**IN THE HIGH COURT FOR ZAMBIA** **2016/HP/1927**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT LUSAKA**

***(Civil Jurisdiction)***

**BETWEEN:**

**DYNAMECHANICS CONSTRUCTION LIMITED** **PLAINTIFF**

**AND**

**FRATELLI LOCCI LIMITED** **DEFENDANT**

**Before the Hon. Mr. Justice M.D. Bowa on 30th of January, 2026.**

*For the Plaintiff :Mr. MC Hamachila of MC Hamachila & Co*
*For the Defendant: Miss A. Adam of D. Findlay and Company*

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# JUDGMENT

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**Cases referred to:**

1. *Examination Council of Zambia vs Reliance Technology Limited SCZ No 46 of 2014*

*2.Noors Motors Ltd vs Sakuwaha appeal No 57 of 2017*

*3.Johnson vs Agaew (1980) AC 37*

*4.Jones Siluyele Mbita and Others vs KCM (2018) ZM SC 31.*

*5.Zambia Railways vs Pauline Mundia and Another 2008 (ZR 287)*

*6.Mhango vs Ngulube and Others (1983) ZR at page 61*

*7. Savenda Management Services vs Stanbic Bank Zambia Ltd Appeal 37 of 2017*

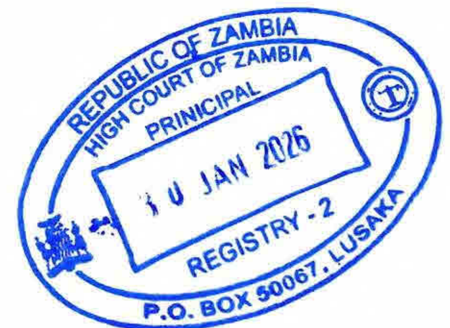
*8 Khalid Mohammed vs the Attorney General1 (1982) ZR 49*

*9.Zulu vs Avondale Housing Project (1982) ZR 173*

*10.Albazero(1977) AC 774,*

*11.Adams vs Cape Industries PLC (1990) BCLC 479*

*12 Salomon vs Salomon (1897) AC 22*



*13 Eastern Co-operative Union vs Yamene Transport (1988- 89) ZR 126*
*14 Mtonga vs Ngambi SC Appeal 27 of 2011 ZMSC 284*

**Legislation referred to**

*2.Section 11(2) of the Sale of Goods Act 1893*
*English Law Extent of Application Act Cap 11 of the Laws of Zambia*

**Other Authorities referred to**

*1.Halsbury's Laws of England 4th edition Volume 19 paragraph 19*

*2.Phipson on Evidence 17th edition , London Reuters(legal) Limited 2010 para 6-06 at page 151*

*3.Construction Law from Beginner to Practitioner, 2016 London at page 36*
*4.Treitel; The Law of Contract, 14th Edition 2017, Sweet and Maxwell*

## 1.Background

1.1 The Plaintiff commenced this action by writ of summons and statement of claim dated 5th October 2016 seeking reliefs couched in the following terms:

(i) *Damages for breach of contract dated 3rd October, 2011 for the sale of the Asphalt by the Plaintiff to the Defendant.*

(ii) *Damages for breach of contract for the hire of machinery by the Defendant from the Plaintiff for the construction of urban roads in Mufulira.*

(iii) *Payment of sum Euro One Hundred and Forty Thousand (Euro 140,000.00) being money owed by the Defendant to the*

*Plaintiff under the contract of sale of the Asphalt Plant dated 3rd October 2011.*

(iv) *Payment of the sum of Twelve Million, Nine Hundred and Thirty-Eight Six Hundred and Forty-Nine Kwacha Twenty-One Ngwee (K12,938,649.21) being money owed by the Defendant to the Plaintiff for the hire of machinery from the Plaintiff.*

(v) *Damages for loss of business.*

(vi) *Interest.*

(vii) *Costs.*

(viii) *Any other relief the Court may deem fit.*

1.2 The Defendant's defence was filed into Court on the 4th April, 2017, disputing the Plaintiff's claims.

**2.0 Trial**

*2.1 <u>The Plaintiff's case</u>*

2.2 PW1 was Elvezard Gilarbi the General Manager of the Plaintiff Company. He testified that he was giving evidence on behalf of the Plaintiff for a claim relating to equipment hired and sold to the Defendant company. He was approached by Mr Locci from the Defendant Company with his team in 2011 with a request for machinery to be used

to perform a contract that the Defendant had been awarded on the Copperbelt.

2.3 He explained that the contract was awarded to the Defendant to work on roads in Mufulira and Ndola. Following an agreement he dispatched to Mufulira an Asphalt plant and further included a roller compacting machine, three rushers and one screener. He also sent one 20-foot container. All of this equipment was hired and the Defendant made 2-part payments towards the hire.

2.4 He explained that the Asphalt plant is used to mix stone and bitumen. The Defendant tested it and took possession of the plant in 2011. He added that the Asphalt plant was delivered to Mufulira in June 2011 as confirmed on page 4 of the Plaintiff's bundle of documents.

2.5 Five or six months later, PW1 asked the Loci's if the Defendant wanted to buy the Asphalt plant off him because he needed some money. They expressed interest and agreed on a price. The Defendant was to buy the plant by paying a deposit of 50,000 Euros as per page 3 of the Plaintiff's bundle of documents. The balance of 90,000 Euros was

then to be paid in 2 instalments of 45,000 Euros in October, 2011 and November, 2011 respectively.

2.6 However, that the Defendant did not pay him anything. After some time, the Defendant's contract with the Government was terminated. He added that page 4 of the Plaintiff's bundle as stated earlier confirmed delivery of the Asphalt plant to the Defendant. He testified that that the document shows the plant was from G.M International which he stated, is the parent company of Dyna Mechanics the Plaintiff Company. Further, that it would be noted that the name G.M International was cancelled out and in its place inserted Dyna Mechanics Construction. He explained that the Plaintiff just used the stationary of the parent company for delivery purposes which at the time he thought was the practical thing to do. He clarified that he was the Director of G.M International.

2.7 It was Mr Gilarbi's further evidence that after the Asphalt plant was delivered, it was tested. People were sent from his team to show the Defendant how to use it. He testified that the Plaintiff was initially informed that the machine was not working properly. However, that problem was resolved

which he concluded was not technical but more to do with the quality of the raw material the Defendant was using. He added that the Defendant had the machine for 5 months before the parties started discussing the possible sale of the Asphalt plant.

2.8 He recounted that he did not receive any complaint from the Defendant. The equipment was worked on by his company before it was delivered to the Defendant company. It was his further evidence that the parties subsequently agreed to the sale and that the agreed contract of sale was signed in Ndola at the Defendant's offices. He testified that Mr Locci's son Alexander Locci was present at the time. Further that there were 2 other people present.

2.9 However, the payment as per contract did not come through in spite the continued use of the machine. He testified that the Plaintiff was thus claiming the sum of 203,064.00 Euros. This was as per page 18 of the Plaintiff's bundle of documents. That the figure included interest. He clarified that the principal sum that was due is 140,000 Euros plus 63,064.05 Euros as interest.

