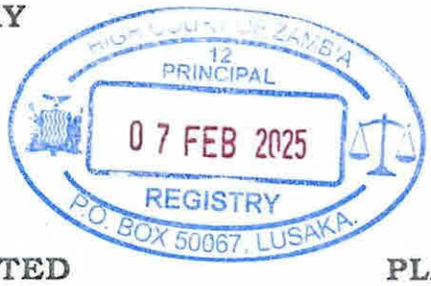
IN THE HIGH COURT FOR ZAMBIA **2020/HP/0973**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)



BETWEEN:

LEGANA INVESTMENTS LIMITED	**PLAINTIFF**
AND	
STANBIC BANK (Z) LIMITED	**1ST DEFENDANT**
STANBIC INSURANCE BROKERS LIMITED	**2ND DEFENDANT**
MADISON GENERAL INSURANCE COMPANY LIMITED	**3RD DEFENDANT**

For the Plaintiff:	*Ms. Kasumpa M. Kabalata – Chalwe and Kabalata Legal Practitioners*
For the 1st and 2nd Defendant:	*Mrs M. Simachela – Nchito & Nchito* *Mrs. M. Chakoleka – Nchito & Nchito* *Mr. B. Kangwa – In house Counsel*
For the 3rd Defendant:	*Mr. K. M. Sikazwe – Jacques & Partners Legal Practitioners*

JUDGMENT

MABBOLOBOLO I. M. J, DELIVERED THE JUDGMENT OF THE COURT

A. CASES REFERED TO:

1. *Mwale v Mtonga and Another SCZ No. 25 of 2015*
2. *Mazoka and Others v Mwanawasa and Others (2005) ZR 138*
3. *Mundia v Sentor Motors Limited (1982) ZR. 66*
4. *Kapoko v The People No. 23 of (2016) ZMCC6*
5. *Colgate Palmolive (Zambia) Inc. v Abel Shemu and 110 Others Appeal No. 181 of 2005*

6. *Mwamba v Nthenge and 2 Others SCZ No. 5 of 2013*
7. *Doroghue v Stevenson (1932) A.C. 562*
8. *Blyth v Birmingham Waterworks Company (1856) 11 EX 781*
9. *Attorney General v George Mwanza (sued in his capacity as personal representative of the late Monica Mwanza) and Whiteson Mwanza (sued in his capacity as personal representative of the late Grace Mwanza) Appeal No. 203/2014*
10. *BJ Poultry Farms Limited v Nutrifeeds Zambia Ltd SCZ No. 3 of 2016*
11. *Khalid Mohammed v Attorney General 91982) ZR 49*
12. *Nyimba Investments Limited v Nico Insurance Zambia Ltd (Appeal No. 130.2016) ZMSC 32*
13. *Esso Petroleum Co. Ltd v Mardon (1967) 2 ALLER*
14. *Morgan v Sim (1885) UKPC33*
15. *J.Z Car Hire v Chala Scirroco Enterprises Ltd, SCZ No. 26 of 2002*
16. *Zulu v Avondale Housing Project (1982) ZR 172*
17. *Mhango v Ngulube & Others, SCZ No. 5 of 1983*
18. *Holmes Limited v Build Well Construction (1973) ZR 97*
19. *Stanbic Bank v Jimmy Kalunga and Another 2014/HPC/028 (unreported)*
20. *Jimmy Kalunga and Another v Stanbic Bank, Appeal No. 60/2017*

B. *LEGISLATION REFERRED TO*

1. *The Constitution of Zambia Chapter 1 of the Laws of Zambia*
2. *The Companies Act No. 10 of 2017 of the Laws of Zambia*
3. *The Banking and Financial Services Act No. 7 of 2017 of the Laws of Zambia*
4. *The High Court Act Chapter 27 of the Laws of Zambia.*

C. *OTHER WORKS REFERRED TO:*

1. *Bryan A Garner, (Ed), Black's Law victionary, 11th Edition, Thonson Reuters, West Publishing Company, 2019*
2. *Cheshire, Fifoot and Furmstone Law of Contract, 15 Edition*
3. *John Hatchard and Muna Nduto, The Law of Evidence in Zambia, Multimedia Zambia, 1991*

1.0 INTRODUCTION AND BACKGROUND

1.1. This is a Judgment on the Plaintiff's suit commenced by way of Writ of Summons and Statement, filed on 22nd September,

2020 and amended by Consent Order granted on 13th June, 2022. The Amended process was withdrawn and refiled as Amended on 18th July,2022.

