

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2013/HP/0837

BETWEEN:

SET POINT ZAMBIA LIMITED

PLAINTIFF

AND

**FIRST NATIONAL BANK ZAMBIA LIMITED
PETER MILOMO**

**DEFENDANT
THIRD PARTY**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA IN CHAMBERS THIS 13th
DAY OF MARCH, 2025**

For the Plaintiff : Mr. N.Nsapato, Mr B. Mwanza & Mr. Z.M. Mubiana, Messrs
Nsapato & Co Advocates
For the Defendant : Mr. V. Musabula & Mr. C. Kamelu Messrs Ventus Legal
Practitioners
For the 3rd Party : Mr. K Nsofu & Mrs. Z.C. Kakunka, Messrs Katongo and
Company

J U D G M E N T

CASES REFERRED TO:

- 1. Christopher Lubasi Mundia v Sentor Motors Limited 1982 ZR 66**
- 2. Kleinwort Benson v Lincoln City Council 1998 4 ALL ER 513**
- 3. Michael Chilufya Sata v Zambia Bottlers SCZ No 1 of 2003**
- 4. Stanbic Bank Zambia Limited v A.S & C Enterprises and others 2008 Vol 1 ZR 259**
- 5. Amchile Import and Export Limited and others v Chimanga Changa and another Appeal No 43 of 2011**
- 6. Zambia Seed Company v West Co-op Haulage Limited and another Appeal No 112 of 2013**
- 7. Savenda Management Services v Stanbic Bank Appeal No 002/2015**
- 8. Atlantic Bakery v ZESCO Appeal No 47 of 2016**
- 9. Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma Appeal No 19/2017**

10. *Barclays Bank Zambia Plc v Cargo Management Services Limited 2017 ZMCA*
11. *Melissa Supermarket Limited and another v Stanbic Zambia Limited 2022 ZMCA 17*
12. *Madison General Insurance Company Limited v Longrun Logistics Limited and others Appeal No 159/2023*

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England, 1965, 1999 Edition*

OTHER WORKS REFERRED TO:

1. *Winfield and Jolowicz on Tort*
2. *Zambian Civil Procedure: Commentary and Cases, Vol 1, by Patrick Matibini 2017, Lexis Nexis*

1. INTRODUCTION

1.1 Set Point Zambia Limited commenced this action on 13th June, 2013, by Writ of Summons which was accompanied by a statement of claim, seeking:

1. *Payment of the sum of ZMW2, 705, 083.54*
2. *Interest;*
3. *Any other relief that the Court may deem fit;*
4. *Costs.*

2. STATEMENT OF CLAIM

2.1 The statement of claim shows that Set Point Zambia Limited is a company that was incorporated under the ***Companies Act Chapter 388 of the Laws of Zambia*** and has its' registered office in Kitwe. First National Bank Zambia Limited was stated as being a company that was also incorporated under the ***Companies Act Chapter 388 of the Laws of Zambia***, and was also registered

under the ***Banking and Financial Services Act Chapter 387 of the Laws of Zambia.***

- 2.2 Averment was made, that CNNC Luanshya Copper Mines Plc was indebted to Set Point Zambia Limited in the sum of US\$ 508, 474.35. Thus, in Order to settle the debt, CNNC Luanshya Copper Mines Plc on 1st November, 2010, drew Two (2) cheques on the Bank of China (Zambia) Limited in favour of Set Point Zambia Limited, both generally endorsed, numbered 809621 in the sum of US\$341, 444.17 and 809622 in the sum of US\$167, 030.18 respectively.
- 2.3 It was stated that the above stated cheques were delivered to Set Point Zambia Limited, who became the owner of the said cheques, and no one but Set Point Zambia Limited had the right to claim payment of the cheques.
- 2.4 However, Set Point Mining Zambia Limited obtained possession of the cheques, and unlawfully caused them to be deposited into its' account with First National Bank Zambia Limited. Averment was made, that First National Bank Zambia Limited as the collecting bank, owed Set Point Zambia Limited as the true owner of the cheques, a duty that it did not collect payment of the cheques for the benefit of anyone, but Set Point Zambia Limited.
- 2.5 Allegation was also made, that First National Bank Zambia Limited collected payment of the cheques from the Bank of China (Zambia) Limited on behalf of Set Point

Mining Zambia Limited, thereby causing loss or damage to Set Point Zambia Limited.