2.10 It was his further testimony that he had also earlier informed the Court that he had hired out some machinery. On page 7 of the Plaintiff's bundle is one of the items he had hired out which he stated is a roller tyre, and on page 9 a Dynapack roller amongst other things. He testified that other items hired out as listed on page 21 of the Plaintiff's bundle were the con crusher, jaw crusher, mechanical broom and a 20-foot container all delivered between the 28th August, 2011 and 20th April, 2012.

2.11 He testified that according to page 5 of the bundle, his company was paid K50,000,000 on 12th August 2011. A further K50,000 was paid on the 3rd of April 2012 as per page 8 of the Plaintiff's bundle. He suggested that on page 20 of the Plaintiff's bundle is a breakdown of what the Company was owed that he stated were:

- K1,512,000 for the Tyre Roller
- K369,00 0 for Bitumen Sprayer
- 246,000 Big plate compactor
- K123,000 Small plate compactor

The total amount claimed was therefore K3,538,109.04 rebased.

2.12 When cross-examined and referred to page 20 of the Plaintiff's bundle of documents, the witness agreed there was no mention of Dyna mechanics in the document. He testified further that the document was prepared by his accountant. Further that it depicts the equipment that was hired and the period of the hire. That this was from 22nd September 2012 to December 2015.

2.13 Questioned further, he acknowledged that he was aware that the Defendant's contract was terminated by the Road Development Agency (RDA) in September, 2012. He did not know that the Defendant did not work after December, 2012. He stated that he did write to the Defendant after the contract was terminated to collect the equipment.

2.14 He agreed that he was granted authority by RDA to collect the equipment in writing. Further that the Defendant did confer with RDA to allow the Plaintiff to collect the equipment. He confirmed the document referred to him on page 11 of the Plaintiff's bundle to be the letter that the Defendant wrote to RDA in this regard.

2.15 He stated that the only thing he collected was the tyre roller. He did not collect the rest of the equipment because he had

asked the Defendant to provide money for diesel which they did not do. Ultimately, it was the Defendant that was supposed to deliver the equipment to the Plaintiff as far as he was concerned. In addition, he asserted that some of the things were not on the site such as the container.

2.16 Questioned further on this assertion, he acknowledged that he did not inform RDA that some of the Plaintiff's equipment was not on site. It was his evidence that he did not have money for diesel and this was the other reason he did not collect the items. He acknowledged that there was no document presented before the court that indicates the conditions and the rates for the hire of the equipment. Further, that there was no document showing the parties agreed for the diesel to be paid to him for the collection of the machinery.

2.17 He testified that he wrote to the Defendant twice to request for the diesel. He however, did not have copies of the letters that he wrote in the Plaintiff's bundle of documents. When referred to page 3 of the Plaintiff's bundle, Mr Gilarbi confirmed that the purchase price for the Asphalt plant was 140,000 Euros. He acknowledged that the agreement did not

include interest. He further agreed that the interest rate that the Plaintiff claims for the Asphalt plant on page 18 of its bundle was not agreed upon with the Defendant. He thus accepted that he put it in himself.

2.18 He asserted that RDA did not allow him to collect the Asphalt plant as he did not request for it. When referred to page 10 of the Plaintiff's bundle, he confirmed that this was a letter authored by the Plaintiff in which it was seeking the release of its equipment. Further that the first item listed, is the Asphalt plant.

2.19 He agreed as true that he never collected the Asphalt plant. That it was further true that the Plaintiff was allowed to collect the plant. He acknowledged that the documents on page 2,4, and 7 of the Plaintiff's bundle of documents are not inscribed with the words 'delivery note' that were inserted in pen. He insisted that they nonetheless served that purpose. He further acknowledged that "Fratelli Locci ltd" the Defendant company does not appear on the documents.

2.20 He agreed that the documents do not have the agreed price for the hire per hour or day. He further agreed that there was

no document in the bundles showing a relationship between GM International and the Defendant.

2.21 When re-examined, Mr Gilarbi testified that the dates referred to on page 20 of the Plaintiff's bundle of documents that covered 23rd September 2012 to December 2015 was included because that was the period the Plaintiff contends the Defendant had the equipment as confirmed by the Plaintiff's accountant.

2.22 PW2 was Moses Katongo. His evidence as that he was employed as a Human Resources officer in the Defendant company at the time of the agreement between the Plaintiff and Defendant and was based in Ndola. He testified that he was not very familiar with the circumstances leading to the agreement but knew that the Defendant was in the business of road construction and were using the Plaintiff's Asphalt plant.

2.23 His understanding was that the plant was hired until the day Mr Gilardi (PW1) and Mr Alexander Locci went to his office with a contract of sale. The 2 men signed the contract at his desk. He in turn appended his signature to the contract as a witness. He testified that the agreement is on

page 3 of the Plaintiff's bundle of documents. He added that the contract had conditions of purchase of the Asphalt plant. The only role that he played was therefore the witnessing of the signing of the contract.

2.24 He was not certain of the actual period the Asphalt plant was hired. However, he was certain the hire ceased when the contract for its ultimate purchase was signed. He found the Asphalt plant in Ndola when he was sent there.

2.25 When cross-examined, the witness testified that he was a Human Resource officer. He agreed that it was not his job to look into issues of contracts between Mr Locci on behalf of the Defendant and other entities. He stated that he did briefly read through the contract before he signed it. He did not have the time to check if the plant was in good working order of not. He did not receive any complaint from the Defendant about the machine not being in good working order. He did not receive or learn of any correspondence between the parties in which such representation was made.

2.26 He was aware that RDA had cancelled its contract with the Defendant. Further, that RDA took possession of the site

where the machinery was. He was also aware that RDA requested the Plaintiff to collect the Asphalt plant. Further that the Plaintiff did not collect the plant. The purchase price of the plant was agreed to be 140,000 Euros. He confirmed that the works did not continue after RDA confiscated the equipment.

2.27 In re-examination, the witness stated that the Asphalt plant was on hire before the signing of the contract. As far as he was aware, the Asphalt plant was working before the signing of the contract. He testified further that everything that was at the site was seized and this happened after the contract of sale had been signed.

2.28 PW3 was Goodson Ngosa an operator of Asphalt plants. He testified that he has been an operator since 2005. He worked for the Defendant and was operating an Asphalt plant from June 2011 to September 2012. He testified that he was working from Mufulira at the time. He explained that the Asphalt plant came from Lusaka and was supplied by Mr Gilarbi (PW1). It was his further evidence that the plant was being used for paving of the roads that the Defendant was working on in Ndola and Mufulira.

2.29 It was Mr Ngosa's further evidence that the Defendant did not manage to complete the works that it was contracted to do. The Company was stopped in the process and he learnt that the contract had been terminated. No other Asphalt plant was used during the period that he operated it.

2.30 When cross-examined, he agreed that he worked with a plant fitter named Charles Mulundu whom he would call on whenever there were issues with the Machinery which he described as having been "relatively small". That Mr. Mulundu would also operate the plant. He was unaware of any communication between the Plaintiff and the Defendant on problems with the Asphalt plant.

