IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 159/2023
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

MADISON GENERAL INSURANCE COMPANY LIMITED	**APPELLANT**
AND	
LONGRUN LOGISTICS LIMITED	**RESPONDENT**
MINET ZAMBIA INSURANCE BROKERS LIMITED	**1ST THIRD PARTY**
NICO INSURANCE ZAMBIA LIMITED	**2ND THIRD PARTY**

CORAM : Siavwapa JP, Chishimba, and Patel SC, JJA
On 18th June, 2024 and 26th July, 2024

For the Appellant:	Mr. K. Mwiche, Mr. K. Sikazwe and Ms. L Chileya of Messrs Jaques & Partners
For the Respondent:	Mr. D.T Tambutukani of Messrs D.T Legal Practitioners
For the 1st Third Party:	No Appearance
For the 2nd Third Party:	No Appearance

JUDGMENT

Chishimba JA delivered the Judgment of the Court.

CASES REFERRED TO:

1) Henderson v Jenkins & Sons (1968) EWCA Civ. J1104 – 2
2) Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others (2005) ZR 138
3) Tanzania Zambia Railway Authority v Mekani Isaac Mwanza & 24 Others SCZ Appeal No. 35 of 2014

4) Goodlife Foods Limited v Hall Fire Protection Limited (2018) EWCA GIV 1371
5) Undi Phiri v Bank of Zambia (2007) ZR Appeal No. 198/2005
6) Roland Leon Norton v Nicholas Lastron (2010) ZR 358
7) Photo Production Limited v Securicor Transport Ltd (1980) AC827
8) Colgate Palmolive (Z) Inc v Shemu and Others SCZ Appeal 11 of 2005
9) ZCCM Investment Holding PLC v Konkola Copper Mines PLC 2014 ZMSC
10) Opiss v Lion by Kenyan Insurance Company Appeal No 185 1991
11) Carter Joel Jere v Shamayuwa & Attorney General 1978 ZR
12) Chapelton v Barry Urban District Council (1940) 1 All ER 356

LEGISLATION CITED:

1) The Rules of the Supreme Court of England 1999 Edition

OTHER WORKS CITED:

1. Halsbury's Laws of England. Volume 25, Reissue.
2. Subrogation by Longman Dictionary of Law 7th Edition
3. Chitty on Contracts Volume 1, General Principles Sweet & Maxwell 2012
4. Black's Law Dictionary

1.0 INTRODUCTION

1.1 This appeal is against the judgment of Judge Mwenda-Zimba delivered on 3rd March, 2023 in which she held that the appellant had failed to prove its claim for the sum of $ 112, 953.51 against the respondent. The learned Judge held that the condition in the transportation contract between Afrox Zambia Limited and the respondent, that the goods would be carried at owner's risk was binding on the appellant. The appellant sought to enforce the rights of Afrox Zambia Limited under the principle of subrogation.

2.0 BACKGROUND

2.1 Afrox Zambia Limited, (hereinafter referred to as Afrox Limited) entered into a contract with the respondent to transport welding products worth ZAR 2,739,205.25 from Johannesburg, South Africa, to Ndola, Zambia. Afrox Limited took out a marine insurance policy with the appellant. The respondent equally took out an insurance cover with the 1st Third Party, Minet Zambia Insurance Brokers Limited (hereinafter 'Minet Insurance'). In a letter dated 19th January, 2021, Minet Insurance informed the respondent that it had placed insurance policies with the 2nd Third Party, Nico Insurance Zambia Limited (hereinafter 'Nico Insurance') covering the period 8th January, 2021, to 31st December, 2021.