2.6 The particulars of negligence or breach of statutory duty were stated as:

- (a) First National Bank Zambia Limited caused or permitted Set Point Mining Zambia Limited to open a bank account at the Kitwe Branch of First National Bank Zambia Limited with account number 62286982759 on the 3rd day of November, 2010, without taking reasonable measures to ascertain and verify the identity and trustworthiness of Set Point Mining Zambia Limited.
- (b) First National Bank Zambia Limited failed to make any or in the alternative any adequate inquiries as to whether Set Point Mining Zambia Limited was entitled to the payment of the cheques which were deposited into its' account by First National Bank Zambia Limited;
- (c) First National Bank Zambia Limited failed to have regard to the fact that the cheques could only have been collected on behalf of the named payee, being Set Point Zambia Limited;
- (d) First National Bank Zambia Limited paid the amounts on the cheques to Set Point Mining Zambia Limited when it knew or ought to have known that Set Point Mining Zambia Limited was not entitled to such payment;

- (e) First National Bank Zambia Limited failed to refuse the cheques for collection when it should have done so;
- (f) First National Bank Zambia Limited failed to take steps that a reasonable bank would have taken in the circumstances to avoid the true owner of the cheques suffering damage.

2.7 The contention was that as a result of First National Bank Zambia Limited's action, Set Point Zambia Limited had suffered loss.

3. FIRST NATIONAL BANK ZAMBIA LIMITED'S DEFENCE

- 3.1 First National Bank Zambia Limited in the amended defence which was filed on 17th March, 2021, contended that prior to the incorporation of Set Point Zambia Limited on 7th November, 2008, there existed a company called Set Point Mining Zambia Limited, which was incorporated on 30th May, 2007, which was also a customer of First National Bank Zambia Limited.
- 3.2 The defence was further that on Set Point Zambia Limited being incorporated, Peter Milomo was listed as a director in the company and that as at that date, he was still a shareholder in the company.
- 3.3 Still in defence, First National Bank Zambia Limited averred that by letters dated 30th November, 2010, which were addressed to it, Set Point Mining Zambia Limited applied to open a bank account with it. It was stated that by the said letters, which were authored by Peter Milomo,

he was introduced as Manager of Set Point Mining Zambia Limited, and that Set Point Mining Zambia Limited was introduced as having dealings with CNNC Luanshya Copper Mines Plc.

- 3.4 The defence was further that accompanying the said letters, was a board resolution which Set Point Zambia Limited availed, which appointed First National Bank Zambia Limited as the bankers for Set Point Zambia Limited, and indicated Peter Milomo as the signatory together with another director.
- 3.5 Further averment was made, that the resolution provided an email address, namely setpointzambia@aol.com for all alerts for transactions on the account.
- 3.6 The contention was that the above stated letters and board resolution, all bore the name Set Point Mining Zambia Limited and were printed on letter heads which had the name Set Point Zambia.
- 3.7 First National Bank Zambia Limited stated that it conducted its' normal screening procedure which was required before opening and operating any account with it. Then on compliance with First National Bank Zambia Limited's account opening checklist, account number 62286982759 was accordingly opened in Set Point Mining Zambia Limited's name.
- 3.8 The averment was that at that point, neither First National Bank Zambia Limited nor its' agents, had any knowledge nor could they have had the knowledge either

actual or constructive, of the existence or incorporation of Set Point Zambia Limited.

- 3.9 The assertions relating to CNNC Luanshya Copper Mines Plc having owed Set Point Zambia Limited the sum of US\$ 508, 474.35, and that in Order to settle the debt, CNNC Luanshya Copper Mines Plc on 1st November, 2010, drew Two (2) cheques on the Bank of China (Zambia) Limited in favour of Set Point Zambia Limited, both generally endorsed, numbered 809621 in the sum of US\$341, 444.17 and 809622 in the sum of US\$167, 030.18 respectively, was said to be within Set Point Zambia Limited's peculiar knowledge.
- 3.10 The same was said as regards the averment that the cheques were delivered to Set Point Zambia Limited who became the owner of the said cheques, and that no one but Set Point Zambia Limited, had the right to claim payment of the cheques.
- 3.11 First National Bank Zambia Limited denied any particular knowledge of the circumstances under which the customer came into possession of the said cheques, stating that Set Point Zambia Limited would be put to strict proof of the assertion, that Set Point Mining Zambia Limited deposited the cheques in its' bank.
- 3.12 The contention was that First National Bank Zambia Limited, as the collecting bank, collected the cheques for its' customer, Set Point Mining Zambia Limited and

received the payment thereof in good faith and without prior notice of any defect in title, and without negligence.

3.13 It was stated that First National Bank Zambia Limited would rely upon the protection in **Section 5 of the Cheques Act Chapter 424 of the Laws of Zambia.**

3.14 The particulars in that regard were stated as:

- (a) The said cheques including the endorsement appeared complete and regular on their faces;
- (b) The clearance of the cheques was compliant with the Foreign Currency Clearing Rules of July 2003, and the paying bank did not file a claim within the time allowed in the said rules;
- (c) There was nothing to put First National Bank Zambia Limited on inquiry as to Set Point Mining Zambia Limited's title to the cheques, as First National Bank Zambia Limited was notified beforehand of the dealings between its' customer and CNNC Luanshya Copper Mines Plc;
- (d) Mr. Peter Milimo, a director in Set Point Zambia Limited executed all the mandate documents leading up to opening an account in First National Bank Zambia Limited, and either himself or his agent deposited the cheques into the said account.

