.1 In a nutshell, the case for the respondent in this action rested entirely on the contents of two letters that were written by an employee of the appellant, Christopher Thole, holding then the position of Operations Manager. The first of those letters was written on 17th October, 2007.

2.1.2 That letter stated that, in arriving at the allowance, the calculation would be on a load consisting of 1500 cases; and that the loads would be on both outgoing and return trips. The second letter, which was written on 9th

August, 2008, during the second contract, sought to confirm that the contents of the letter of 17th October, 2007 were still subsisting.

2.1.3 The respondent's contention therefore was that its claim was arising from the appellant's disagreement with, and non-adherence to, the terms of that letter.

2.2 *The appellant's case*

2.2.1 The appellant rejected Christopher Thole's letters, particularly the one of 17th October, 2007, saying that they were fraudulently written. The appellant contended that what was appearing in those letters was not provided for in the contract.

3.0 The Pleadings

3.1 *The respondent's statement of claim*

3.1.1 The claim filed by the respondent was, essentially, a liquidated money demand in the total sum of K5,173,408.20 (rebased), which was broken down and pleaded as follows:

3.1.2 (i) A cumulative sum of K1,068,093.44 which,

according to the respondent, the appellant wrongly deducted from the month of February, 2009 to the month of March, 2010; the respondent attributed this to the following omissions by the appellant: that the allowance for bottles that were broken or went missing in transit (also known as the BIT allowance) should have been calculated on all the full loads, including those that did not actually have broken and missing bottles, but that the appellant did not do so.

3.1.3 (ii) A cumulative sum of K723,000.00 which, according to the respondent, was deducted by the appellant from January 2010 to December, 2010. The respondent said that the appellant failed to justify the deductions comprising that sum by giving the respondent the relevant debit notes, trip data sheets, as well as a composition of the deductions; hence, the respondent could not accept the deductions:

3.1.4 (iii) a sum of K266,000.00 whose origin was not explained by the respondent in its averments

3.1.5 (iv) A total sum of K299,545.93. According to the respondent, this was made up of K99,545.93 and K200,000.00. The sum of K99,545.93 was said to be the figure that the respondent had arrived at, after applying the correct calculation, as opposed to the appellants wrong calculation for the period July 2011 to January, 2012. The dispute, from the respondent's view, was with regard to the issue whether or not the calculation would be on the assumption that all loads were those of an interlink trailer (i.e carrying 1470 cases), and using the price of castle lager, as written in the letter by Christopher Thole dated 17th October, 2007. The sum of K200,000.00, on the other hand, was said to be a deduction from invoice number 177 in February, 2011, for reasons not known to the respondent.

3.1.6 (v) A sum of K1,604,588.41 which was made up of K884,727.11 and K719,862.30. According to the respondent, on 16th March, 2012, it raised two invoices in the said sums of money respectively to

claim the BIT allowance for the return trips of empty bottles which the appellant did not take into account in its calculations for the 2010/2011 and 2011/2012 financial years; but the appellant refused to pay them.

3.1.7 (vi) A sum of K855,772.73. The respondent averred, with regard to this figure, that for the period January 2010 to December 2010 the appellant wrongly calculated the allowance and came up with a figure of K637,455.83, when the correct calculation should have given a figure of K1,493,228.56. Hence the sum of K855,772.73, which the respondent was claiming, was the difference between the two figures.

3.1.8 (vii) A sum of K245,047.33. According to the Respondent, this was the difference between the appellants' wrong calculation of the BIT allowance amounting to K321,773.41 and the respondent's correct calculation amounting to K566,790.74

3.1.9 (viii) A sum of K35,417.43. According to the respondent, this arose from the appellant's debit note number 1401 for the month of February, 2012. The

respondent contended that, on the debit note was a deduction of K17,035.72 which it had disputed. In the respondent's view, the correct amount on the debit note should have been K18,381.71, being an allowance within the permitted limit. This should then have been paid to the respondent. The two figures when added together came to K35,417.43.

3.1.10 (ix) Lastly, a sum of K54,990. 23. According to the respondent, this was a wrong deduction on debit note number 1501 issued on 31st March, 2012 but covering the month of April, 2011. The respondent contended that the appellant deducted a sum of K66,983.71 instead of K11,993.48 and hence the difference of K54,990.23 was due to the respondent. The respondent further explained that, in that month, the calculation should have been on 192 trips, both outward and return, carrying 1470 cases, calculated at an allowance of 0.25% and computed on the price of castle lager. This gave the respondent an allowance in monetary terms of K96,173.28. The respondent went on to say that the missing bottles

for that month in money terms was about K108,166.76; and that when the allowance of K96,173.28 was removed from the sum of K108,166.76 it meant that the only deduction that should have been made was about K11,993.48.

3.1.11 The statement of claim also contained a claim for damages for breach of contract. This, according to the respondent, arose from the fact that the over deductions and the eventual termination of the contract resulted in the respondent's failure to meet its debt obligations to other parties, particularly the Citizen's Economic Empowerment Commission.

3.1.12 There were two other claims: One was for a refund of amounts wrongly deducted during the period November 2007 to December 2008. The respondent wanted the court to assess this claim. The other was for the under calculation of the BIT allowance for the period February 2009 to December 2009. Again, the respondent wanted the court to assess this claim.