2.2 The policies covered were fidelity guarantee, haulier's liability, general and public liability, umbrella liability and commercial motor-full third party worth a premium of $14, 588.20. The cover also included group personal accident and employer's liability worth a total premium of K2,266.00. The letter further advised the respondent *"that the premium payment credit period is 30 days from inspection of cover."*

2.3 There was an attempt by Minet Insurance, Nico Insurance and the respondent to enter into an instalment premium agreement plan. However, the said agreement was only signed by the

respondent. The said agreement is at pages 252 to 253 of the record of appeal and provides in part that:

> *3. In case of a default on the part of the client (insured) in respect of payment of the insurance premium due, cover shall automatically lapse and may be reinstated any time during the insurance year upon payment of the arrears and penalties thereon. Any claim arising during the lapsation period shall be admissible for payment.*

2.4 On 13th March, 2021, it was discovered that the respondent's truck carrying the consignment, had been hijacked in South Africa and the goods stolen. However, some of the goods were later recovered. Afrox Limited made a claim against the lost goods with the respondent, who in turn, directed the claim to Minet Insurance, which had taken out a policy for the respondent with Nico Insurance. When Afrox Limited approached Nico Insurance, Nico Insurance refused to honour the claim on the ground that the policy had lapsed.

2.5 It turned out that the respondent had not paid the premiums as and when they fell due even after several reminders. On 22nd July, 2021, an email was sent to the respondent by Minet Insurance giving notice that if the premiums were not settled by 27th July, 2021, the covers would be cancelled. The cancellation was finally effected on 1st September, 2021.

2.6 The respondent then transferred K2,266.00 to Minet Insurance in respect of the group personal accidents policy. On 6th October, 2021, Nico Insurance sent a letter to the respondent officially cancelling the policies for non-payment of the premiums. In spite of the cancellation, on 16th December, 2021, the respondent paid the sum of $14,564.00 to Minet Insurance who in turn, forwarded the funds to Nico Insurance. However, Nico Insurance informed Minet Insurance that they would not accept the premium and refunded it on 26th March, 2022.

2.7 Following the refusal of Nico Insurance to honour the claim, Afrox Limited lodged a claim with the appellant under its valid insurance policy. As a result, on 13th May, 2022, the appellant discharged the claim in accordance with the insurance policy and paid Afrox Limited the sum of $112,953.51 which was equivalent to ZAR1, 698,119.55.

2.8 Having settled Afrox Limited's insurance claim, the appellant commenced an action against the respondent by writ of summons endorsed with a claim for the payment of the sum of US$112,953.51 being the sum paid to Afrox Limited under their insurance policy and interest thereon.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence on record, the learned Judge was of the view that the pertinent questions to be resolved were:

1) Whether there was a valid insurance cover between the respondent and Nico Insurance with Minet Insurance as agents; and

2) Whether the appellant is entitled to the claim.

3.2 The trial Court began by considering whether the appellant is entitled to sue on behalf of Afrox Limited under the principle of subrogation. After considering the general principles of subrogation as outlined by the learned authors of **Halsbury's Laws of England. Volume 25, Reissue, at paragraph 314 and 317**, the Court found that the appellant is entitled to claim its loss under the policy with Afrox Limited from the respondent because under subrogation, the appellant is entitled to all the rights and remedies belonging to Afrox Limited. Further, that there were no limitations on the appellant from doing so.

3.3 The Court below found that there was no valid insurance cover between the respondent and Nico Insurance. The learned Judge dismissed the instalment payment plan because only the respondent signed it, while neither Minet Insurance nor Nico Insurance as parties thereto, signed it. That even if it was agreed, as contended by the respondent, that it was drafted by Minet Insurance hence bound to it, the premium was still not paid within 30 days as required by clause 2. Clause 3 could not

apply because the insurer, Nico Insurance, did not exercise the discretion to reinstate the policy once the arrears and penalties were paid. Therefore, the Court found that the cover lapsed and was not reinstated. The Judge held that there can be no insurance contract where a premium has not been paid.

3.4 The Court then addressed the allegation by the respondent that the transportation agreement with Afrox Limited was that the goods were carried at owner's risk. The Learned Judge noted that this issue was not pleaded and should not have been part of the decision. However, evidence having been led by DW in her witness statement, and not objected to, and PW2 having been cross-examined on the same, she proceeded to consider it.

3.5 The trial Court found that according to the quotation containing terms and conditions of the transportation agreement between Afrox limited and the respondent, the goods were carried at owner's risk. Though not a party to these proceedings, Afrox Limited was bound to the terms having agreed to them, and so is the appellant which is entitled to the rights of Afrox Limited under the principle of subrogation.