2.31 He asserted that there was never any time when anyone sent a team to fix parts on the plant whilst he was there. He did not know why the Defendant's contract with RDA was cancelled. He testified that work did not continue after RDA terminated the contract. He agreed that the Asphalt plant and other machinery were confiscated by RDA. He was not aware that RDA requested the Plaintiff to collect its machinery.

2.32 When re-examined, Mr. Ngosa stated that the small problems associated with the plant related to welding and occasional cutting off of the conveyor belt.

2.33 PW4 was Chimuka Lwiindi a Secretary to the General Manager in the Defendant company. She testified that she raised tax invoices for payments made by the Defendant. That the first was for mobilisation of equipment from Mufulira to Ndola. This equipment included a grader, a roller, the Asphalt plant, a 20-foot container, 2 small hand compactors and 1 big plate compactor. There were also mechanical brooms.

2.34 She testified that the payments were made in 2011 and shown on page 5 and 8 of the Plaintiff's bundle for the hire of equipment. She stated that these were the only payments made and there was an outstanding balance that should have been paid though she could not recall the sum.

2.35 When cross-examined, she testified that the first payment made was for mobilisation of the equipment that was hired.

That was the case for the Plaintiff.

*2.36 <u>The Defendant's case</u>*

2.37 Patrick Chibuye Kunda, a freelance interpreter testified as DW1. His evidence was that he is fluent in and interprets French, Italian, Spanish and Portuguese. He testified that between 2011-2012. He was Operations Manager at the Defendant company for the formula 1 project in Mufulira Lot 2. At the time, the Plaintiff had a working relationship with the Defendant. That the Defendant had hired earth moving equipment from the Plaintiff . Also included were an Asphalt plant, roller compactors, crushers and a 20-foot container.

2.38. He testified that he was very close to the Defendant's Director an Italian national by virtue of his proficiency in Italian. He explained that he was present in most of the Defendant's meetings to provide translation. It was his further testimony that the initial agreement entered into between the parties was to buy the Asphalt plant. However that the agreement changed from the purchase of the plant because a few faults were detected on it at the site. Notably, that the heating elements were not heating to the required temperature the bitumen was supposed to get to.

2.39 The subsequent mechanical repairs undertaken, adjustments and costs incurred by the Defendant in the

process did not yield any result. Further the fact that the Plaintiff misrepresented the quantity of the bitumen that the plant could produce meant the production was slow and delayed the project. The Defendant thus decided to hire the Asphalt plant instead of buying it.

2.40 He testified that the Plaintiff was notified about the faults upon discovery. He added that what followed was that RDA terminated the Defendant's contract and seized all the equipment that included the Plaintiff's machinery that was on site. The Defendant then communicated the termination of the contract to the Plaintiff. RDA was also requested to allow the Plaintiff to collect its equipment that was hired under the Formula 1 project.

2.41 He testified further that there was also a letter on page 10 of the Plaintiff's bundle from the Plaintiff addressed to the Defendant dated 1st October 2012. In it, the Plaintiff communicated its desire to move its machinery from the site. Included on its list were the Asphalt plant, 2 Crushers, Bitumen tank and trailer, Mechanical broom and Dynapac roller.

2.42 The Defendant responded to that letter on 1st October 2012 confirming that the Asphalt plant and other machinery were in its yard in Mufulira and Ndola. He testified further that on page 12 of the bundle is a letter from RDA dated 8th August 2013 addressed to the officer in charge Mufulira Central Police granting authority to the Plaintiff to retrieve their equipment from the sites. As far as DW1 was aware, the agreement between the Plaintiff and Defendant was terminated immediately after RDA terminated its contract with the Defendant in or about October 2012.

2.43 He testified that on page 5 of the Defendant's bundle is a letter from the Defendant dated 12th October, 2012 addressed to the Plaintiff inquiring about the rates of the hire of the equipment and plant and seeking to discuss the matter. He could not recall there being any agreement between the Plaintiff and Defendant over the applicable rates.

2.44 He confirmed that on page 18 of the Plaintiff's bundle is a document making reference to a sale of the Asphalt plant at 140,000 Euros that he assumed was the sale price. He testified that on page 19 is a document making reference to

the hire from 8th July to 2nd October 2011. He added that the rates were depicted in days.

2.45 He could not recall if there was a final agreement on the rates. He questioned the interest claimed stating that during this period there were letters circulated about the termination of the contract with RDA and authorization granted to the Plaintiff to retrieve its equipment. Therefore that there was no contract subsisting in the stated period.

2.46 He stated that at page 20 of the Plaintiff's bundle of documents reference is made to "standing time" from September 2012 to 27th July 2015 at K 1400 per day. His reaction to this is that the contract was terminated in 2012. He further disputed the rate of K1,400 per day as there was no formal agreement to that effect.

2.47 It was Mr Lwnidi's further evidence that on page 21, reference was made to the hire of 2 crushers, mechanical broom and a 20-foot container. The period is stated to be between 28th of August and 31st December 2015 and the rate used is per day. He stated that he could not recall there being any formal agreement on this.

2.48 Page 22 makes reference to the sale of the Asphalt plant at 140,000 Euros. Interest was represented to be of 9 months as at 30th of September, 2016. His reaction to this was that the plant was not purchased for reasons he had earlier explained. As far as he was aware, the documents he had been referred to in the Plaintiff's bundle asserting these claims were prepared and worked out by the Plaintiff.

2.49 When referred to the notice to produce, he testified that it had a document showing the payments that the Defendant made of K50,000, K30,000, K20,000 and a further K20,000 dated 3rd of April 2012, 10th of August 2012, 17th August 2012, and 21st September 2012 respectively. He added that the first payment was by cheque whilst the other 3 were by Bank transfer. The total paid was K120,000.

2.50 When cross-examined, Mr Lwindi testified that it was correct that the Defendant claims the sale was cancelled because the Asphalt plant was not of mercantile quality and had defects. He agreed that the request to withdraw the machine did not allude to the fact that the Asphalt plant was defective. He could not recall if there was any correspondence from the Defendant alluding to the defects.

He maintained that the Plaintiff was informed about the defects. He did not know Mr Godson Ngosa (PW3) and did not agree with the testimony attributed to him to the effect that the machine was working ok.

2.51 He agreed that he had never personally operated an Asphalt plant. When referred to page 1 of the Defendant's bundle, he testified that he had not come across the exhibited document. He accepted that according to paragraph 2 of what he agreed was a contract of sale, there is indication of a balance on an amount that was due in November 2011. He did not know if the payment was made in 2011. He testified that it became difficult to come up with a computation after the termination of the agreement.

2.52 When re-examined examined, he testified that it became difficult to come up with a rate because the computation was one sided. There was no reconciliation that was done. He did not know if there was any handover or not as he was just an employee. It was not his responsibility to know.

2.53 DW2 was Zico Banda a Regional Manager with RDA. She testified that in 2013 she was Regional Manager for RDA Copperbelt, based in Ndola. She held that position since late

December 2012. She testified that at the time she was Regional Manager for the Copperbelt she found that the contract between RDA and the Defendant had been terminated. After the termination of the contract, the equipment that was on the project was seized by RDA and was in its custody.