3.2 *The appellant's defence*

3.2.1 In its final amended defence, the appellant averred that, when the BIT allowance was introduced, the system that was in place was not able to print a summary of all trucks but could only identify those trucks which had missing and broken bottles. The system was later upgraded to one that could print summaries for every load carried. The result was a change in the formula for calculating the allowance. Since the latter formula was more accurate, the appellant obtained trip data sheets for the period 2009 to 2012 and applied the new formula. This yielded minor differences. And for that reason, the appellant was admitting a total of K255,569.74 as due to the respondent. This was broken down as follows; a sum of K170,407.57 for the period 2009 to 2010; a sum of K19,974.79 for the period 2010 to 2011; and a sum of K65,187.37 for the period 2011 to 2012.

3.2.2 The appellant also averred that it used to avail the transporters, including the respondent, all documentation; and, therefore, the fact that the respondent did not have in its possession the relevant documentation was an exhibition of its poor record keeping, and was also a sign that its claims were purely speculative.

3.2.3 The appellant further averred that some of the deductions were for the purpose of recovering advances which the respondent had obtained, amounting to K1,550,000.00.

3.2.4 Reacting specifically to the breakdown of the money claimed by the respondent, the appellant traversed the allegations in the statement of claim as follows:

3.2.4.1 (i) It denied that there was any wrong calculation resulting in an over deduction of K1,068,093.44, saying that this claim was purely speculative on the respondent's part.

3.2.4.2 (ii) It averred that the deductions of K723,000 occurred during the period January, 2010 to December, 2010, but related to the missing and broken bottles in excess of the permitted allowance which occurred in the year 2009, and had not been deducted at that time.

3.2.4.3 (iii) It averred that the sum of K266,000.00 was one of the issues that was already resolved at mediation

3.2.4.4 (iv) Regarding the claim for K299,545.93, the appellant explained that the sum of K200,000 was deducted in February 2011, and was a recovery for an advance that the respondent obtained in December 2010 or January 2011, to buy trucks. The sum of K99,545.93 was not traversed.

3.2.4.5 (v) As regards the claim for K1,604,588.41, broken down in two sums of K884,727.11 and K719,861.30 the appellant averred that it rejected the two invoices raised by the respondent in March, 2012 in respect

of the two sums of money because the contract of carriage did not provide an allowance for return trips.

3.2.4.6 (vi) (vii), (viii) & (ix) The appellant averred that the sums of K855,772.73, K245,047.33, K35,417.43 and K54,990.23 in these heads of claim, respectively, all related to the advances that the respondent had obtained.

3.2.4.7 The rest of the claims were denied by the appellant.

4.0 The Trial

4.1 At the trial, the respondent relied entirely on the letter written by Christopher Thole, and what its contents meant. Hence the evidence that was led was on questions such as; (i) whether the allowance was to be calculated on both the full loads and the return loads of empty bottles; (ii) whether the calculation was to be on all loads, or only on loads that had broken or missing bottles; (iii) what price would be used to calculate the allowance, for example, was it the price of castle beer or that of another product; and, (iv) was the allowance payable in cash to the transporter when there were no broken or missing bottles, or when the

level of such broken and missing bottles was below that which was allowed.

5.0 The trial Judge's decision

5.1 The learned trial judge reduced the dispute into the following six questions:

(i) Whether the BIT allowance was applicable on both the outward trips of full loads and the return trips of empty crate loads.

(ii) Whether on the proper construction of *clause 6* of the contract, the BIT allowance was claimable by the respondent in monetary terms

(iii) What was the applicable percentage for the BIT allowance, and the formula for its calculation

(iv) Whether Christopher Thole as an employee of the appellant company had authority to alter or amend the terms of the contract entered into between the respondent and the appellant;

(v) Whether there were miscalculations, over deductions, double deductions and under calculation of the BIT allowance by the appellant; and

(vi) Whether the appellant had wrongly deducted the sums of money alleged to have been advances obtained by the respondent.

5.2 In answer to the first question, the learned judge found that the allowance was applicable only on the full outward loads, and not on the return loads of empty crates. To

arrive at that answer, she observed that Christopher Thole's letter which the respondent was relying upon in its contention that return trips were included was written on 17th October, 2007; and yet the subsequent contract which the parties entered into in June, 2008 did not contain such a provision. Hence, she agreed with the appellant's contention that the letter of 17th October was written by Christopher Thole fraudulently, in collusion with the respondent.

5.3 While dealing with the first question, the judge dealt with and answered the fourth question as well. She found that Christopher Thole did not have authority to alter contracts, a power which was only vested in the appellant's Operations Director.

5.4 To answer the second question, the learned judge read clause 6 of the contract and, in her view, found it to be ambiguous. She, therefore, resorted to the commercial common-sense interpretation. She opined that to pay a transporter an allowance for not incurring missing or broken bottles, or for incurring a lesser number than the permitted limit, did not make any commercial sense. She

therefore found that the allowance was merely a discount to cushion transporters against the expense of incurring broken or missing bottles.

5.5 As regards the third question on the percentage applicable, the judge found that there was no dispute that initially the percentage was 0.1% and was then revised to 0.25%, as from January, 2009. It was the learned judge's further finding that the correct allowance ought to have been calculated at 0.25% from January 2009 on a load of 1470, using the price of castle.

5.6 In view of her finding that the allowance was only applicable on full loads, the judge held that all claims by the respondent relating to miscalculation of the BIT allowance, or relating to unpaid allowances in respect of the return trips of empty crates, had failed. She listed those claims as:

(i) The claim for K1,604,588.41 for the period 2010 to 2011; and

(ii) The claim for the period January, 2009 to December, 2009.

We cannot find this second claim in the respondent's statement of claim.