3.15 The defence further or in the alternative was, which was denied, was that First National Bank Zambia Limited was not entitled to such statutory protection, any loss which

Set Point Zambia Limited may prove was caused or contributed to by their own negligence.

3.16 The particulars in that regard were stated as:

(a) Set Point Zambia Limited having received the cheques, failed to secure them or to keep them in safe custody and deposit them in the bank account for Set Point Zambia Limited at First National Bank Zambia Limited.

3.17 First National Bank Zambia Limited denied that it owed Set Point Zambia Limited a statutory duty or at all. Thus, the particulars of negligence and breach of statutory duty as pleaded were denied, and the assertion that acts by First National Bank Zambia Limited resulted in the loss claimed or at all was denied.

3.18 On 17th August 2016, First National Bank Zambia Limited took out third party proceedings and upon the Order being granted, Peter Milimo who was joined a as third party to these proceedings.

4. EVIDENCE LED AT TRIAL

4.1 At trial, Set Point Zambia Limited called One (1) witness, while First National Bank Zambia Limited did not call any witnesses. Peter Milomo testified and he did not call any witnesses.

PW1-THELMA NAMWINGA

4.2 This witness told the Court that she was an Administrative Manager at Set Point Zambia Limited. She explained that her duties involved managing the day to

day work, and that she issued quotations, invoices etcetera.

- 4.3 Further in her testimony, Thelma Namwinga testified that between September and November 2010, Set Point Zambia Limited supplied copper concentrates to CNNC Luanshya Copper Mines Plc. Then on the date on which the payment was due, follow ups were made to find out when CNNC Luanshya Copper Mines Plc would settle the outstanding invoice.
- 4.4 Her evidence was that in response, CNNC Luanshya Copper Mines Plc informed them that the cheques had already been paid out. Thelma Namwinga testified that unknown to Set Point Zambia Limited, the cheques had been deposited in an account with First National Bank Zambia Limited.
- 4.5 She clarified that Set Point Zambia Limited did not have an account with First National Bank Zambia Limited, but rather that it had two accounts with Stanbic Bank, adding that one was a Kwacha account, while the other was a Dollar account.
- 4.6 Thelma Namwinga was unable to recall the value of the cheques which were paid out, and she testified that when they had followed up with the client, they were told that the cheques had been cleared to Set Point Mining Zambia Limited, which was not Set Point Zambia Limited. Her prayer was that First National Bank Zambia Limited be

ordered to pay the money which was taken by Set Point Mining Zambia Limited.

CROSS EXAMINATION OF THELMA NAMWINGA BY COUNSEL FOR FIRST NATIONAL BANK ZAMBIA LIMITED.

- 4.7 When cross examined, Thelma Namwinga testified that she knew Peter Milomo stating that they worked together. When referred to the Patents and Company's Registration Document for Set Point Technologies Limited which was at page 9 of Peter Milomo's bundle of documents, her evidence was that Peter Milomo appeared on the document.
- 4.8 Thelma Namwinga's testimony was that Peter Milomo oversaw Set Point as one of the directors. It was also her testimony that from the document which she had just been referred to, she could not tell whether Peter Milomo was also a shareholder. When cross examined further, she agreed that from the document, Peter Milomo was a shareholder as well.
- 4.9 Still in cross examination, Thelma Namwinga stated that when they followed up with CNNC Luanshya Copper Mines Plc, they were informed that the cheques had been collected, although they were not told by whom. Then thereafter, when further follow up was made, CNNC Luanshya Copper Mines Plc wrote a letter stating that M.P Sikole collected the cheques.

CROSS EXAMINATION BY COUNSEL FOR PETER MILOMO

- 4.10 It was Thelma Namwinga's evidence in cross examination by Counsel for Peter Milomo, that the funds that they were expecting were paid to a company called Set Point Mining Zambia Limited.
- 4.11 Her evidence when she was referred to the payment requisition from CNNC Luanshya Copper Mines Plc, which was at pages 3-4 of Set Point Zambia Limited's bundle of documents, was that M.P Sikole received the cheques.
- 4.12 That marked the close of the case for Set Point Zambia Limited.

DW1-PETER MILOMO

- 4.13 In his defence, Peter Milomo stated that he was aware of the company Set Point Zambia Limited, adding that he was a director in the said company until 2011. Further testimony was given, that Peter Milomo was a shareholder in the said company with 125000 ordinary shares.
- 4.14 He identified page 4 of First National Bank Zambia Limited's bundle of documents as the termination of his appointment as director at Set Point Zambia Limited. He was not sure what happened to his 125000 shares in Set Point Zambia Limited, as he was not communicated to.
- 4.15 Further in his defence, Peter Milomo stated that he was aware of a company called Set Point Mining Zambia Limited. He explained that the said company was

incorporated in 2007, before Set Point Zambia Limited was incorporated. Page 5 of his bundle of documents was stated as being the certificate of incorporation for Set Point Mining Zambia Limited which was dated 31st July, 2007.