2.54 She confirmed that on page 7 of the Defendant's bundle of documents was a letter from RDA addressed to Mufulira Central Police dated 8th of August 2013 referring to the equipment brought on site . Her subordinate authored the letter and in it advised that the equipment should be released to Dyna mechanics the Plaintiff Company. She explained that this is the equipment that had been seized by RDA.

2.55 When she saw the letter she did not release the equipment. Instead, she wrote a comment on the letter stating that the equipment should not be released until authority was sought from the CEO – RDA. The letter with her comment is in the notice to produce dated 1st July 2020 at page 4. She explained that she signed the letter on 13th August 2013.

She explained that did not agree with the letter presented to her by the Plaintiff. Therefore, on page 3 of the notice to produce is a letter she drafted to seek guidance from the CEO dated 16th July 2013 for the attention of the legal counsel.

2.56 On page 2 of the notice to produce is a letter dated 23rd November 2012 from the Plaintiff addressed to the CEO RDA seeking authority to surrender this equipment. She testified that she eventually received a letter from the CEO on page 5 of the notice to produce, instructing her to go ahead and release the equipment. She then in turn instructed her technician to witness the handover of the equipment to the Plaintiff. This was done for what was collected as per internal memo dated 16th September 2013.

2.57 From the 5 items listed, only 1 item was collected. This was a Dynapac Roller that was collected on 16th September 2013. The other 4 equipment were not picked up because the capacity of the lowbed truck that came to get the machinery could not cater for all at the same time.

2.58 According to the Mrs Banda, it was the Plaintiff that was supposed to provide the truck for collection of the equipment

being the ones authorised to do so. To the best of her knowledge, the Plaintiff did not collect the rest of the equipment. She added that there was nothing stopping them from picking up their equipment on site. She confirmed that the Asphalt plant was not collected and was not part of the original list that she had been authorised to release.

2.59 When cross-examined, it was the witness testimony that the contract between RDA and Defendant was to construct a pedicle road from Makombo to Luapula river. She came in after the contract had been terminated. She confirmed that according to the statement in the second paragraph of page 7 in the Defendant's bundle, the roads worked on were in Mufulira and Ndola a fact she could not rule out as she came after the contract was terminated.

2.60 She agreed that the pedicle road was therefore a separate agreement. She was not in a position to tell if the roads were done or not. She could not confirm if the Defendant was paid. All that she knew was that the case between RDA and the Defendant was closed.

She was aware that there was a contract between the Defendant and The Plaintiff. RDA was not privy to that contract and its dealings were exclusively with the Defendant that it had an agreement with.

2.61. She explained that following the termination of the contract, the Defendant had to be involved in the identification and release of the equipment to the appropriate owners. She therefore agreed as correct that the Plaintiff had to go through the Defendant to get its equipment from RDA.. She did not know why the contract with RDA and the Defendant was terminated. She agreed that it was just one of the pieces of equipment that was collected by the Plaintiff. As far as she was aware RDA kept the equipment after the termination of the contract because there was a case in Court. She did not know where the other equipment is.

2.62 In further cross-examination, she testified that the Asphalt plant was not listed in the letter at page 2 of the notice to produce. She agreed that she could not authorise the release of anything that was off the list.

2.63 When re-examined , Mrs Banda testified that there could have been other letters aside from the one on page 1 containing the list after the termination of the contract.

2.64 DW3 was Alessandro Locci who gave his evidence via the Zoom Platform with leave of Court. He testified that he was the site manager for the Defendant company. He identified and produced his witness statement with leave of court in evidence. The statement discloses that sometime in 2011 the Defendant was awarded a contract by the RDA for the rehabilitation of Urban roads under the Formula 1 road project in Mufulira (lot 2) Ndola and Pedicle Road.

2.65 He recalled that it was on 3rd October, 2011, that he entered into an agreement on behalf of the Defendant with the Plaintiff for the purchase of an Asphalt plant. The purchase price was 140,000 Euros. The plant was to be used for the road works. It was agreed that an initial fifty thousand Euros (50,000) as advance payment would be made and the balance of ninety thousand Euros(90,000) was to be paid in two equal instalments in October 2011 and November 2011 respectively.

2.66 He testified that it was an implied condition of the contract that the Asphalt plant would be of merchantable quality and reasonably fit to produce asphalt at the requisite quality to enable it complete the road works contract with RDA. That however when the Plaintiff delivered the plant to the Defendant, it was observed that it did not work properly. The quantity and quality of asphalt production represented by the Plaintiff was not achievable due to numerous mechanical faults. Particularly, that the bitumen heating element did not reach the requisite temperature and required the replacement of parts and readjustment.

2.67 He testified that the Defendant paid for the replacement of the heating elements and mechanical repairs of the plant but this still did not yield the expected results of reaching the necessary temperature for bitumen heating within the requisite time which caused slow asphalt production and resulted in delay in the project.

2.68 Therefore, due to the Asphalt plant not being reasonably fit to perform its intended purpose and further not being of merchantable quality, the Defendant decided to reject the plant and treated the contract as having been repudiated by

the Plaintiff. The Defendant also informed the Plaintiff of the mechanical faults in the Asphalt plant and by letter dated 1st October 2012 at page 2 of the Defendant's bundle of documents, the Plaintiff agreed to accept the Asphalt plant back. From that point on, it was agreed that the Defendant could hire the Asphalt plant as opposed to outright purchase in light of the faults it had.

2.69 It was his further evidence that on 18th September, 2012, RDA terminated the Defendant's contract and seized all machinery and equipment found on its sites that included the Plaintiff's machinery that had been hired by the Defendant. On the 6th October 2012, the Plaintiff by letter on page 3 of the Defendant's bundle of documents requested for authorisation for the Defendant to release their machinery that was seized by the RDA.

2.70 On the 8th October, 2012, the Defendant communicated in writing to the Plaintiff the machinery that was seized by RDA that included the Asphalt plant. That communication is on page 4 of the Defendant's bundle of documents. He added that on 10th November, 2012, the Defendant also notified the RDA that certain equipment seized by them belonged to the

Plaintiff and should be released to them. That communication is on page 6 of the Defendant's bundle.

2.71 He testified that The RDA agreed to release to the Plaintiff the stated machinery as per letter on page 7 of the Defendant's bundle. He was aware the Plaintiff was thereafter notified that it was free to collect its Asphalt plant and machinery from RDA.

2.72. It was Mr Locci's further evidence that on the 6th October 2012, the Plaintiff sent to the Defendant its final statement of dues for the hire of machinery which the Defendant did not agree with as the Plaintiff unilaterally applied rates of hire of machinery that were not agreed upon by the parties at any stage. This disapproval was communicated to the Plaintiff by way of letter dated 12th October, 2012 on page 5 of the Defendant's bundle of documents.