5.7 Again, in view of her holding that the allowance was not payable in monetary terms, she found the following claims to be untenable;

(i) the claim for K855,772.73;

(ii) the claim for K99,545.93; and,

(iii) the claim for K1,861,172.32, being for loads carried between January, 2009 and December 2009.

Again, this third claim does not appear in the statement of claim.

5.8 As for the claim for the sum of K723,000.00, the judge was of the view that it should be assessed by the Deputy Registrar, applying the percentage applicable as from January, 2009 (that is 0.25%) in order to ascertain the excess that was charged and deducted.

5.9 As for the amount admitted by the appellant in the sum of K255,569.74, the judge awarded it to the respondent.

5.10 On the question whether the appellant had wrongly deducted money as advances obtained by the respondent, the judge found that the respondent had indeed obtained advances from the appellant. That part of the claim therefore failed.

5.11 The claim for breach of contract was dismissed by the judge on the ground that the appellant had merely exercised a right that existed in the contract to terminate it.

5.12 The judge, however, granted the sums of K30,441.34, K175,070.00 and K24,123.10 on debit notes number 6007, 6006 and 6004 respectively which the respondent alleged to be double deductions. The learned judge's reason for these awards was that the appellant's witness, DW5, had conceded that at times the appellant would make errors resulting in double deductions. The judge also held that no real defence had been advanced by the appellant to the claims.

5.13 When it came to costs, the judge held the view that, because the respondent had only partially succeeded, the parties should bear their own costs.

6.0 The Court of Appeal's decision

6.1 The respondent appealed to the Court of Appeal. The court below upheld the trial judge's holding that Christopher Thole had no authority to alter the terms of the contract between the parties, meaning that his letter of 17th October, 2007 was of no effect.

6.2 The court below again upheld the trial judge's holding that the allowance was not payable in monetary terms.

6.3 However, the Court of Appeal disagreed with the trial judge in her holding that the BIT allowance was only applicable on the full outgoing loads. It held that, upon construction of clause 6 of the contract, the allowance was applicable to the return loads of empty crates as well. But the court was quick to point out that the appellant, as revealed by its defence, had been cognizant of this and used to include the return trips in its calculation of the BIT allowances.

6.4 The court also upheld the trial court in its holding that the appellant had indeed advanced the respondent a total of K1,550,000.00.

6.5 The trial court was again upheld on its holding that a sum of K723,000.00 be referred to assessment by the Deputy Registrar.

6.6 The Court of Appeal further held that the BIT allowance, according to the contractual provisions, was applicable to loads with actual missing or broken bottles, as well as those without. The Court then found that, according to the pleadings, the appellant was applying the BIT allowance only on the loads with actual missing and broken bottles; and that the respondent, had however, waived the application of the provisions in the contract, opting to accept the one applied by the appellant. But the Court found that, as at December 2010, the respondent had started raising issues concerning the payment of the correct allowance. The Court of Appeal, therefore, deemed the respondent to have decided to revoke the waiver, as at December, 2010. Hence, giving an allowance of two months as notice, the court below held that the

respondent was entitled to re-computation of the allowance as from February, 2011, to the date of termination of contract. This was referred to the Deputy Registrar for assessment.

6.7 The court also agreed with the respondent's contention that some of its claims, particularly the sum of K99,545.93, had not been resolved by the trial court. Consequently, the court below referred that sum for assessment before the Deputy Registrar.

6.8 The court below however upheld the trial court in its dismissal of the claim for damages for breach of contract.

6.9 As regards costs, the Court of Appeal held the view that the respondent had substantially succeeded, both in the High Court and Court of Appeal. The holding was based on the Court of Appeal's view that, in the High Court proceedings, the admitted sum of K255,569.74, the award of K723,000 which was referred to assessment and the other awards of K30,441.34, K175,070 and K24,123.10, represented a substantial judgment in favour of the respondent which entitled it to costs. Again, in the Court of Appeal proceedings, the award for the loads without

broken and missing bottles which went to assessment was also substantial. That, coupled with the fact that the respondent had won the ground on costs, entitled it to the costs of the appeal in the court below.

7.0 The Appeal

7.1 The appellant came to this court on five grounds of appeal. The respondent also has a cross-appeal which is based on twenty-two grounds.

7.2 The appellant's grounds of appeal have restricted the appellant's appeal to only the following areas;

(i) the order by the Court of Appeal for a re-computation of the BIT allowance as from February, 2011 to the date of termination of the contract. This is traversed in the first and second grounds;

(ii) the order that the sum of K99,545.92 be assessed. This is traversed in the third ground; and,

(iii) the award of costs to the appellant for the proceedings in both the High Court and the Court of Appeal. This is traversed in the fourth and fifth grounds.

7.3 The respondent's grounds, being numerous, are slightly on diverse issues. However, the respondent's position is this:

That prior to coming to court, the two parties had acknowledged that there had been wrong calculations of the BIT allowance which had prompted the parties to make their own re-computations. In the case of the appellant, it came up with the figure of K255,569.74 as the shortfall. This, it admitted in its pleadings. In the case of the respondent, it came up with a sum of K4,756,534.37 as being due. According to the respondent, what the Court of Appeal was required to do was only to determine which sum between the two was the correct one. In view of this position, as will be seen later, the respondent contends that the Court of Appeal was wrong to send the sum of K99,545.92 for assessment because this sum of money was included in the claim of K4,756,534.37

7.4 In view of the foregoing position, the respondent has laid major emphasis on challenging the reasons upon which the two courts below discounted Christopher Thole's letter of 17th October, 2007. To that end, grounds one to nine,

as well as ground eleven, are dedicated to various aspects of the effect of Christopher Thole's letter.