3.6 The Learned Judge found that the appellant had failed to prove its claim on a balance of probabilities.

4.0 GROUNDS OF APPEAL

4.1 Dissatisfied with the decision of the Court below, the appellant has appealed raising two grounds as follows:

1) ***The Court below erred both in law and fact when she made findings on an issue that was not specifically pleaded by the respondent as stated at page J43 paragraph 11.19. The Court having found that the issue was not pleaded should not have made a decision based on an unpleaded averment at the detriment of Madison General Insurance Company Limited; and***

2) ***The Court below erred both in law and fact at page J49 paragraph 11.33 when the Court held that the exclusion clause in the agreement between Afrox and the respondent was binding and enforceable against Madison General Insurance Company Limited. As the Court failed to acknowledge that there no contract before the Court in which the alleged exclusion clause was contained and that the same was raised as (an) issue during cross-examination by the appellant.***

5.0 APPELLANT'S HEADS OF ARGUMENTS

5.1 The appellant filed heads of argument in support of the appeal dated 20th May, 2023. In ground one, the appellant submits that the issue and findings on whether the transportation agreement between the respondent and Afrox Limited was at owner's risk, was not specifically pleaded and the Court should not have pronounced itself on it.

5.2 The Court was referred to the cases of **Henderson v Jenkins & Sons** [1], **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others** [2] and **Tanzania Zambia Railway**

Authority v Mekani Isaac Mwanza & Others [3]. The import of these cases is that the function of pleadings is to define the factual issues to be decided, to provide each party with notice of the case intended to be set up by the other party, and to provide a brief summary of each party's case from which the nature of the claim and defence may be easily apprehended.

5.3 It was submitted that it was flawed for the Court below to rely entirely on an issue that was not pleaded and merely sneaked in at the last minute, bearing in mind that DW admitted that the appellant ought to have been compensated by way of subrogation, a claim that the trial Court agreed to as well.

5.4 In ground two, the appellant contends that the exclusion clause in the agreement between Afrox Limited and the respondent was not binding and enforceable against the appellant, there having been no contract containing the alleged exclusion clause.

5.5 It was argued that the trial Court placed undue reliance on the English case of **Goodlife Foods Limited v Hall Fire Protection Limited** [4] where the Court found the exclusion clause in the contract for the supply of a fire suppression system to be reasonable. That in the case, the appellant and respondent had already entered into a contract for the installation of a fire

suppression system. That the issue for determination was whether the exclusion clause on the quotation was to be considered within the context of the existing signed contract and whether it was incorporated into it.

5.6 The appellant submitted that there was no evidence of notice on record, and noted that this was the first instance where Afrox Limited had utilized the respondent's transportation services. In the absence of a signed contract incorporating an exclusionary clause, the Court below erred in making its findings. It was further, argued that it was flawed and speculative of the Court below to find that the quotation exhibited at pages 369 to 370 of the record of appeal, contained terms and conditions of the transportation agreement as no such agreement was exhibited. In any case, a quotation does not constitute a contract at law. That there was no such contract to establish the grounds for the decision by the Court.

5.7 The Court rightly found that the appellant was entitled to recover under the doctrine of subrogation. Therefore, it should recover from the respondent. We were urged to uphold the appeal with costs in both Courts.

6.0 ARGUMENTS BY THE RESPONDENT

6.1 The respondent filed heads of argument dated 12th June, 2024.

In response to the argument that the Court below made findings on unpleaded issues, the respondent, submits that having had an opportunity to object to the evidence in the supplementary bundle of documents, the appellant, chose not to object at trial. Further, that the respondent's witness was cross examined on the evidence in her documents. The respondent placed reliance on **Order 18 Rule 7 (1) of Supreme Court Rules of England (RSC)**, and the cases of **Undi Phiri v Bank of Zambia** [5] and **Roland Leon Norton v Nicholas Lastron** [6] on unpleaded matters, where evidence is led without objection by the other party. That the unpleaded issue not objected to will be considered by the Court.