1.2. In the Amended Statement of Claim, the Plaintiff stated that it is a Company incorporated under the **Companies Act No. 10 of 2017**, the 1st Defendant is a registered Commercial Bank registered by the Bank of Zambia, the 2nd Defendant is a registered Insurance Broker and Company and the 3rd Defendant was a registered Insurance Company carrying on business within the Republic of Zambia.

1.3. According to the Plaintiff, in 2018, the Plaintiff approached the 1st Defendant for a loan facility in the sum of ZMW1,000,000.00. That the facility was denied by the 1st Defendant who instead offered to buy among, other things, the Plaintiff's brand new refrigerated Isuzu Truck Registration No. BAE 7171 ("the Motor Vehicle") and lease it back to the Plaintiff for a facility amounting to ZMW1,000,000.00 for period of 36 months to be paid back in instalments of ZMW40,000.00 per month.

1.4. It was stated that the Motor Vehicle was one of the core assets of the Plaintiff company used to transport its meat products across the country and that at the time of the lease, the Motor Vehicle was comprehensively insured with Goldman Insurance Limited as one of the conditions of the loan facility offered by the 1st Defendant was that it be insured comprehensively.

1.5. That the Plaintiff in view of its need for finances accepted the 1st Defendant's offer to buy its asset and offer a Lease Facility

in August, 2018. That the 1st Defendant then advised the Plaintiff to inform its insurance Company to endorse the 1st Defendant's interest as first loss payee. That however, within 24 hours, the 1st Defendant further cancelled the Plaintiff's existing insurance with Goldman Insurance in order for the 1st Defendant to insure the vehicle with their preferred Insurance Company.

1.6. It was stated that the 1st Defendant then arranged an Insurance Policy for the Motor Vehicle with the 2nd Defendant without the Plaintiff's consent under Insurance Policy No. P/01/4002/246219/2018 dated 13th August, 2018. The Insurance Cover obtained by the 2nd Defendant was comprehensive insurance from 18th August, 2018, to 30th June, 2019 with premium payment of 27,928.05. That the Plaintiff reported the 1st Defendant to the Competition and Consumer Protection Commission for anti -competitive conduct but to date the matter has not been concluded.

1.7. According to the Plaintiff, on 7th January, 2019, its Motor Vehicle was involved in a road traffic accident resulting in damage to the refrigerated container. That on 9th January, 2019, the Plaintiff informed the 2nd and 3rd Defendants about the road traffic accident involving the Motor Vehicle of Policy No. P/01/4002/246219/2018.

1.8. That the Plaintiff was advised to obtain quotations from 3 listed garages all of which turned out to lack the capacity as the 3rd Defendant's preferred garage could not repair refrigerated trucks which information was brought to the attention of the 1st Defendant in February, 2019. Further

that the supplier of the Motor Vehicle, Action Auto, declined to give a quotation for repair.

1.9. The Plaintiff averred that the 1st Defendant advised the Plaintiff to obtain quotations for replacement of the Motor Vehicle as it was a technical write off based on the fact that the Plaintiff was unable to find anyone who could repair it.

1.10. Further that, the 1st and 3rd Defendants did not repair the Motor Vehicle despite the Plaintiff paying its obligations to both parties for the loan facility which payment was debited directly from the Plaintiff's Account with the 1st Defendant and insisted that the vehicle be transported to Port Elizabth, South Africa.