7.6 The rest of the grounds are on other areas. For instance, ground twelve is on a finding about suspension of the BIT allowance; ground thirteen is on a finding that the re-computation never took place; ground fourteen is on the deduction of the loans; grounds fifteen, sixteen and seventeen are against the finding that the BIT allowance was not payable in cash; ground eighteen is on a finding that the sum admitted by the respondent was the difference found after applying a more accurate method; grounds nighteen and twenty are against the finding that the claims in paragraphs eighteen to twenty-three of the statement of claim were not payable to the respondent; and, finally, grounds twenty-one and twenty-two are on the Court of Appeal's holding that the respondent waived the contractual provision.

7.7 It is clear from this preview of the grounds of appeal by both sides that two awards have not been appealed against. The first is the sum of K723,000 which the trial judge referred for assessment, and was upheld by the

Court of Appeal. The second consists of the three double deductions of K30,441.34, K175,070 and K24,123.10. These awards remain standing, as confirmed by the Court of Appeal.

7.8 At this point, we cannot help but note that, because of the respondent's emphasis on Christopher Thole's letter, the parties and the two courts below were sidetracked from the main issue: that is, proof of the respondent's claim to the required standard.

7.9 *The law on the burden of proof*

7.9.1 Coming to the burden of proof, when is a plaintiff said to have discharged his burden? On this subject, the learned editors on the work **Phipson On Evidence** provide some very useful notes. In paragraph 6-01, they state as follows:

> **"The phrase** *'burden of proof'* **is used to describe the duty which lies on one or other of the parties, either to establish a case or to establish the facts upon a particular issue. The phrase** *'standard of proof'* **is used to describe the degree to which proof must be established".**

7.9.2 In paragraph 6-02 the work states as follows:

> **"The persuasive burden has been referred to as** *'the legal burden', 'the probative burden', 'the ultimate burden', 'the burden of proof on the pleadings',* or *'the risk of non-persuasion'.* **What is referred to in this work as the persuasive burden is the obligation imposed on a party by a rule of law to prove (disprove) a fact in issue to the requisite standard of proof. A party who fails to discharge a persuasive burden placed on him to the requisite standard of proof will lose on the issue in question. The persuasive burden is often referred to as the burden of proof, but it is important to keep it distinct from the evidential burden.**
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> **The evidential burden is sometimes referred to as** *'the duty of passing the judge',* **or** *'the burden of adducing evidence'.* **It obliges the party on whom the burden rests to adduce sufficient evidence for the issue to go before the tribunal of fact. In criminal cases, or in civil jury cases such as libel cases, the judge is obliged to withdraw an issue from the jury where the party on whom the evidential burden rests has failed to satisfy the burden. In other civil cases, the evidential burden may have significance where, by statute, presumption or otherwise, a presumption arises in favour of one party, or certain facts are treated as being** *prima facie* **evidence.**
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> **In both civil and criminal proceedings, the general rule is that the party bearing the persuasive burden will also bear the evidential burden. Where a party has an evidential burden, it may be satisfied either by adducing evidence himself, or by eliciting evidence from the witnesses of his**

adversary. It is wrong to speak of the persuasive burden shifting during the course of the trial, but writers sometimes speak of the evidential burden shifting during the course of a trial as evidence is led.

One effect of the burden of proof is that if the party bearing the burden has not pleaded a positive case, the other party need not plead and prove that alternative states of affairs do not exist".

7.9.3 As regards the burden of proof in civil cases, the learned editors write in paragraph 6-06 as follows:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons. This rule is adopted principally because it is just that he who invokes the aid of the law should be the first to prove his case; and partly because, in the nature of things, a negative is more difficult to establish than an affirmative. The burden of proof is fixed at the beginning of the trial by the state of the pleadings, and it is settled as a question of law, remaining unchanged throughout the trial exactly where the pleadings place it, and never shifting.

In deciding which party asserts the affirmative, regard must be had to the substance of the issue and not merely to its grammatical form; the latter, the pleader can frequently vary at will. Moreover, a negative allegation must not be confused with the mere traverse of an affirmative one. The true meaning of the rule is that where a given allegation, whether affirmative or negative, forms an essential part of a party's case, the proof of such allegation rests on him".

7.9.4 In the case of **Mohammed v Attorney General**[1], Ngulube, DCJ, delivering the judgment of this Court said this:

"Proceedings were commenced in which the appellant alleged that the fire ranger Munga had been negligent, among other things, by his failure to burn in a proper manner dry, tall grass in an area where there was a lot of dead-wood, logs and maize, and by his failure to give prior notice that the area was going to be set on fire. The defence was a denial that the fire ranger was acting in the course of his employment. The learned trial judge rejected this defence and Mr Muzyamba submits that in that event and in every case where the defence set up is defeated, the plaintiff ought to succeed as a matter of course.