- 4.16 He went on to testify, that as seen at page 7 of the said bundle of documents, Set Point Zambia Limited was incorporated on 7th November, 2008.
- 4.17 In his continued testimony, Peter Milomo stated that Set Point Mining Zambia Limited supplied copper concentrates to CNNC Luanshya Copper Mines Plc, NFCA and the Chinese Copper Smelter. Therefore, Set Point Mining Zambia Limited was expecting payments.
- 4.18 Peter Milomo told the Court that he used to manage all the transactions with the other directors, Abraham Zulu and Henry, as they were almost always in the DRC. He identified page 6 of his bundle of documents as the List of Directors.
- 4.19 It was stated that the bankers for Set Point Mining Zambia Limited were First National Bank Zambia Limited, with Peter Milomo adding that he was part of the board resolution that was made to open a bank account with First National Bank Zambia Limited for Set Point Mining Zambia Limited. In that regard, he stated that page 20 of First National Bank Zambia Limited's bundle of documents was the board resolution evidencing the same.

- 4.20 He explained that when the board resolution was made, himself, and two other directors, being Henry Kamanga and Abraham Zulu were present, and he had chaired the meeting.
- 4.21 Other documents that were identified, were at page 21 of the said bundle of documents, being the application to open the account which was authored by Abraham Zulu, page 22, being the specimen signatures, and that Peter Milomo would sign with either of the two directors, as the two directors would usually be in the DRC.
- 4.22 Page 23 of the said bundle of documents was identified as being the national registration cards for the other two directors and himself.
- 4.23 In clarifying what positions he held, Peter Milomo testified that he was manager at Set Point Mining Zambia Limited and director and shareholder in Set Point Zambia Limited. Further in testifying, he stated that some South Africans wanted to purchase Set Point Mining Zambia Limited, but that failed, and a year later, they opened Set Point Zambia Limited. He added that they wanted him to be director in the said company.
- 4.24 In relation to the claims that are before Court, Peter Milomo's evidence, was that sometime in November 2010, Abraham Zulu had called him, and informed him that part of the funds had been collected from CNNC Luanshya Copper Mines Plc and that two cheques had been

deposited in an account at First National Bank Zambia Limited.

- 4.25 His evidence was that Set Point Mining Zambia Limited's account was credited with the value of the cheques. Page 1 of Peter Milomo's bundle of documents was testified as being a cheque deposit slip on which the funds were deposited into Set Point Mining Zambia Limited's account, stating that it was accepted by First National Bank Zambia Limited, as there was a stamp for it on the said document.
- 4.26 Peter Milomo still in his evidence, stated that he was issued with instructions by the directors of Set Point Mining Zambia Limited to pay creditors, and to also pay for equipment as seen from the funds transfer request which was at page 2 of his bundle of documents to Agridech Enterprises Limited, and the other which was at page 3 of the same bundle of documents, for payment to purchase copper concentrates in the DRC by cash in the sum of K500, 000.00.
- 4.27 He also stated that at page 4, was a telegraphic transfer to Eriyas Bulent in Turkey to purchase a dump truck in the sum of US\$114, 000.00.
- 4.28 Peter Milomo concluded his testimony by testifying that Set Point Mining Zambia Limited should indemnify First National Bank Zambia Limited, as it was the beneficiary of the funds. He told the Court that he was just a manager and that as seen at pages 3 and 4 of Set Point Zambia

Limited's bundle of documents, M.P Sikole collected the cheques.

CROSS EXAMINATION BY COUNSEL FOR FIRST NATIONAL BANK ZAMBIA LIMITED

- 4.29 In cross examination, Peter Milomo stated that Set Point Mining Zambia Limited existed before Set Point Zambia Limited. His testimony was that both companies supplied CNNC Luanshya Copper Mines Plc, but not with the same products. It was also his evidence that he was employed by both companies.
- 4.30 Peter Milomo agreed that Set Point Mining Zambia Limited did not have an account with First National Bank Zambia Limited. He explained that he was part of the board resolution with two other directors, to open a bank account with First National Bank Zambia Limited for Set Point Mining Zambia Limited.
- 4.31 He agreed that identification documents for the signatories were submitted, so that the account could be opened. Peter Milomo further in cross examination, stated that the two companies had their own letterheads and email addresses.
- 4.32 On being referred to the board resolution which was at page 20 of First National Bank Zambia Limited's bundle of documents, Peter Milomo's testimony was that it had Set Point Mining Zambia Limited in the right to corner. He also agreed that in the last paragraph of the resolution, it

indicated that all email alerts were to be sent to Set Point Zambia Limited.