2.73 That the Plaintiff further charged the Defendant for standing hire of the equipment which was also neither agreed upon by the parties nor applicable in the circumstances as the Plaintiff was free to collect its equipment from RDA and expressed willingness to do. That this expression is shown

by the Plaintiff's letter dated 1st October 2012 at page 2 of the Defendant's bundle.

2.74 He was aware and in a position to confirm that the Defendant hired a 20-foot container from the Plaintiff that was brought to the site and was only utilised for 12 months. It was agreed by the parties that standard rates of hire would apply to this and no other rates were agreed upon subsequently.

2.75 He added that the jaw-crusher was never in fact delivered on site and was therefore neither hired nor used by the Defendant at any stage. That this is further evident from the fact that there are no delivery notes and or written confirmation of delivery produced by the Plaintiff. Further that as regards the con-crusher , his evidence was that although it was brought to the site by the Plaintiff, it was in separate pieces that had to be assembled. However this was not done on site and was therefore never used by the Defendant. The Defendant thus disputed any liability for this claim.

2.76 He was also aware that the Plaintiff has applied hiring rates on the machinery after the termination of the contract that

the Defendant strongly disputed because the Plaintiff was allowed to collect the equipment from RDA and was notified about this on various occasions but wilfully elected not do so as shown on pages 6 and 7 of the Defendant's bundle of documents. He therefore maintained that the hiring rates for the equipment and machinery were not agreed upon by the parties.

2.77 He was also in a position to confirm that the Defendant did make payment to the Plaintiff for the hire of the equipment as per invoices raised at pages 5 and 8 of the Plaintiff's bundle of documents. He was not aware of any subsequent invoices raised by the Plaintiff which were outstanding and unpaid by the Defendant. He believed the statements of account exhibited and relied upon by the Plaintiff was an afterthought and not supported by the agreement between the parties or an invoice seeking for payment of the amount claimed.

2.78 It was his position that at the time of seizure and termination of the contract by RDA, the Defendant did not owe any of the sums claimed by the Plaintiff as is evident from the fact that there are no pending invoices on record.

2.79 When cross-examined, it was DW3's evidence that he did confirm there was an agreement entered into for the purchase of the Asphalt plant on page 3 of the Plaintiff's bundle of documents. That he signed the contract. He maintained his contention that the Asphalt plant was faulty. He confirmed that he did not have anything in writing before the Court to support the suggestion that the Defendant wrote to the Plaintiff to notify it about the defects.

2.80 He did not remember Goodson Ngosa (PW3) and was unaware that he testified that the Asphalt plant was working properly. Questioned further, he testified that on page 3 of the Defendant's bundle is a letter whose subject was a final statement on hire of machinery. He confirmed that the Defendant received this statement though he did not personally sign for it. He however maintained there was no agreement between the parties on the hiring rates and quantities indicated.

2.81 He stated that what worked and the Defendant had asked for was paid for. What did not and was not asked for and merely dumped at the site, was not paid for. He did not have any evidence before Court for the payments. He did not

agree with the computation shown to him on pages 18-22 of the Plaintiff's bundle.

2.82 There was no re -examination and that was the close of the Defendant's case.

## 3.0 Submissions

*The Plaintiff's submissions*

3.1 The Plaintiff's submissions were filed into Court on the 13th April, 2023. It was submitted that there is evidence on record that the Plaintiff and the Defendant entered into an agreement for the hire of the Plaintiff's equipment in this matter for the construction of roads in Mufulira. That there is evidence at page 10 of the Plaintiff's bundle of documents of the request made by the Plaintiff for confirmation of the equipment that was delivered to the Defendant at the time the contract with the Defendant was terminated with RDA.

3.2 Reference was made to the Learned authors of **Construction Law from Beginner to Practitioner, 2016 London** at page **36** that opine that:

***"the meaning of the terms is a question of fact where the contract has been made on a wholly oral basis. The court must decide the issue from the evidence which is given to it".***

It was submitted as not in dispute that there was an agreement between the parties for the hire of the Plaintiff's equipment. Therefore, that the Plaintiff is entitled to the sums due for the hire of the equipment by the Defendant in this matter.

3.3 It was argued that there was evidence on record that there was an agreement for the sale of the Asphalt plant; that the Defendant's employee who operated the machine testified it was working fine and that PW1 informed the Court he did not collect the Asphalt plant and that the Defendant had bought it and it was their property. It was submitted that this was a position the Plaintiff confirmed to RDA in its letter at page 11 of the Plaintiff's bundle.

3.4 Reference was made to the learned authors of **Treitel; The Law of Contract, 14th Edition 2017, Sweet and Maxwell** wherein the authors wrote at page 928 that:

***"A breach of contract is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract or performs defectively or incapacitates himself from performing "***.

3.5 It was submitted that the Defendant had breached the contract for the purchase of the Asphalt plant and as such

that the Plaintiff is entitled to payment of the sum of 140,000 Euros in respect of the purchase agreement. The Plaintiff prayed for the grant of its reliefs accordingly.

*Defendant's submission's*

3.6 The Defendant's submissions were filed into Court on 30th June 2023. It was submitted that the questions for the Court's determination were:

a) Whether or not the contract of sale for the Asphalt plant dated 3rd October 2011 was repudiated and terminated by the parties; and the consequences as a result thereof.

b) Whether or not the Defendant owes to the Plaintiff any monies for the hire of the machinery, particularly the sum of Twelve Million Nine Hundred and Thirty-Eight Thousand Six Hundred and Forty-Nine Kwacha One Ngwee (K12,938,649.21) as per Plaintiff's claim.

3.7 On the first question posed, it was the Defendant's submission that it was not in dispute that the parties entered into an agreement for the purchase of an Asphalt plant on 3rd October 2011 on page 3 of the Plaintiff's bundle of documents. However, that it was the Defendant's contention that the agreement was terminated by the parties

owing to the fact that the Asphalt plant was neither reasonably fit to perform the purpose intended nor of merchantable quality owing to various mechanical faults.

3.8 It was argued that it cannot be disputed that the transaction between the parties was one that was for the sale of goods governed by the **English Sale of Goods Act 1893**. It was argued that section 14 of that Act provides that:

*"Implied conditions as to quality or fitness*

***Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or conditions as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:***

*(1)* ***Where the buyer, expressly or by implication, makes known to the seller the particular purpose for the which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is on the course of the seller's business to supply (whether he be the manufacturer of not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no condition as to its fitness for any particular purpose:***

(2) ***Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or***

***not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed:***

3.9 It was argued that it was evident from the testimony on record of PW1 that the Plaintiff was made aware the particular purpose for which the Asphalt plant was required by the Defendant. Notably the production of the requisite quality of Asphalt to facilitate the road construction contract awarded to the Defendant by the RDA. That it was not in dispute that the Plaintiff company ordinarily dealt in and supplied for hire various machinery used in road construction that included the Asphalt plant.

3.10 It was argued that in pursuance of section 14, there was clearly an implied condition in the contract of sale between the parties that the Asphalt plant would be reasonably fit for the said production of Asphalt at the requisite quantity and therefore of merchantable quality.