An unqualified proposition that a plaintiff should succeed automatically whenever a defence has failed is unacceptable to me. A plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence

does not entitle him to judgment. I would not accept a proposition that even if a plaintiff's case has collapsed of its inanition or for some reason or other, judgment should nevertheless be given to him on the ground that a defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need a defence". (*Underlining ours for emphasis*)

7.9.5 This point was again driven home, later, in the case of **Zulu v Avondale Housing Project Limited**[(2)]. There again, Ngulube, DCJ, delivering the judgment of this Court, said:

"On behalf of the appellant, Mr Phiri has asked this court to reverse the findings made by the trial court. He submits that the respondent had in fact not adduced any evidence to support the allegations contained in the letter of dismissal, and that, in the circumstances, the learned trial commissioner erred in finding the appellant guilty of those allegations, especially having regard to the fact that his superiors had scrutinized the documents and authorized the payments"

Ngulube, DCJ, went on to say:

"There is one observation I wish to make before leaving this subject. Mr Phiri's general approach has been to allege that the respondent had not adduced evidence in support of the allegations in the dismissal letter. I have found that the respondent did in fact adduce such evidence. In the process, however, I have also pointed out

the deficiencies in the appellant's own evidence. It appears that the appellant is of the view that the burden of proof lay upon the respondent and it is on this that I would like to say a word. I think that it is accepted that where a plaintiff alleges that he has been wrongfully or unfairly dismissed, as indeed in any other case where he makes any allegations, it is generally for him to prove those allegations. A plaintiff who has failed to prove his case cannot be entitled to judgment, whatever may be said of the opponent's case. As we said in Khalid Mohamed v The Attorney General:

'Quite clearly a defendant in such circumstances would not even need a defence' **" (*Underlining for emphasis*)**

7.9.6 This principle emphasizes the point that a plaintiff, or claimant, must prove that which he claims; he cannot seek to prove those claims by merely relying on what he perceives to be weaknesses in his opponent's defence, or case.

7.9.7 In the case of **Mhango v Ngulube & Ors**[3], we said:

"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore, any shortcomings in the proof of a special loss should react against the claimant. However, we are aware that, in order to do justice, notwithstanding the

indifference and laxity of most litigants, the courts have frequently been driven into making intelligent and inspired guesses as to the value of special losses on meagre evidence. In this case, it would have been the easiest thing to call an expert witness, but the first plaintiff chose not to do so. The result is that the evidence presented to the court was unsatisfactory, and, in our opinion, the learned trial judge would have been entitled either to refuse to make any award or to award a much smaller sum, if not a token amount, in order to remind litigants that it is not part of the judge's duty to establish for them what their loss is" (*Underlining for emphasis*)

7.9.8 While on the same subject, the following is what we said in the case of **Kunda v The Attorney-General** [4]:

"There is no dispute that the plaintiff incurred expenses in the sum of K2,000 in taxi fares and this we award to her as special damages. The other pecuniary head of claim related to the loss of profits when for a month the grocery shop was closed.....The plaintiff admitted that she kept no accounts and even if the learned trial judge accepted, as he did, that she used to gross K3,000 per day, he had no evidence upon which to make an award since, obviously, only the clear profits would have been the loss suffered. The gross loss was claimed at K87,000 but the failure by the plaintiff to adduce evidence to quantify the net loss must react against her. This Court has frequently lamented these failures by plaintiffs, and the practice of expecting courts to make inspired guesses must be discouraged. We can only award a token sum of K1,000 in acknowledgment that the plaintiff lost something but

which she did not prove." (*Underlining ours for emphasis*)

7.9.9 What the above two cases emphasise is the general rule that claims of a liquidated nature are to be proved by specific evidence which demonstrates the alleged loss with certainty.

7.10 *The approach which the parties and the two courts below took*

7.10.1 The approach which the two courts below took was to put emphasis on the questions in dispute; that is,

(i) Christopher Thole's letter of 17th October, 2007, together with its contents, and

(ii) the parties' respective interpretation of the contract. The courts below then assumed that the respondent's action was to be proved on the determination of those questions only.

7.10.2 The consequence of that approach is that the arguments by both parties in this appeal are almost entirely based on those questions: Indeed, the respondent, for example, has dedicated not less than

ten, out of the twenty-two, grounds on those questions.

7.10.3 Admittedly, given that the respondent had rested its entire case on those questions, it was inevitable to discuss them in the course of the action, but the action was by no means to be proved by their determination only. This is because, according to the authorities that we have cited above, the action was to be proved by real evidence; that is, documentation which demonstrated the actual loss that was sustained. Hence, even if those questions were answered in the respondent's favour, there was still need to back them up with documentary or other evidence which revealed the actual loss that the respondent suffered as a result of the appellant not computing the allowance in the manner which the respondent contended.

7.11 *What evidence was the respondent required to adduce in order to prove the action?*

7.11.1 The contract between the parties was all about

documents. For example, there were documents recording the trips that the respondent undertook to carry the drinks and the empty crates; there were documents that recorded the actual bottles that were broken, or went missing, on every trip; there were documents which recorded the difference between the value of the broken and missing bottles that were actually incurred and the value of the number of broken or missing bottles that the respondent was permitted to incur; there were documents which charged the difference which was in excess of the permitted allowance (debit notes); there were documents which the respondent submitted to the appellant in order to claim payment for the trips it undertook; and there were documents which reflected the payments that the appellant made to the respondent, less the amounts reflected on the debit notes where applicable. These were only some among the various documents that were involved.

7.11.2 Such documents, if put together properly, could prove any loss that the respondent was claiming, if such loss existed. For example, the contention that there were instances of over deduction could easily be proved by these documents. For convenience, especially that of the Court, the respondent's bundle of documents could have been set out in parts which were dedicated to several components of the respondent's action, so that documents that were proving a particular claim were put together. This should then have made it easy for the court to follow the respondent's contention during *viva voce* testimony.

7.12 *Did the respondent adduce the requisite evidence?*

7.12.1 Our examination of the documents that were adduced and the testimony that was led shows that the record is replete with assorted documents which both parties filed through their respective bundles. There are invoices, debit notes, trip data sheets, and

so on. The documents were no doubt generated during the performance of the contract, but none of them, however, can be traced to any particular head of claim that the respondent pleaded. Most important, there was no documentation adduced in evidence relating to the actual payments; such documents were very vital in proving any head of claim because they were the ones that would have demonstrated the actual loss suffered.