- 4.33 Further admission was made that on the application to open the bank account, which was at page 21 of the same bundle of documents, Set Point Zambia Limited appeared in the top right corner while on the top left corner was an email address setpointzambia@aol.com.
- 4.34 Peter Milomo maintained that Set Point Mining Zambia Limited had dealings with CNNC Luanshya Copper Mines Plc, and that it was expecting payment from the said CNNC Luanshya Copper Mines Plc. His evidence was that the two cheques were collected as Set Point Mining Zambia Limited was expecting payments from CNNC Luanshya Copper Mines Plc.
- 4.35 He added that he deposited the cheques into the account for Set Point Zambia Mining Zambia Limited after M.P. Sikole collected the cheques. It was Peter Milomo's testimony that Abraham Zulu gave him the cheques to deposit.
- 4.36 When referred to the letter which was at page 3 of his bundle of documents, which was authored by himself and Abraham Zulu to the Manager at First National Bank Zambia Limited, requesting to transfer K500, 000, 000.00, Peter Milimo stated that Set Point Zambia Limited did not have a bank account with First National Bank Zambia Limited.

- 4.37 He testified that page 1 showed that Set Point Zambia Limited deposited funds into the account for Set Point Mining Zambia Limited.
- 4.38 Peter Milomo agreed that the said cheques that were deposited, were at pages 1 and 2 of Set Point Zambia Limited's bundle of documents, which cheques were in the names of Set Point Zambia Limited. It was stated that at no point, did Peter Milomo inform Set Point Mining Zambia Limited that the cheques were not for it.
- 4.39 His evidence when he was referred to the requests for funds transfer to First National Bank Zambia Limited which were at pages 2-3 of his bundle of documents, was that on the top right corner of the documents, it was written Set Point Zambia, and that they were written Set Point Mining Zambia Limited on the right top corner.
- 4.40 It was agreed that the email for Set Point Zambia was written on the bottom of the details for Set Point Mining Zambia Limited. However, Peter Milomo denied that this could cause confusion.
- 4.41 Peter Milomo's evidence when he was referred to the bank statement for Set Point Mining Zambia Limited which was at page 9 of Set Point Zambia's bundle of documents, was that he withdrew the monies which were indicated against his name, contending that it was at the director's instructions.

**CROSS EXAMINATION OF PETER MILOMO BY
COUNSEL FOR SET POINT ZAMBIA LIMITED**

- 4.42 In cross examination by Counsel for Set Point Zambia Limited, Peter Milomo stated that he was manager at Set Point Mining Zambia Limited. He agreed that he was part of the resolution to open a bank account at First National Bank Zambia Limited for Set Point Mining Zambia Limited. It was further agreed that at no point did Set Point Zambia Limited ever open an account with First National Bank Zambia Limited.
- 4.43 Peter Milomo reiterated that the resolution to open the bank account was for Set Point Mining Zambia Limited with First National Bank Zambia Limited, adding that even the application to open an account which was at page 21 of First National Bank Zambia Limited's bundle of documents was for Set Point Mining Zambia Limited.
- 4.44 Further agreement was made, that when the bank account was being opened at First National Bank Zambia Limited, all the documents for the registration of Set Point Mining Zambia Limited were taken there, including the certificate of incorporation, which was at page 14, and the certificate of share capital which was at page 15.
- 4.45 Admission was also made, that at page 20, the board resolution stated that it had been resolved that First National Bank Zambia Limited be appointed as the bankers for Set Point Zambia Limited. Peter Milomo testified that no query was raised by First National Bank

Zambia Limited on the difference in the names in the resolution and the names on the certificate of incorporation.

- 4.46 He agreed that he deposited the cheques which were at pages 1-2 of Set Point Zambia Limited's bundle of documents, which indicated the payee as Set Point Zambia Limited. It was again agreed that First National Bank Zambia Limited did not query the deposit slip.
- 4.47 Peter Milomo's evidence was that the bank statement which was at page 9 of Set Point Zambia Limited's bundle of documents, was for Set Point Mining Zambia Limited, being the bank account that was credited with the cheques. Peter Milomo stated that any person could put a name and an email address that they wished.

RE-EXAMINATION OF PETER MILOMO

- 4.48 In re-examination, Peter Milomo clarified with reference to the funds transfer requests, which were at pages 2-3 of his bundle of documents, that prior to the incorporation of Set Point Zambia Limited, Set Point Mining Zambia Limited had been incorporated, and it was using the logo which was on the left-hand side.
- 4.49 His explanation was also that the directors of Set Point Zambia Limited wanted to buy Set Point Mining Zambia Limited but that was not agreed, hence the incorporation of Set Point Zambia Limited in 2008. On his involvement in Set Point Zambia Limited, Peter Milomo stated that he

was buying consumables for the company from South Africa.