3.11 Reference was made to the case of **Examination Council of Zambia vs Reliance Technology Limited**[1] that it was argued provided clear guidance as to what constitutes 'merchantable quality'. That the Supreme Court held:

***"There is a strict duty to provide goods which are of merchantable quality and which ae reasonably fit for the purpose for which they were being sold. In Grant V. Australian Knitting Mills Ltd (1936) AC 85, Dixon J. at page 418 provided useful guidance as to the meaning of the term merchantable quality as follows:*** *"The goods should be in such a state that the buyer, fully acquainted with the facts, and therefore knowing what hidden defects and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and without special terms;*

***We agree with the surfeit of authorities that have determined merchantability within the context of sale of goods, including the observations made by the Court in B S Brown & Sons Limited V Craiks Limited [(1970) 1 ALL ER 823] as quoted by the learned counsel for the appellant in his submissions. Goods are said to be of merchantable quality if they are fit for purpose for which goods of that kind are commonly bought***".

3.12 It was submitted that the Defendant's contention and evidence on record was that when the Asphalt was delivered by the Plaintiff to the Defendant, it did not work properly such that the quality and quantity of the asphalt production as represented by the Plaintiff was not achievable due to

various mechanical faults. That this was pointed out by PW1 and admitted in cross-examination of PW2.

3.13 Further that DW1 and DW3 gave evidence of the agreement and its subsequent termination due to the faults, the Defendant's rejection of the plant and the Plaintiff's acceptance to take it back. It was argued that this evidence was not substantially challenged during cross-examination.

3.14 It was submitted that the Defendant having established that the Asphalt plant was not of merchantable quality or reasonably fit to produce asphalt at the requisite quantity as represented by the Plaintiff before the sale, was on firm ground to exercise its right to reject it and consequently terminate / repudiate the contract of sale dated 3rd October, 2011.

3.15 Reference was made to **Section 11(2) of the Sale of Goods Act** in support which provides that:

***"In Scotland, failure by the seller to perform any material part of a contract of sale is a breach of contract, which entitled the buyer either within a reasonable time after delivery to reject the goods and treat the contract as repudiated, or to retain the goods and treat the failure to perform such material part of a***

***breach which may give rise to a claim for compensation or damages".***

3.16 It was argued that this position was upheld by the Supreme Court in the case of *Examination Council of Zambia vs Reliance Technologies (supra)* in which the Court held that:

***"The defects that plagued the printer from inception had seriously compromised its functional character. We hold therefore, that the printer was not merchantable. We further hold that the appellant as buyer was entitled to exercise the primary remedy available to it when there is a breach of a condition namely, to reject the printer as provided for in section 11(2) of the Sale of Goods Act".***

3.17 Also referred to was the case of **Noors Motors Ltd vs Sakuwaha**[2] wherein the Court of Appeal making reference to the Supreme Court decision held as follows:

***"as observed by the Supreme court in Examination Council of Zambia vs Reliance Technology Limited, there is a strict duty to provide goods which are of merchantable quality and which are reasonably fit for the purpose they are sold. In casu, the engine which was susceptible to overheating seriously affected the functioning of the bus. Therefore, the respondent was entitled to return it pursuant to section (11) (2) of the Sale of Goods Act. The appellant breached its duty to provide a merchantable bus to the Respondent".***

3.18 It was argued that the evidence on record clearly shows that the Plaintiff confirmed the Asphalt plant was its property and as a result accepted the return of the plant. That the Plaintiff cannot on the one hand acknowledge ownership and seek a return of the Asphalt plant and on the other seek payment for the said plant and that there was a contract that was clearly repudiated by the Defendant.

**Johnson vs Agaew**[3] was cited in aid wherein the Court held that:

***"it is easy to see that a party who has chosen to put an end to a contract by accepting the other party's repudiation cannot afterwards seek specific performance. This is simply because the contract has gone – what is dead is dead"***.

It was submitted therefore that the Plaintiff's claim on the sale of Asphalt plant must fail in the absence of evidence to the contrary.

3.19 Moving on to the second proposed question regarding the claim of K!2,938,649.21 as hire charges claimed by the Plaintiff, it was the Defendant's submission that there is no documentary evidence to support the Plaintiff's allegations on the agreed rate of hire; or evidence to support the unilaterally calculated sum which the Plaintiff seeks to

claim. That this extended to the period when the equipment and machinery were seized by RDA following the termination of the Defendant's contract. It was the Defendant's position that is had denied liability of the sum in its entirety.

3.20 Reference was made to the learned authors of **Halsbury's laws of England 4th edition Volume 19 paragraph 19** who opine that:

***"To succeed in any issue, the party bearing the legal burden of proof must (i) satisfy a judge or jury of the likelihood of the truth of his case by adducing a greater weight of the evidence than his opponent and (ii) adduce evidence sufficient to satisfy them to the required standard or degree of proof...In civil cases, the standard of proof is satisfied on a balance of probabilities"***.

3.21 It was argued that this position has continually been reiterated by the Courts in a number of decisions such as **Jones Siluyele Mbita and Others vs KCM** [4], **Zambia Railways vs Pauline Mundia and Another**[5] among others wherein the Court held that:

***"... the old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable".***

3.22 It was submitted thus that the Plaintiff had the burden of proving that the Defendant indeed owes it the outstanding

claimed sum for the machinery. The Defendant questioned whether the Plaintiff had succeeded in establishing the debt. It was submitted as not in dispute that there was an agreement between the parties for the hire of various equipment. However, the Defendant has disputed that there is an outstanding amount due for the hire of the machinery.

3.23 The Defendant invited the Court to take note that the evidence on record and highlighted in its submissions shows that the Plaintiff failed to adduce any proof in support of its claims for the hire of the machinery. That the delivery notes were challenged by the Defendant during cross-examination as not being in its name.

3.24 Further, that the statements relied upon by the Plaintiff on pages 20-22 of its bundle in support of the calculation of the amount due were established to have been unilaterally prepared by the Plaintiff with no supporting basis as to the number of hours or agreed rate of hire and that the claims were in any event rejected by the Defendant by letter dated 12th October, 2012.

3.25 It was the Defendant's position that all outstanding amounts for the hire of machinery requested by the Plaintiff were duly

settled in full in 2012. The Court was also referred to note that the Plaintiff failed to adduce any documentary proof in the form of subsequent invoices that should have been raised for the claimed hire of equipment had there actually been an outstanding amount due to it besides the payments on record.

3.26 It was thus submitted that the Plaintiff's claim was entirely based on a statement prepared by the Plaintiff with no supporting evidence to substantiate its calculations and computations. It was submitted as trite that more is required for the Court to ascertain the amounts and evidence to support these amounts.

3.27 In support of this proposition the Defendant relied on the case of **Mhango vs Ngulube and Others**[6] wherein the Supreme Court stated:

***"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 special loss should react against the claimant".***

3.28 Further relied upon was the case of **Savenda Management Services vs Stanbic Bank Zambia Ltd**[7] wherein it was held that:

***"The need for particularisation of such claims is in order to alert a Defendant of the case against him and aid the Court to properly assess and determine the loss by giving it a monetary value. We have in the past held, and as argued by counsel for the Respondent, that it is 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..."***

3.29 1t was argued that there was no evidence adduced in support of the standing time claim or the equipment for the period September 2012 to July 2015, or that there was any agreement to that effect. The Court was again invited to note that RDA seized the equipment in September 2012 and there was evidence on record showing the Plaintiff was aware of the termination of the agreement. Further that it expressed its willingness to pick up its machinery once given the go ahead by RDA.