7.12.2 We further observe that the respondent produced a document on which it had made its own re-computation in order to arrive at the sum of K4,756,534.37. However, in terms of evidence, there was no documentation that was systematically put up to prove that re-computation.

7.12.3 We again note that the respondent's witness, Misheck Chatora, in his witness statement, talked at great length on the respondent's re-computation of the figures and on Christopher Thole's letter. What the witness did not do was to single out and introduce to the court the respective sets of

documents that went to prove each particular head of claim in the action. As a matter of fact, the witness, in his statement, was merely introducing the documents in the respondent's bundles as examples of the documents that were used in the contract.

7.12.4 Our conclusion, therefore, is that the respondent did not satisfactorily adduce the documentary evidence that was necessary to prove such an action; for, such documents as were adduced in evidence could not be identified as proving any particular head of claim with the exception of only the debit notes for the sums of K24,123.10, K175,070.40 and K30,441.34. These have not been appealed against.

7.12.5 We now consider the grounds of appeal.

7.13 *The appellant's first, second and third grounds of appeal*

7.13.1 The three grounds cover two awards that were made by the Court of Appeal:

(i) the order that there be a re-computation of the BIT allowance from February, 2011 to the date of termination of contract;

(ii) the order that refers the sum of K99,454.92 to be assessed by the Deputy Registrar

7.13.2 *The appellant's arguments*

7.13.2.1 The argument by the appellant on the first issue is on two limbs: first, the appellant contends that the respondent raised the issue of what constituted a load only in terms of the contents of Christopher Thole's letter, and not from the perspective of the provisions of the contract. The appellant complains that by proceeding to make a finding that, under the contract, a load included empty crates and return trips, the appellant was denied the opportunity of addressing the court as to whether that was the correct interpretation to be given to the contract. Further, the appellant argues that since the order was about re-computation of the BIT allowance and the Court of Appeal had already found that the sum admitted by the appellant had been arrived at after applying a more accurate method of calculation, then the court should not have made a further order for re-computation of the allowance.

7.13.2.2 In the second issue, the appellant brings out an argument that is totally in tune with what we are saying in this matter. The appellant argues thus: The essence of a party claiming a liquidated amount is that the party so claiming has arrived at the figure as the total amount due to them. The court, as a matter of practice and procedure, only refers claims for unliquidated amounts for assessments: It was therefore wrong for the Court of Appeal to refer the sum of K99,545.92 to assessment since the very fact that it was being sent for assessment was an indication that the claim had not been proved, and should have been dismissed instead.

7.13.3 *The respondent's arguments*

7.13.3.1 The respondent's counter-argument to the first issue is that what the appellant is complaining about is tied to Christopher Thole's letter which the two court's below discounted. In this regard, the respondent in its cross-appeal has mounted ten grounds of appeal to attack the decision by the Court

of Appeal on that letter. The respondent goes on to submit that, once we agree with it that the two courts below wrongly discounted Christopher Thole's letter, then the appellant's two grounds of appeal ought to fail.

7.13.3.2 The respondent adds that, in any event, there is plenty of demonstration on the record that the respondent pleaded the issue of what constitutes a load also from the point of view of contractual provisions; that this can be seen from the respondent's pleadings, as well as those of the appellant, the testimony of the parties and also the clauses in the contract.

7.13.3.2 With regard to the reference of the sum of K99,545.93 to assessment, the respondent, as we have shown in the preview of the parties' positions above, does not agree either that the claim should have been referred to assessment. The respondent, however, argues that this sum of money was part of a larger claim which, according to its grounds of appeal, ought to have succeeded as claimed.

7.13.4 *Our Decision*

7.13.4.1 The order by the Court of Appeal that there be a re-computation of the BIT allowance as from February, 2011 to the date of termination of the contract is based on its view that, on a proper construction of the contract, the calculation of the BIT allowance was to be applied on all loads; that is, those with broken or missing bottles and those without; and on both the outward and return trips.

7.13.4.2 Incidentally, this is the very position that Christopher Thole's letter reflects. The Court of Appeal, nevertheless, went to great lengths to show the reason why it was in agreement with the trial court in holding that Christopher Thole's letter was not valid. We do not see then what the point was in dwelling so much on Christopher Thole's letter if the court's view was that the contract supported the position that was expressed in the letter.

7.13.4.3 Further, we note earlier in its judgment the court had found that, notwithstanding the appellant's view, it still used to calculate the BIT allowance on return trips. There was clearly a contradiction by the Court of Appeal in this regard.

7.13.4.4 The real issue here however is that the respondent did not adduce specific documents which pointed to the fact that the appellant never calculated the BIT allowance on return trips and on loads without broken or missing bottles, and which showed the actual loss that the respondent incurred by that alleged omission. So, it was never just about whether Christopher Thole's letter, or the provisions of the contract, required the BIT allowance to be calculated on the return trips and on loads without broken bottles. It was about whether the respondent had adduced documentary evidence which specifically showed the loss that the respondent had suffered due to the appellant's non-adherence to either Christopher Thole's letter or to the contract. In that

regard, we have held above that the respondent did not adduce satisfactory evidence pointing to that.

7.13.4.5 It follows that the first and second grounds of appeal by the appellant do succeed.

7.13.4.6 Conversely, the respondent's grounds one to nine, and then eleven, whose argument is that the respondent's main claim should have succeeded on the ground that Christopher Thole's letter was valid must fail: for, it is pointless to argue about the validity of Christopher Thole's letter if there is no evidence adduced to prove the loss.