4.50 That marked the close of the case for Peter Milomo.

5. DECISION OF THIS COURT

5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

- 5.2 It is not in contention that Set Point Zambia Limited was incorporated under the ***Companies Act Chapter 388 of the Laws of Zambia*** on 7th November, 2008. It is also common cause that Set Point Mining Zambia Limited was incorporated under ***the Companies Act Chapter 388 of the Laws of Zambia*** on 30th May, 2007.
- 5.3 The facts which are further not in dispute, are that Peter Milomo was a director in Set Point Zambia Limited until his appointment was terminated on 7th December, 2010. The facts that are also common cause are that Peter Milomo was a shareholder in Set Point Zambia Limited.
- 5.4 It is not in contention, that a resolution was made to open a bank account with First National Bank Zambia Limited for Set Point Zambia, using a letter head which had Set Point Mining Zambia Limited and Set Point Zambia on 3rd November, 2010, which resolution was signed by Henry Kamanga, Abraham Zulu and Peter Milomo.
- 5.5 It is common cause that the said account was opened. The facts which are further not in dispute are that Peter Milomo deposited cheques into the account at First National Bank Zambia Limited which was held by Set

Point Mining Zambia Limited, which were received from CNNC Luanshya Copper Mines Plc by M.P Sikole, and which cheques were payable to Set Point Zambia Limited.

ISSUES IN DISPUTE

- 5.6 The issues in dispute are whether First National Bank Zambia Limited is liable to pay Set Point Zambia Limited the sum of ZMW2, 705, 083.54 with interest thereon as claimed.

ANALYSIS

- 5.7 Thelma Namwinga told this Court that Set Point Zambia Limited had supplied copper concentrates to CNNC Luanshya Mines Plc, and it was expecting payment. Thus, when the date for payment became due, follow ups were made with CNNC Luanshya Copper Mines Plc, and it wrote a letter indicating that the cheques for the payment were collected by M.P Sikole.
- 5.8 The defence by First National Bank Zambia Limited was that there was nothing that would have put it on alert that Set Point Mining Zambia Limited was not entitled to the payments in view of the documents that were submitted in respect of the said company when the account was being opened.
- 5.9 Peter Milomo on the other hand, contended that Set Point Mining Zambia Limited was expecting payment from CNNC Luanshya Copper Mines Plc, and he was instructed by the directors to deposit the cheques into the bank account at First National Bank Zambia Plc after M.P

Sikole collected the cheques from CNNC Luanshya Copper Mines Plc.

- 5.10 In the submissions, Set Point Zambia Limited stated that it should succeed on the claims, as it had demonstrated that First National Bank Zambia Limited owed it a duty of care, which was breached, and as result of that breach of care, Set Point Zambia Limited had suffered damage.
- 5.11 ***Winfield and Jolowicz on Tort at page 132*** was referred to, on the elements of negligence, while the cases of ***Stanbic Bank Zambia Limited v A.S & C Enterprises and others*** ⁽⁴⁾ and ***Barclays Bank Zambia Plc v Cargo Management Services Limited*** ⁽¹⁰⁾ were further relied on in establishing what negligence is.
- 5.12 On the damage that Set Point Zambia Limited suffered, the case of ***Michael Chilufya Sata v Zambia Bottlers*** ⁽³⁾ was relied on, and the assertion was that the claim for negligence had been pleaded. The submission was also that the amount claimed in United States Dollars was converted into Zambia Kwacha.
- 5.13 Relying on ***Section 13 of the High Court Act, Chapter 27 of the Laws of Zambia***, it was submitted that despite not pleading to loss in the correct currency, being United States Dollars, as the amount was converted into Zambia Kwacha, the loss should be awarded to Set Point Zambia Limited.
- 5.14 The case of ***Amchile Import and Export Limited and others v Chimanga Changa and another*** ⁽⁵⁾ was relied

on as regards the provisions of **Section 13 of the High Court Act**.

- 5.15 First National Bank Zambia Limited in its' submissions, stated that Set Point Zambia Limited had made extensive submissions to support of the claim for damages. However, note was made that Set Point Zambia Limited had pleaded a monetary claim in Kwacha. Therefore, the issue of damages had never been pleaded.
- 5.16 Submission was made that a party is bound their pleadings, and that the Court cannot grant reliefs outside the pleadings.
- 5.17 The case of **Savenda Management Services v Stanbic Bank** ⁽⁷⁾ was relied on, as having held that ours is an adversarial system which shackles the Judge to the pleadings. Thus, by virtue of **Section 13 of the High Court Act**, the Judge is not at large to grant any reliefs and remedies, except those arising out of the pleadings.
- 5.18 Also relied on, was the case of **Atlantic Bakery v Zesco** ⁽⁸⁾.
- 5.19 Submission was made, that Set Point Zambia Limited could not claim damages for negligence, as it did not plead the same. It was further stated that the claim for damages could not stand, as Set Point Zambia Limited was indemnified fully by Etana Insurance Company, as found by the Court in the Ruling dated 30th April, 2024.
- 5.20 It was also submitted that this Court in that Ruling, found that it was premature to find that Set Point Zambia

Limited had been fully indemnified at that point. However, as seen from the affidavit in opposition that Set Point Zambia Limited filed, to the Notice to Raise Preliminary Issues on 22nd January, 2024, which was deposed to by Willie Jansen Van Rensburg, it established that Set Point Zambia Limited was fully indemnified for the loss by Etana Insurance Company.