1.11. It was averred that the Plaintiff requested the 1st Defendant to freeze and suspend payments on its facility in view of the fact that the Motor Vehicle that was being used to generate income to pay for the facility was not in use. Further because the delay in settling the claim was not attributed to the Plaintiff but the Defendants, but the 1st Defendant did not do so. That the 1st Defendant threatened the Plaintiff with foreclosure and continued charging interest on the said facility yet it was responsible for the delay in handling the claim.. Further that the 1st Deponent refused to suspend the payments on the Plaintiff's lease facility and further refused to provide the Plaintiff with another facility despite being the one that justly insisted on providing a loan/lease facility and unilaterally cancelled the Plaintiff's Insurance and selected the Insurance Company to insure the Motor Vehicle through the 2nd Defendant.

1.12. According to the Plaintiff, on 17th January, 2020, the 3rd Defendant settled the Plaintiff's claim on a total loss basis and paid the claim amount to the 1st Defendant. That the 1st Defendant was further complacent in its measures to mitigate the losses being incurred by the Plaintiff despite the fact that it was the first loss payee of the Insurance Policy provided by the 2nd Defendant and also a beneficiary of monthly instalment payments with interest from the Plaintiff even without the Plaintiff enjoying the benefit of its lease facility. Further that the 1st Defendant further failed to replace the Motor Vehicle despite receiving the full value of the Motor Vehicle from the Insurance Company sometime in January, 2020.

1.13. The Plaintiff averred that the 1st, 2nd and 3rd Defendants were negligent in the handling of the Plaintiff's interests and set out the particulars of Negligence as below:

1.13.1. Failure by the 2nd Defendant to facilitate an Insurance Policy that would adequately cover the Plaintiff's interest in the event of damage to the Motor Vehicle which the 1st Defendant had purchased from the Plaintiff and leased back to the Plaintiff.

1.13.2. Failure by the 1st Defendant as first loss payee to adequately pursue the claim against the 3rd Defendant and mitigate its losses on the loan facility timeously.

1.13.3. Failure by the 3rd Defendant to expeditiously handle the Plaintiff's claim under Insurance Policy No. P/01/4002/246219/2018

1.13.4. Failure by the 1st Defendant to replace the Motor Vehicle after receiving full value of the claim under Insurance Policy NO. P/01/4002/246219/2018 in January, 2020, from the 3rd Defendant to the detriment of the Plaintiff.

1.14. That by reason of the matters aforesaid, the Plaintiff has suffered loss and damage as particularized below:

1.14.1. Loss of right of use of one of its core business assets;

1.14.2. Loss of indemnity through Insurance paid to the 3rd Defendant by the Plaintiff;

1.14.3. Loss of opportunity cost to restore business asset after 36 months of the lease facility; and

1.14.4 Loss of business as a result of the 1st and 3rd Defendant's delay to indemnify the Plaintiff following insurance payments.

1.15. The Plaintiff set out the particulars of special damages as follows:

1.15.1. Damages from the 1st Defendant for loss of right of use of business asset and failure to indemnify the Plaintiff according to clause 2.1 of the lease facility and loss of opportunity cost to restore ownership of business asset after 36 months of the lease facility.

1.15.2. Damages from the 1st and 3rd Defendant for loss of business.

1.16. The Plaintiff seeks the following reliefs:

1.16.1. *Damages for negligence from the 1st, 2nd and 3rd Defendants;*

1.16.2. *Damages for loss of right or use of asset and failure to indemnify the Plaintiff according to clause 2.1. of the lease facility and loss of opportunity cost to restore the ownership of business asset after 36 months of the lease facility;*

1.16.3. *Damages from the 1st and 3rd Defendants for loss of business;*

1.16.4. *An order that the 1stDefendant recomputes its statement of the Plaintiff's loan on Account No. 467521549 taking into account what payment was effected by 3rd Defendant to the 1st Defendant in January, 2020, instead of January, 2019;*

1.16.5. *An order that all interest charged to the Plaintiff's Account after 9th January, 2019 to January, 2020, be discarded or borne by the 2nd and 3rd Defendants;*

1.16.6. *An order that the 2nd and 3rd Defendants breached the terms of their respective contracts with the Plaintiff.*

1.16.7. *In the alternative an order that the 1st Defendant should honour any interest obligation arising from the breach;*

1.16.8. *Damages for breach of contract by the 2nd and 3rd Defendants.*

1.16.9. *Interest;*

1.16.10. Costs; and

1.16.11. Any other relief the Court may deem fit.

1.17. In the Defence filed by the 1st and 2nd Defendant on 4th August, 2022, they denied the claim that what was applied for by the Plaintiff was a loan and would aver that on 1st June, 2018, the Plaintiff applied for a sale and lease back facility in order to raise working capital.