7.13.4.7 Coming to the sum of K99,545.93, there is something to be said about its reference to assessment. First, we agree with the respondent's submission that this, indeed, was one component of the respondent's main claim which was based on its grievance that the appellant did not calculate the BIT allowance on all loads, as reflected in Christopher Thole's letter.

7.13.4.8 Secondly, the trial judge misplaced this claim as one based on the respondent's contention that the BIT allowance was payable in cash; hence, when the trial

judge resolved that question against the respondent, the claim failed.

7.13.4.9 And, thirdly, the Court of Appeal, on the other hand, was misled by one of the grounds of appeal by the respondent which alleged that the claims in paragraph 18 of its statement of claim, in which the sum of K99,545.93 was pleaded, had been overlooked by the trial judge, thereby leaving that part of the respondent's action unresolved. And so, in what seemed to be agreement with that submission, the Court of Appeal immediately referred the sum of K99,545.93 to assessment before the Deputy Registrar.

7.13.4.10 That was wrong because the court had not even established the basis upon which it was sending that claim for assessment. In other words, this amounted to sending a claim for assessment without establishing liability; which, in turn, was tantamount to transferring the trial of the issue to the Deputy Registrar.

7.13.4.11 Otherwise, as rightly submitted on behalf of the respondent, this was part of the much larger claim, and which was pleaded as having been arrived at by the respondent on the basis of a load being that of an inter-link trailer (i.e 1,470 cases) and at the price of castle lager. The respondent explained that, in this particular case, its own computation had shown that this sum of money was lost between July, 2011 and January, 2012.

7,13.4.12 So, to prove this claim, the respondent should have specifically identified and set apart specific documents, such as trip data sheets, invoices, debit notes, and so on, for the period from July, 2011 and January, 2012. These should have demonstrated those instances when the appellant calculated the allowance on a single trailer, instead of an inter-link trailer, and those instances when a price other than that of castle larger had been used. And all these documents should have then shown that the shortfall in the allowance to be credited to the

respondent came to K99,545.93 or part thereof. We therefore agree with the appellant's submission that this was not a claim that could be referred to assessment; but fell to be proved either wholly or in part, or not proved at all.

7.13.4.13 But, as we have said above, this type of evidence was not adduced. Hence, the claim ought to have been dismissed, and not referred to assessment.

7.13.4.14 It follows that the appellant's third ground of appeal has also succeeded.

7.13.4.15 There is no specific corresponding ground in the respondents cross-appeal, save that the respondent argued this issue within its ten grounds of appeal which support the validity of Christopher Thole's letter. We have already said that those grounds have failed.

7.13.4.15 By way of traversing the rest of the respondent's grounds of appeal, we will now say something about the main claim.

7.13.5 *The respondent's claims for (i) K5,173,408.20, (ii) a refund of deductions from November, 2007 to December, 2008, and (iii) the under-calculation of the BIT allowance for the period February 2009 to December, 2009*

7.13.5.1 Almost the entire action by the respondent was based on the following contentions;

(i) that the BIT allowance should have been calculated on all the loads, that is, on those that had incurred breakages and on those that had not;

(ii) that the loads should have been for both the outward and return trips, and

(iii) that where the calculation fell within or below the permitted limits of broken and missing bottles then the allowance was payable in cash

7.13.5.2 We have said that while that, indeed, was the basis for the action, it was by no means the manner by which it was to be proved. So, while answering those questions, there was need for the trial court to be alive to the fact that, even if those questions were

answered in the respondent's favour, it still bore the burden to adduce documentary evidence to prove its loss; because, as we have said, the contract between the parties' involved documents in all the transactions of the contract.

7.13.5.3 In our view, the most ideal approach for the trial court would have been first to proceed on the assumption that the respondent was correct in its contentions, and then to look at the evidence in order to see what documents the respondent had specifically adduced to prove the loss in each particular head based on those contentions.

7.13.5.4 If, indeed, the trial court found evidence tending to do just that, then it was to proceed to make findings of fact accordingly. Hence, the trial court should have been able to say to itself this: that with the findings that it had made on the evidence and if the respondent's contentions were found to be correct then there was indeed a loss. It was only then that the court was now to turn to the contentions and consider whether it agreed with the respondent or not. If the court

determined those questions in the respondent's favour, then either the whole action or those heads of claim that would have been found as a fact to have been proved would succeed. But if the court determined those questions against the respondent, as was the case here, then the action would fail on that basis.

7.13.5.5 If, however, the trial court did not find evidence tending to prove loss in the first place, then it meant that either the whole action, or such heads of claim as would have been found not to have been proved, would have failed of its, or their, own inanition. And, in that event, it would be unnecessary, as we have pointed above, for the court to even delve into answering those questions.

7.13.5.6 We have said above that the trial judge, as well as the Court of Appeal, resolved this action only by answering those questions: And when the questions were not answered in the respondent's favour, most of the heads of claim in the action failed.

7.13.5.7 At this point, by way of emphasis, we pose a few questions; what would have been the trial judge's approach had she answered those questions in favour of the respondent? Would she have upheld the claim? In our view, in the absence of evidence proving loss, that would have been wrong. Again, would she have referred the action to assessment? As we have said earlier, that too would have been wrong. So, these questions just go to illustrate what the crux of this matter really was; that is, proof of loss by documentary evidence.