6.2 The respondent's position is that the lower Court cannot be faulted for considering the evidence in respect of unpleaded matters. That the appellant's advocates omitted to object to the admission of the evidence at their own peril. Reference was made to the judge's views at page J43 of the judgment appearing at page J 51 of the Record of Appeal.

6.3 The position by the respondent is that the evidence adduced, not objected to, related to the question whether the respondent was liable to the appellant under the principle of subrogation. The party by whom the appellant was claiming to be

indemnified had contracted with the respondent that goods were to be transported at owner's risk the owner being Afrox Limited. Therefore, the Court was obliged to consider this evidence. Our attention was drawn to the definition of **Subrogation by Longman Dictionary of Law 7th Edition and Halsbury's Laws of England Volume 25** and on the nature of subrogation.

6.4 The argument is that once a party is substituted, they take the place of original owners in relation to the rights and remedies belonging to the insured. The party so substituted cannot claim rights and remedies which the insured did not have at the time. In *casu,* the appellant was not entitled to claim for loss under the transportation agreement with the respondent under the principle of subrogation. This is because the contract between Afrox Limited and the respondent spelt out in the terms and conditions of transportation which provided that transportation of goods was at owner's risk. No liability would attach to the respondent for any loss suffered.

6.5 The evidence that the respondent was not liable to Afrox Limited for any loss though not pleaded was adduced by the parties and not objected to. The common law principle of contract that parties have freedom to freely contract and enforcement of said

contracts was alluded to. Reference was made to the cases of **Photo Production Limited v Securicor Transport Limited** [7] **Colgate Palmolive (Z) Inc v Shemu and Others** [8] on the aforestated principle of law of contract.

6.6 The respondent went on to distinguish the case relied upon by the appellant of **Tanzania Zambia Railways** [3]**.** That the facts in the cited case shows that unpleaded evidence was admitted in the absence of the other party, who could have raised an objection. In *casu,* the respondent was present, but did not object to the admission therein.

6.7 In response to ground two, the holding that the exclusion clause in the agreement between Afrox Limited and the respondent was binding and enforceable against the appellant, the respondent referred to the principle of subrogation. The respondent could assert the exclusion clause against the appellant even though the appellant was not a party to the agreement between them.

6.8 As regards the contention that there was no contract before Court in which the alleged exclusion clause was contained, reference was made to the amended witness statement and supplementary bundle of documents in which the terms and conditions were produced.

6.9 In buttressing, the existence of a contract with the exclusion clause, the respondent referred to the evidence by PW2 that a quotation was given to Afrox Limited. Reference was made to **Chitty on Contracts Volume 1, General Principles Sweet & Maxwell 2012** on agreement and inference from conduct.

6.10 The respondent submitted that the Court found that there was a contract between Afrox Limited and the respondent containing the exclusion clause, by virtue of the fact that Afrox Limited accepted the terms of the estimate by issuing a purchase order for the respondent to load the consignment. The argument that the appellant was not a party to the agreement between Afrox Limited and the respondent is irrelevant as the exclusion clause was applicable to it by virtue of principle of subrogation. As held in **ZCCM Investments Holding PLC v Konkola Copper Mines PLC** [9], exclusion clauses can be relied upon even if not expressly pleaded, provided the opposing party had sufficient notice of the clause.

6.11 The argument by the appellant that Afrox Limited was using the respondent's transportation services for the first time, thus no prior relationship existed, lacks merit and was not raised in the Court below. Therefore, it cannot be raised on appeal. The Court was urged to dismiss the appeal.

7.0 ARGUMENTS BY THE 1ST THIRD PARTY

7.1 The 1st Third Party, Minet Insurance Limited did not appear or file heads of argument.

8.0 ARGUMENTS BY THE 2ND THIRD PARTY

8.1 The 2nd third party, Nico Insurance, filed its heads of argument on 21st June, 2023 and submitted that the relationship between a defendant to the main action and a person joined in the third party claim, is very similar to that of plaintiff and defendant. That a third party action is an action within an action.

8.2 That the learned Judge in the Court below had to decide issues distinctly between the appellant and respondent, and between the respondent and the third parties. The trial Court addressed the issue whether there was a valid insurance contract between the respondent and Nico Insurance, and found that the insurance cover had lapsed, and was not reinstated.