5.21 Further submission was made that the object of damages is to compensate a party for loss.

5.22 The case of ***Madison General Insurance Company Limited v Avril Cornhill and Michael Kakoma*** ⁽⁹⁾ was relied on, as having discussed the principle of indemnity in insurance. Thus, Set Point Zambia Limited having been fully indemnified for the loss by Etana Insurance Company, it could not sustain the argument that it had suffered damage as a result of First National Bank Zambia Limited's negligence.

5.23 In so submitting, it was stated that reliance was placed on the settled doctrine of subrogation. In that regard, the case of ***Madison General Insurance Company Limited v Longrun Logistics Limited and others*** ⁽¹²⁾ was relied on, as where the Court of Appeal held that:

“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."

5.24 Further authority was sought from the case of **Melissa Supermarket Limited and another v Stanbic Zambia Limited** ⁽¹¹⁾.

5.25 It was also submitted that to award more money to Set Point Zambia Limited after it had been indemnified by Etana Insurance Company would entail that it would be unjustly enriched.

5.26 The definition of *unjust enrichment* as stated in **Black's Law Dictionary** at page 1573 was stated as:

"A benefit obtained from another not as a gift and not legally justifiable for which the beneficiary must make restitution or recompense."

5.27 The case of **Kleinwort Benson v Lincoln City Council** ⁽²⁾ was further submitted as where *Lord Hope of Craighead* noted the following as regards unjust enrichment:

"The essence of this principle is that it is unjust for a person to retain a benefit which he has received at the expense of another, without any legal ground to justify its retention, which that other person did not intend him to receive...."

The approach of the common law is to look for an unjust factor, something which makes it unjust to allow the payee to retain the benefit.... The common law accepts that the payee is enriched where the sum was not due to be paid to him, but it requires the payer to show that this was unjust.”

- 5.28 The claim as pleaded in the statement of claim was referred to, with submission being made that it showed that Set Point Zambia Limited claims the sum of ZMW2, 705, 083.54 as the loss that it suffered. However, it was now sought to amend that sum, which was endorsed in the Writ of Summons to the Dollar equivalent, arguing the equitable jurisdiction that is reposed in the Court pursuant to ***Section 13 of the High Court Act.***
- 5.29 The decision in the case of ***Savenda Management Services v Stanbic Zambia*** ⁽⁷⁾ was reiterated and the contention was that this Court could not amend the claim, as that was not pleaded. Further submission was made, that it is a matter of common knowledge that the Zambian Kwacha has plummeted against major currencies in the world since these proceedings were commenced.
- 5.30 The case of ***Zambia Seed Company v West Co-op Haulage Limited and another*** ⁽⁶⁾ was stated as having guided on the amendment of pleadings, and it was submitted that Set Point Zambia Limited sat on its' rights

to amend its' pleadings as this matter was commenced more than Ten (10) years ago, and this Court should not be used as a tool to cure its' indolence.

5.31 It was also submitted that this Court could not grant the relief sought under the umbrella, "*any other relief that the Court may deem fit*" considering that the pleadings by Set Point Zambia Limited had not pleaded the same.

DECISION

5.32 I have noted the submissions, and with regard to the amount claimed, the indorsement on the Writ of Summons and statement of claim is payment of ZMW2, 705, 083.54 and interest.

5.33 The indorsement does not state what the payment of ZMW2, 705, 083.54 is for. A perusal of the statement of claim shows that Set Point Zambia Limited was expecting payment from CNNC Luanshya Copper Mines Plc in the sum of US\$508, 474.35. The statement of claim further shows that CNNC Luanshya Copper Mines Plc on 1st November, 2010 drew up two cheques in favour of Set Point Zambia Limited on cheque numbers 809621 in the sum of US\$341, 444.17 and cheque number 809622 in the sum of US\$167, 030.18.

5.34 The evidence on record shows that Peter Milomo admitted that he deposited these two cheques into the bank account for Set Point Mining Zambia Limited which was held at First National Bank Zambia Limited. This is even

- evidenced on the deposit slip which is at page 1 of his bundle of documents which is dated 5th November, 2010.
- 5.35 The total amount deposited was US\$508,474.35 which amount tallies with the amount that is stated in paragraph 3 of the statement of claim as that which CNNC Luanshya Copper Mines Plc owed Set Point Zambia Limited.
- 5.36 However, as seen the indorsement in the Writ of Summons and statement of claim is for the payment of ZMW2, 705, 083.54 and interest. There is nowhere in the statement of claim where averment is made that this sum as claimed was converted into Kwacha from the sum of US\$508,474.35 that Peter Milomo deposited into the account for Set Point Mining Zambia Limited.
- 5.37 The statement of claim in paragraph 9 particularises the negligence and breach of statutory duty on the part of First National Bank Zambia Limited in paying the money to Set Point Mining Zambia Limited and not Set Point Zambia Limited.
- 5.38 However, the indorsement in the Writ of Summons and statement of claim does not plead damages for negligence and or breach of statutory duty.
- 5.39 It is trite that a party is bound by their pleadings. In the case of ***Christopher Lubasi Mundia v Sentor Motors Limited*** ⁽¹⁾ it was held that:

“The function of pleadings is to give fair notice of the case which has to be met and to define

the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties.