3.30 The Defendant thus argued it was evident that there was no agreement between the parties for the payment of standing time

of equipment. It was argued further that the Defendant cannot be held liable for standing time for the equipment seized by RDA that was ready for collection; and that the Plaintiff by its own negligence failed to collect the equipment after being allowed to do so by RDA. Conclusively, it was the Defendant's submission that the Plaintiff had not successfully established:

- ✓ the existence of an agreement for the hiring rates and standing time of the equipment.
- ✓ evidence that these rates were agreed upon and the existence of the period of hire as suggested by the Plaintiff so as to put the Court in a position to appreciate the computation of the figure arrived at by the Plaintiff.

3.31 That aside from the statement prepared by the Plaintiff, there is no other evidence to support the amount claimed by the Plaintiff. The Defendant concluded by stating that it is highly unlikely that the evidence adduced for the Plaintiff can establish a reasonable degree of probability of its version of events as it is more probable than not that the Plaintiff was fully paid for all the invoices it raised against the Defendant for the hire of machinery. The Defendant prayed that the action be dismissed with costs accordingly.

*The Plaintiff's submissions in reply*

3.32 The Plaintiff's arguments in reply were filed into court on the 4th August, 2023. It was submitted that the evidence on record was that the Asphalt plant that was initially hired to the Defendant and then later sold was of merchantable quality and fit for the purpose. That PW3's evidence was that he operated the plant until the end of the contract with RDA and his evidence was not challenged in cross examination. Section 14 (3) of the Sale of Goods Act was cited in aid wherein the law provides:

***"Subject to the provisions of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:***

***(3) an implied warranty or condition as to quality or fitness for a particular purpose may be annexed by usage of trade".***

3.33 The Plaintiff further maintained that the evidence on record shows that the Asphalt plant was sold to the Defendant. In addition, that there is evidence from DW1 who confirms that the Defendant did hire the equipment. Further that the Plaintiff has shown on pages 19-22 of its bundle, the computation of the amounts owed whereas the Defendant

has not availed the Court any evidence of the amount owed for the hire of equipment. The Plaintiff prayed for the grant of all of its reliefs that it submitted it had duly established with costs.

## 4.0 Court's consideration

4.1 I have carefully considered the evidence before me and the elaborate submissions by both parties. The questions for determination as I see it are:

1. *whether there was a contract for the sale of the Asphalt plant that was breached by the Defendant as alleged.*
2. *what if any are the consequences of the alleged breach.*
3. *Is the Plaintiff entitled to the claim of K12,938,649.21 for the hire of equipment.*

4.2 The fundamental principle in civil disputes remains that he who claims must prove his case on a balance of probabilities. In **Khalid Muhammed vs Attorney General** [8], Justice Ngulube CJ as he was then, summed up the settled principle of the law in the following terms:

***"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 defence set up by the opponent has also collapsed. Quite clearly a defendant in such circumstances would not even need defence."***

4.3 In **Zulu vs Avondale Housing Project**[9] Ngulube DCJ stated the following:

***"I think it is acceptable 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 these allegations. a Plaintiff who has failed to prove his case cannot be entitled to judgment whatever may be said of the opponent's case."***

4.4 The learned authors of **Phipson on Evidence 17th edition , London Reuters(legal) Limited 2010 para 6-06 at page 151** state:

***"so far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of issues. If, when all the evidence is adduced by all the parties, the party who has the 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"***

4.5 The authors go on to state:

***"This rule is adopted principally because it is just that he who invokes the aid of the law should be 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 unchallenged throughout the trial exactly where the pleading place it and never shifting in deciding which party assets 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"***

4.6 In the present matter therefore, it is the Plaintiff's primary burden to establish that there was a contract of sale that was breached by the Defendant for the payment of the sum of 140,000 Euros for the purchase of the Asphalt plant. Further, that prior to such sale, the Defendant was and remains indebted to it for the hire of its equipment in the sum of K12,938,649.21.

4.7 Two quite contrasting positions emerge in the evidence presented by the parties. The Plaintiff's version is that it was approached by the Defendant through Mr Locci DW3, for the

hire of its equipment to work on roads in a contract awarded to it by the RDA. That the equipment was delivered to the Defendant and used on the project. Subsequently, the parties went into a discussion and agreed for the outright sale of the Asphalt Plant in particular to the Defendant at 140,000 Euros. That was to be paid in 2 instalments.

4.8 The Plaintiff claims that the Defendant in breach of the contract of sale that was duly executed did not pay a penny of the contract sum and is also in breach in payment of the amounts due for the hire of its equipment.

4.9 The Defendant does not dispute the hire and contract of sale entered into. However, its position is that the initial agreement entered into was for the sale of the Asphalt plant. The Asphalt plant delivered to it was neither of merchantable quality nor fit for the purpose as it did not provide the quality of the asphalt assured by the Plaintiff. The Defendant therefore repudiated the contract and opted to hire the equipment instead.

4.10 Delays in production of the asphalt affected the contract the Defendant had with the RDA that subsequently terminated the contract. All the equipment was seized by RDA but

sanctioned for release by RDA to the Plaintiff upon request. The Defendant disputes owing the Plaintiff any money for the hired equipment stating it settled all invoices issued and in any event that there was no evidence led to show the basis of the sums now claimed or of an agreement on the rates as presented by the Plaintiff.

4.11 The ultimate question therefore turns on which position I accept and why.

4.12 The evidence before me clearly shows that a contract for the sale of an Asphalt plant was entered into between the parties on 3rd of October 2011. In spite of the fact that the exhibit on page 4 of the Plaintiff's bundle (presented to be a delivery note) does not show the name of the Defendant and was by every indication a leaf from what is clearly G.M International's books a suggested parent company of Dyna mechanics, I am prepared to find as not in dispute that the Asphalt plant was delivered to the Defendant.

4.13 It is of course not unimportant that the Defendant through cross-examination seeks to demonstrate that there was no relationship between GM International Ltd and themselves.

The position of the law remains that a parent company is a separate entity from its subsidiary.

4.14 In the **Albazero**[10]**,** the question of the personalities of companies in a group was considered. Roskill LJ at p 807 held that it is was a fundamental principle in English Law,

> ***'Long established and now unchallenged by judicial decision...that each company in a group of companies...is a separate legal entity possessed of separate legal rights and liabilities so that the rights of one company in a group cannot be exercised by another company in the that group even though the ultimate benefit of the exercise of those rights would ensure beneficially to the same person or corporate body irrespective of the person or body in whom these rights were vested in law"***

4.15 In **Adams vs Cape Industries PLC**[11], the English Court of Appeal held:

> ***"Save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of Salomon vs Salomon and Company Ltd***[12] ***, merely because it considers that justice so requires. Our law , for better or worse , recognizes the creation of subsidiary companies, which though in one sense creatures of their parent companies, will nevertheless under the general law fall to be treated as separate***

***legal entities with all the rights and liabilities which would normally attach to separate legal entities"***

4.16 The clear position is thus that all the companies in a group of companies are separate legal entities and not agents of their controlling shareholders.