8.3 Therefore, Nico Insurance was of the view that though the appellant has appealed against the entire judgment, this appeal does not affect that part of the judgment which relates to the third party claim. It is contended that in fact, perusal of the appellant's heads of argument speaks to this fact.

9.0 DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and the

arguments filed by the Learned Counsel. The appellant's appeal focuses on whether the exclusionary clause, in the agreement between Afrox Limited and the respondent was binding on the appellant, whether it was an issue pleaded, for the trial Court to have considered it and made findings thereon.

9.2 A recap of the pertinent facts is necessary before delving into determining the appeal and to put the matter into context. Afrox Limited entered into a contract with the respondent to transport its welding products from South Africa to Ndola Zambia. The appellant, Madison General Insurance Company Limited (hereinafter referred to as Madison General Insurance), and Afrox Limited entered into a Marine Insurance Policy. Afrox Limited equally took out an insurance cover with Nico Insurance, the 2nd Third Party brokered by Minet Zambia Insurance, the 1st Third Party in the Court below. The insurance policy issued by Nico Insurance lapsed on account of failure to pay the premium within the stipulated period. During that lapse period, the consignment belonging to Afrox Limited was hijacked in transit within South Africa, whilst being transported by the respondent. Part of the goods were recovered.

9.3 Afrox Limited made a claim for the lost goods with the Respondent, which in turn directed the claim to Minet

Insurance and Nico Insurance. Nico Insurance rejected the claim on the ground that the insurance policy held by Afrox Limited was cancelled due to lapse of the said policy.

9.4 Afrox Limited proceed to make a claim to Madison General Insurance in respect of the loss of its consignment by theft. Madison Insurance, discharged the claim in accordance with the policy and paid the sum of US$ 112,253.51 (ZAR 1,698, 119, 55) to Afrox Limited.

9.5 Subsequently, Madison General Insurance sued the Respondent for the sum paid to Afrox under its insurance policy. Madison General Insurance sued on the principle of subrogation. The doctrine of subrogation allows an insurer, after compensating an insured for any loss under the insurance contract, to step into the shoes of the Insured. The insurer is then entitled to all the rights and remedies the insured might have against a third party in respect of the loss compensated. It is trite that the suit is instituted in the name of insured but under statutory provisions it can be brought in the insurer's name.

9.6 The doctrine is founded on a binding and operative contract of indemnity. The right to subrogate does not create a privity of contract between the insurance company and the third party,

as it merely gives the insurance company the right to take over the rights of the insured. We refer to the Kenyan decision in the case of **Opiss v Lion by Kenyan Insurance Company** [10].

9.7 The subrogation principle applies where there is a contract of insurance. After crystallization of the risk insured, the insurer compensates the insured for the financial loss occasioned by a third party. The insurer in law steps into the shoes of the insured. According to **Black's Law Dictionary**, **"Subrogation simply means substitution of one person for another that is one person is allowed to stand in the shoes of another and assert that person's rights against the defendant."**

9.8 The holding by the Court below to the effect that the insurance policy between Afrox Limited and Nico Insurance had lapsed and that therefore, the 2nd Third Party is not liable is not subject of the appeal; and in our view is sound.

9.9 The issues on the appeal revolve around the claim by Madison General Insurance against the transporter of the consignment, engaged by Afrox Limited to deliver its goods. Madison General Insurance, as earlier stated claimed on the principle of subrogation having settled the claim by the Afrox Limited and sought refund of the paid claim from the transporter.

9.10 It is not in dispute that there was a contract between the respondent and Afrox Limited. The issue in dispute is the

alleged exclusion clause in the said agreement to the effect that goods were being transported at owner's risk and whether the said agreement is binding and enforceable against Madison General Insurance. The contention in the first instance is that the issue of the exclusionary clause was not pleaded in the lower Court and the Court ought not to have relied upon it to arrive at the decision to the detriment of Madison General Insurance.