Where the pleadings are at variance with the evidence adduced in court, the case fails since the Plaintiff's case is completely re-cast without actual amendment of the statement of claim, and not only will the Court record be incorrect as a reference thereafter but the other party will be unable to meet the case having had no correct notice."

5.40 The Court in that matter also noted as follows:

"Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such."

5.41 Further, the Supreme Court in the case of ***Atlantic Bakery v ZESCO*** ⁽⁸⁾ guided as follows on pleadings:

"A Court is not to decide on an issue which has not been pleaded. Put differently, a Court should confine its decision to the questions raised in the pleadings. It can thus not grant relief which is not claimed. Litigation is for the parties; not the Court. The Court has no business extending or expanding the boundaries of litigation beyond the scope defined by i.e parties in their pleadings. In other words, a

court has no jurisdiction to set up a different or new case for the parties.”

5.42 In this matter, particulars of negligence and breach of statutory duty have been stated in the statement of claim. This is in line with the explanatory notes in **Order 18/12/2** which state that:

“Whenever either party is imputing fraud, negligence, or misconduct to his opponent, the facts must be stated with especial particularity and care.”

5.43 Further the explanatory notes in **Order 18/12/29 of the said Rules of the Supreme Court** states as follows in respect of pleadings alleging negligence:

“(26) Negligence

Particulars must always be given in the pleading, showing in what respects the Defendant was negligent. The statement of claim "ought to state the facts, upon which the supposed duty is founded, and the duty to the Plaintiff with the breach of which the Defendant is charged" Then should follow an allegation of the precise breach of that duty, of which the Plaintiff complains, and, lastly, particulars of the injury and damage sustained.”

5.44 The learned author **Patrick Matibini** in the book, **Zambian Civil Procedure: Commentary and Cases, Vol 1, 2017, Lexis Nexis** at page 565 states that a dispute

between parties is defined by their pleadings, which are the parties' written statements, each setting out their detailed contentions and claims or counterclaims, so that the opponent may know what case he has to meet or what the reply to his case is.

5.45 Further, that it is the case that has been pleaded that has to be proved, and consequently, the decision of the Court cannot be based on grounds not set out in the pleadings of the parties.

5.46 **Order 6 Rule 2 (1) of the Rules of the Supreme Court of England, 1965, 1999 Edition** in terms of indorsement on the Writ states that:

***“(1) Before a writ is issued it must be indorsed -
(a) with a statement of claim or, if the statement of claim is not indorsed on the writ, with a concise statement of the nature of the claim made or the relief or remedy required in the action begun thereby;”***

5.47 I have already noted that in this matter what was indorsed on the Writ of Summons was a claim for payment of ZMW2, 705, 083.54 and interest.

5.48 I have already noted what the Supreme Court stated in the ***Atlantic Bakery v ZESCO*** ⁽⁸⁾ as regards the fact that the Court cannot grant reliefs which are not pleaded.

5.49 Applying the above to this matter, my Ruling dated 30th April, 2024 was on an application that was made by First

National Bank Zambia Limited and included the determination of whether Set Point Zambia Limited could legally pursue this matter against it when it was indemnified by Etana Insurance Company and whether the claim if it was a subrogation claim had been properly pleaded.

5.50 I did find in that Ruling in paragraphs 4.76 and 4.77 as follows:

4.76 In this matter, exhibit 'WJVE1' to the affidavit in opposition shows that the insurance cover was for a loss of R3, 000, 000.00. The Kwacha equivalent of that amount has not been stated. Therefore, there is nothing to show the exact amount that was paid under the insurance cover, such that it can be said that Set Point Zambia Limited was paid the entire amount of the loss sustained.

4.77 On that basis, it would be premature to conclude that the entire amount paid under the insurance cover was paid to Set Point Zambia Limited by Etana Insurance Company Limited, thereby indemnifying it against the entire loss. Thus, any award paid, would amount to unjust enrichment.

5.51 The reliance on the case of ***Amchile Import and Export Limited and others v Chimanga Changa and another***

(5) does not help Set Point Zambia Limited in view of the failure to plead the reliefs sought.

5.52 Given the above, and as there are no pleadings to explain the basis for the claim for the payment of ZMW2, 705, 083.54, and as Etana Insurance Company did indemnify Set Point Zambia Limited for the loss of money which Peter Milomo deposited into the account of Set Point Mining Zambia Limited in the amount of R3, 000, 000.00, for the loss of US\$508, 474.35, the claim for the payment of ZMW2, 705, 083.54 with interest thereon, has not been proved on a balance of probabilities.

6. CONCLUSION

6.1 That being the position, the claims by Set Point Zambia Limited fail and are dismissed with costs to First National Bank Zambia Limited and Peter Milomo which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 13th DAY OF MARCH, 2025

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