7.13.5.8 As far as the evidence that ought to have been adduced is concerned, we have specified the kind of documents that should have been adduced, and how they should have been adduced. Suffice to say that all these documents should have tended to add up to the various heads of claim, and, ultimately, to the grand total of K5,173,408.20, or part thereof. In the case of the other two unspecified claims, the

documents should have added up to some figure. In the case of the advances that the appellant deducted, the respondent should have adduced documents on which the advances were obtained, and those on which it paid them back in order to show that those which the appellant was deducting from the invoices were without basis.

7.13.5.9 Suffice to say that the respondent did not adduce the evidence that we have described above, at least not in the manner that we have explained. So, we do not see what evidence the trial judge, even assuming that she had answered those questions in the respondent's favour, would have relied on to uphold the respondent's claims. This means that most of the heads of claim had failed of their inanition.

7.13.5.10 At this point, we will specifically address grounds nineteen and twenty of the respondent's cross-appeal, where the respondent argues that the claims in paragraphs 18 to 23 were admitted by the appellant because it did not traverse them.

7.13.5.11 First, those claims were all part of the big claim of K5,173,408.20. The appellant generally traversed this claim by disagreeing with the respondent's contention. Hence, it is not correct to say that these heads of claim were not traversed by the appellant.

7.13.5.12 Secondly, we wish to say that those claims, like the others, fell to be proved by documentary evidence as we have demonstrated above. The fact that we have found that such evidence was lacking means that the claims had failed of their inanition. This, then defeats the respondent's argument because, as we said in the case of **Mohammed v Attorney General**, a defendant in such circumstances would not even need a defence. In the event, it was immaterial whether the appellant did traverse those claims or not.

7.13.5.13 Having said the foregoing, we find the rest of the grounds in the respondent's cross-appeal to be without merit as they all revolve around the BIT allowance. The fourteenth ground, which is on the

advances must fail for the reason of lack of evidence to prove that they had been paid back.

7.13.5.13 There being no appeal on the claims for K723,000, K30,441.34, K175,070.40 and K24,123.10, we will proceed to the appellant's 4th and 5th grounds of appeal, which are both on the issue of costs.

7.14 *The appellant's fourth and fifth grounds of appeal*

7.14.1 These grounds bring us to the issue of costs

7.14.2 *Costs of the High Court Proceedings*

7.14.2.1 The trial judge made an order that the parties bear their own costs. The Court of Appeal reversed that order and held that the respondent had obtained substantial judgment during the High Court proceedings, and deserved to have been awarded the costs. There is now an appeal on that holding.

7.14.2.2 On behalf of the appellant, Mr. Tembo, learned counsel, submits that the respondent launched multiple claims in the High Court, but only a few succeeded. Counsel argues that, in such circumstances, the court should use its discretion and order the parties to bear their own costs, as the

trial judge did in this case. In this regard, Mr Tembo submits that the Court of Appeal erred when it awarded the respondent the costs of the High Court proceedings. Counsel relies on a number of authorities, particularly the case of **Collet v Van Zyl Brothers Limited** [5].

7.14.2.3 On behalf of the respondent, Mr. Mwitwa, learned counsel, argues that the respondent was entitled to the costs because it had succeeded in the action, and had not displayed conduct which merited the court's displeasure. Counsel relies on the case of **YB and F Transport Ltd v Supersonic Motors Ltd** [6].

7.14.2.4 We have considered the arguments by both sides. In the case of **Mutale v Zambia Consolidated Copper Mines**[7], we held:

> **"(i) With regard to costs, the general rule is that 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, for instance where only nominal damages are awarded".**

7.14.2.5 The learned editors of the *Rules* of the *Supreme Court (1999 edition)* under *Order 62/3/5* thereof cite the case of **John Richardson Computers v Flanders (No.2)**[8] as authority for the proposition that in certain circumstances the court may award only a certain percentage of the costs.

7.14.2.6 At the trial, the respondent succeeded in the admitted sum of K255,569.74, the three double deductions which in total came to K229,634.84 and the sum of K723,000 which was referred to assessment. This was as against the sum of K5,173,408.20 and other claims. For that reason, the trial judge held that the parties should bear their own costs. The Court of Appeal, however, held that the respondent had succeeded on two further claims, and it awarded the respondent the costs in both courts. Before us, however, the respondent's success has reverted to what it was in the High Court. The said success in our view is only about one fifth of the whole claim. In the circumstances, we opine that the

respondent should have had costs in the High Court only to the extent of 20%. And we so order.

7.14.3 *Costs of the proceedings in the Court of Appeal*

7.14.3.1 It is clear from what we have discussed in this judgment that the respondent's appeal to the Court of Appeal ought to have failed, thereby entitling the appellant to costs of those proceedings. We order accordingly.

7.14.3.2 It follows that the appellants fourth and fifth grounds of appeal have also succeeded.

7.14.4 *Costs of these proceedings*

7.14.4.1 The appellant having succeeded on all grounds, we award it costs of these proceedings to be agreed or taxed in default of agreement.

9.0 Conclusion

9.1 In conclusion, the appellant's appeal has succeeded wholly while the respondent's cross-appeal has failed, also wholly.

9.2 What remains of the respondent's case is the judgment

as it was at the High Court namely;

(i) in the sum of K255,569.74 as admitted by the appellant;

(ii) in the sums of K24,123.10, K175,070.40 and K30,441.34; and

(iii) in the sum of K723,000 to be assessed as ordered by the trial court.

9.3 Otherwise, this appeal is allowed.

.....
E. M. Hamaundu
SUPREME COURT JUDGE

.....
R. M. C. Kaoma
SUPREME COURT JUDGE

.....
N. K. Mutuna
SUPREME COURT JUDGE