9.11 The first issue to be determined is whether the unpleaded issue let into evidence ought not have been relied upon and determined. The unpleaded evidence is that the terms and conditions of the transportation agreement was at owner's risk. The Court below acknowledged that the issue of the goods having been transported at owner's risk was not pleaded and ought not to have been part of the decision. However, evidence was led by Valerie Vorster (DW) to this effect and not objected to. On this basis, the Court below went on to address the exclusion clause and how it may be incorporated in a contract. She cited a number of English decisions appearing at page 55 of the record of appeal.

9.12 A perusal of the appellant's statement of claim at pages 138 to 139 of the record of appeal and the defence at pages 74 to 76 of the record appeal, shows that, apart from confirming the

existence of a transportation agreement between the respondent and Afrox Limited, nothing was said about an exclusionary clause to that effect in the pleadings.

9.13 However, at page 412 of the record of appeal, PW2 in cross-examination was asked what documents were signed or exchanged between Afrox Limited and Longrun Logistics Limited (respondent), to facilitate the transportation of the goods. He responded that Afrox Limited requested for a transportation quotation from the respondent which was duly issued. A purchase order was made by Afrox Limited. At page 413 of the record of appeal, the witness recalled, in further cross-examination, that there was a term that all the goods handled and transported by Longrun Logistics Limited were at owner's risk. This unpleaded evidence was not objected to. The record shows that PW2, was even re-examined on the terms and conditions and the quotation issued.

9.14 In her amended witness statement, Valerie Vorster (DW) stated that the respondent entered into a contract with Afrox Limited for the transportation of welding products from Johannesburg to Ndola, and referred to the terms and conditions contained at pages 369 to 370 of the record of appeal. The said terms and conditions were produced in the supplementary bundle of documents and not objected to trial.

9.15 From the above, we find that though, the issue of the terms and conditions in the quotation was not pleaded, it was nonetheless, brought into evidence by PW2 and DW, and not objected to. In **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & Others** [2] it was held that:

> **"In case where any matter not pleaded is let in evidence, and not objected to by the other side, the Court is not and should not be precluded from considering it. The resolution of the issue will depend on the weight the Court will attach to the evidence of un-pleaded issues.**
>
> **The Courts, however, do not condone in any way shoddy and incomplete pleadings. Each case must be considered on its own facts. In a proper case, the Court will always exclude any matter not pleaded, more so where an objection has been raised."**

9.16 Should the Court have considered and determined the unpleaded matter let in evidence at trial? There is abound *corpus juris* in our jurisdiction on the functions of pleadings and the purpose, which is defining the case which a party is to meet and the issues to be determined. It is trite that parties are bound by the pleadings. We refer to the cited **Mazoka** case.

In the case of **Carter Joel Jere v Shamayuwa & Attorney General** [11] the Supreme Court stated where evidence of matters not pleaded are led in evidence at trial, and is not objected to, a Court is not prevented from considering such evidence. As earlier stated, the evidence that Afrox Limited's goods were to be transported at owner's risk was not pleaded.

However, it was let in evidence together with the documents namely, the quotation issued and the terms conditions of transportation.

9.17 We are of the firm view that the Court below cannot be faulted for considering the issue of the goods being transported at owner's risk as it was let in evidence and not objected to. Ground one lacks merit.

9.18 In ground two, the appellant argues that there was no contract between Afrox Limited and the respondent on record upon which the Court below could find that the exclusion clause was binding and enforceable against the appellant.

9.19 The issue in ground two to be determined is whether there was binding exclusion clause in the agreement between, Afrox Limited and the respondent. In determining this issue we will tackle the question whether, in the first place, there was a contract between the said parties containing that alleged exclusion clause.

9.20 It is trite that an exclusion clause/ exemption clause is a clause that excludes or restricts liability which would otherwise arise on a breach of contract. An exclusion clause has to be brought to the attention of the person against whom, it is to operate at the time of the making of contract. According to **Trietel on Contract, 12th Edition at page 240, paragraph 7-003**, a party

who wishes to rely on an exclusion clause must show that the clause has been incorporated in the contract.