4.17 However, this angle was not pursued with any vigour by the Defendant. In truth, the evidence is clear that the arrangement was always between the Plaintiff and the Defendant in spite of the casual manner the delivery notes using GM International stationary were dealt with as a matter of convenience by PW1, the Plaintiff's director.

4.18 I therefore also accept as beyond dispute that various other equipment was delivered to the Defendant for use in its road construction project with the Defendant using similar stationary as delivery notes.

4.19 I accept and find as more probable that there were problems found with the Asphalt plant. Although there is no correspondence that was flowing between the parties relating to the faults with the plant, PW3 Mr Ngosa in his testimony did indicate that the plant did have what he categorised as "small issues" that he and the other operator

he named as Charles would attend to and consult on. He does not say it had no problems at all.

4.20 I find the Defendant's account of what was observed on the quality and quantity of the asphalt leading to its decision to repudiate the contract more consistent and acceptable to me. It was, in terms of section 11(3) of the Sales of Goods Act 1893 applicable to Zambia by virtue of the English law extent of application Act Cap 11 of the Laws of Zambia, open to the Defendant to take such route having found that the plant was not of merchantable quality. This position is supported by the Supreme Court and Court of Appeal decisions cited by the Defendant of *Examination Council of Zambia vs Reliance Technology Limited and Noors Motors Ltd vs Sakuwaha* (supra) respectively.

4.21 I accept that the contract between the Defendant and the RDA was terminated in September, 2012 and that all of the Defendant's equipment on site was seized by RDA. Correspondence in both bundles show representation being made by the Defendant upon being made aware of the termination of the agreement seeking to collect its equipment that included the Asphalt plant.

4.22 The letter dated 1st October 2012 on page 10 of the Plaintiff's bundle of documents supports the argument that the Plaintiff was claiming the plant to be its own thus clearly showing it had accepted the Defendant's repudiation of the contract. Further by letter dated 23rd of November 2012, the Plaintiff's director writes to the CEO of RDA requesting for the release of its plant and machinery. The letter reproduced below:

23rd November 2012

The Director and CEO
Road Development Agency
P O Box 50003
Lusaka

Dear Sir,

RE: WITHDRAW OF OUR PLANT AND MACHINERY

We refer to the letter dated 10th November 2012 Fratelli Locci Sri served to your office of notifying the owners of listed plant and machinery including 3nos plate compactor (2No. big plate compactor Mufulira, 2No. small plate compactor in Ndola) which Mr. Locci didn't include on the list, see attached letter.

We would like to make an earnest appeal to seek for your permission and instruction order to release our properties which are of later in your custody.

We trust and hope that you find the above in order.

Yours faithfully
DYNAMECHANICS CONSTRUCTION LTD

ELVESIO GILARDI
GENERAL MANAGE

4.23 On the 8th August, 2013, RDA wrote to the officer in Charge at Mufulira Central Police authorising the release of the plant and machinery that was used by the Defendant to the Plaintiff as rightful owners. That letter is also reproduced below for ease of reference:

Thursday, 08, August, 2013

The Officer-In-Charge
Mufulira Central Police
MUFULIRA

Dear Sir/Madam,

RE: RELEASE OF PLANT AND MACHINERY TO DYNAMECHANICS CONSTRUCTION LTD

The above subject matter refers.

We hereby authorise you to release the plant and machinery used by Fratelli Locci on the rehabilitation of urban roads (Formula One Road Project) in Mufulira (Lot 2) to Dynamechanics Construction Limited who are the owners.

The release of the said equipment has been discussed at high level and authority granted. Kindly oblige.

For any queries please, do not hesitate to contact the under-signed.
Your prompt action shall be highly appreciated.

Yours faithfully
For Road Development Agency – Copperbelt Province

Eng. Ziko Banda
REGIONAL MANAGER

4.24 Based on the above, I find compelling the submission that the sale agreement was duly repudiated by the Defendant and accepted by the Plaintiff who pressed on to collect its plant and equipment. The Plaintiff had a duty to mitigate its loss and its failure to collect its plant and equipment and any subsequent claims of loss in spite of the sanctioned release by RDA cannot be faulted or attributed to the Defendant. The Supreme court decisions in **Eastern Co-operative Union vs Yamene Transport**[13] and **Mtonga vs Ngambi**[14] are instructive on the principle of the duty to mitigate loss. I would dismiss the claim for a breach of contract accordingly.

4.25 Moving on to the claim for the hire of equipment. I am quite prepared to find as indisputable that there was an agreement for the hire of equipment that extended to the Asphalt plant. This agreement was not reduced in writing and there is no correspondence showing an acknowledgement of the existence of any hire agreement which defined what was to be the applicable hiring rates.

4.26 The Defendant makes the point that the only invoices presented by the Plaintiff were paid and consequently that

at the time of the termination of its agreement with RDA there was nothing owing. PW2 asserts that she issued invoices and there was a balance outstanding but there is no documentation or evidence to support that position.

4.27 There were further no other invoices issued by the Defendant or justification provided for extending the billing to September 2016 well beyond the period and month that the contract between the Defendant and RDA was terminated that I find to have been in September of 2012.

4.28 I am satisfied on the evidence as being beyond dispute that the Plaintiff was made aware of the termination of the contract and it was indeed on account of this that the company started making earnest representation for the release of its plant and machinery.

4.29 PW1 Mr Girlarbi admits in cross-examination that he presented no evidence to show there was an agreement with the rates that he claims on pages 19-22 of the Plaintiff's bundle of documents. He agrees that his accountant worked out the figures and the interest and further that that these figures were not agreed on with the Defendant.

4.30 It was the Plaintiff's burden to prove his claim for the damages with a fair degree of certainty on how he arrived at the figures he asserts. The cases of Mhango vs Ngulube and Savenda Management Services vs Stanbic Bank Zambia Ltd *(supra)* cited by the Defendant as well as a plethora of other authorities settle this principle.

4.31 In Mhango vs Ngulube in particular, Ngulube AG CJ reading the judgment of the court observed the following:

> ***"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 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."***

4.32 I am not persuaded to find that the Plaintiff has discharged that burden in this case, or let alone presented any evidence that would even put the court in a position to make an intelligent or inspired guess on what award it could possibly make. I would accordingly hold that the claim for hiring fees stands unproven and is dismissed.

## 5.0 Conclusion

5.1 Having found that both substantive claims for breach of contract and value for hire of equipment have not been established by the Plaintiff, I would dismiss the Plaintiff's suit for lack of merit with costs to the Defendant to be taxed in default of agreement.

5.2 Leave to appeal is granted.

**Dated at Lusaka this ..................day of ...............2026.**

**JUDGE M.D BOWA**