9.21 We also refer to **Halsbury's Laws of England paragraph 369 to 244** where the learned author's state that:

> **"For an exclusion clause to incorporate into a contract, the party against whom, it is to operate must be given reasonable notice of its existence. Notice is determined as follows:**
>
> 1. **If the party against whom the clause operates has actual knowledge of the clause at the time when the contract is concluded, he is inevitably bound by it.**
> 2. **Where there is actual knowledge, the party against which the clause operates will not be bound, if he has no reason to believe that the document containing the clause contained contractual terms"**

9.22 As to the question of whether there was a contract of transportation between Afrox Limited and the respondent, the record shows that there was a contract, the agreement between the respondent and Afrox Limited based on the quotation and the terms of conditions. It was not in dispute that the goods were transported by the respondent. This shows that, there was an agreement between the said parties otherwise, the goods would not have been transported. Perusal of the record at pages 369 and 371, shows the quotation and the terms and conditions of the respondent for transportation to its customers.

9.23 As noted in paragraph 9.2 above, when PW2 was asked what documents were signed or exchanged between Afrox Limited and the respondent, he stated that Afrox Limited requested for a transportation quotation from the respondent who issued the same and that a purchase order was also issued. Thereafter, the cargo was loaded and transported. We are of the view that the said notice of the terms and conditions were communicated to Afrox Limited and brought to its attention.

9.24 The next issue is whether the said terms and conditions formed part of the contract. We hold the view that the quotation containing the terms and conditions for transportation formed part of the agreement between Afrox Limited and the respondent. In **Chapelton v Barry Urban District Council** [12], the Court held that:

> **"... Questions of this sort are always questions of difficulty, and are very often largely questions of fact. In the class of case where it is said that there is a term in the contract freeing railway companies, or other providers of facilities, from liabilities which they would otherwise incur at common law, it is a question of how far that condition has been made a term of the contract and how far it has been sufficiently brought to the notice of the person entering into the contract with the railway company, or other body, and there are numerous authorities on that point. ..."**

9.25 At page 359, Mackinnon LJ went on to add that:

> **"... If a man does an act which constitutes the making of a contract, such as taking a railway ticket, or depositing his bag**

in a cloakroom, he will be bound by the terms of the document handed to him by the servant of the carriers or bailees, as the case may be. ..."

9.26 In this case, the evidence shows that a quotation was issued containing the terms and conditions upon which Afrox Limited would be bound should it choose to hire the respondent. The terms and conditions appear at page 370 of the record of appeal, which stipulated as follows:

"Please note that all work under taken by Longrun Logistics is subject to the following terms and conditions. Please ensure that you are acquainted with the following terms and conditions prior to Longrun Logistics undertaking your work."
Clause 2 "All goods are handled, stored and transported at "owners' risk". No liability will be taken by Longrun Logistics. You are encouraged to insure your cargo. GIT Insurance is available upon written request, before loading, from the customer and at extra cost to the customer and it must be paid for before loading"
Clause 3 "This estate and the above conditions will be deemed as accepted and applicable when the consignment is released for loading or where loading instructions are issued to load the consignment."

9.27 Having proceeded to hire the transport services of the respondent on the terms and conditions sufficiently brought to the notice or attention of Afrox Limited via the quotation, Afrox Limited was bound by the terms and conditions accompanying the quotation sent to them by the respondent. We cannot fault the judge for holding that the exclusionary clause was binding

on the appellant. We reiterate that the exclusion clause was binding on the appellant who sued on the principle of subrogation. Therefore, the exclusion clause relied upon by the respondent exempted it from liability for the loss of the cargo.

10.0 CONCLUSION

10.1 In conclusion, we uphold the judgment of the Court below in its holding that the goods were carried at owner's risk as stipulated in the quotation containing the terms and conditions of transportation. Further, that Afrox Limited, was bound to the terms and so is the appellant, which was entitled to the rights of Afrox Limited under the principle of subrogation. The appeal is accordingly dismissed. Costs follow the event.

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M. J. Siavwapa

JUDGE PRESIDENT

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F. M. Chishimba

COURT OF APPEAL JUDGE

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A. N. Patel S.C

COURT OF APPEAL JUDGE