1.18. That the 1st and 2nd Defendants denied that Defendant instead offered to buy among others things the Plaintiff's brand new refrigerated Motor Vehicle and would aver that following the Plaintiff's application for a Lease Facility the 1st Defendant offered a Lease Facility valued at K965,232.08 to be repaid over a period of 36 months and that one of the leased assets was a 2016 Isuzu refrigerated Truck. That the sum above was a then advanced to the Plaintiff on 14th August, 2018.

1.19. According to the 1st and 2nd Defendants, it is denied that at the time of the Lease, the Plaintiff's Motor Vehicle was comprehensively insured with Goldman Insurance and would aver that at the material time the Plaintiff failed to provide proof of comprehensive insurance cover over the asset from Goldman Insurance or any other Insurance Company. That the Plaintiff's related averments were denied and that the Defendant would at trial aver that the Plaintiff failed to provide the Defendants with a valid Insurance Cover to satisfy the provisions of the Lease Facility and on 9th August, 2018, the Plaintiff authorized the 1st Defendant in writing to insure the leased asset and

renew the Insurance Policy annually throughout the duration of the Lease in accordance with clause 2.2. of the Facility Letter. Further that the Complaint before the Competition and Consumer Protection Commission was admitted but would aver that the matter was concluded without an adverse finding against the Defendants.

1.20. According to the 1st and 2nd Defendants, the total insurance premium payable was the sum of K36,984.72 and not K27,928.05 as claimed by the Plaintiff. Regarding the accident and, according to the Police Report, the accident involving the Plaintiff's Motor Vehicle occurred on 18th January, 2019, and the Defendants were informed on 21st January, 2019.

1.21. The 1st and 2nd Defendants admitted that the Plaintiff was advised to obtain 3 quotations for repair of the Motor Vehicle as it is standard procedure but denied the claim that the supplier of the Motor Vehicle declined to give quotations to repair and would aver that Action Auto provided a quotation for repair of the Motor Vehicle and indicated that the repair works would be carried out in South Africa at their cost and that they would bear any risks associated thereto.

1.22. The 1st and 2nd Defendant deny having neglected the Plaintiff's interests and would aver that according to the Lease Agreement, the 1st Defendant was the absolute owner endorsed as first loss payee and therefore equally required indemnification. That the 1st and 2nd Defendants deny the assertion regarding the request to freeze and suspend

payments and threatening the Plaintiff with foreclosure and continued charging interest and would aver that in terms of clause 8.2 of the Lease Facility the Plaintiff has an obligation to continue paying all amounts due under the Facility even if the asset was damaged and that the Plaintiff occasioned the delay in the 3rd Defendant settling the claim.

1.23. The Defendants deny the assertion that the 1st Defendant was complacent in its measures to mitigate the losses incurred by the Plaintiff and would aver that it pursued the insurance claims expeditiously and offers of settlement were made in March and April, 2019 which the Plaintiff unreasonably rejected and only reverted to the under writer in November, 2019 when it accepted the amount offered by the 3rd Defendant.

1.24. The assertion that the 1st Defendant failed to replace the Motor Vehicle despite receiving the value of the Motor Vehicle is denied and it was averred that the Defendant was compensated as first loss payee under the Insurance Policy without obligation to procure a replacement asset.

1.25. The 1st and 2nd Defendants deny the particulars of professional negligence, particulars of loss particulars of special damage, particulars of damage and the claims as estimated by the Plaintiff.

1.26. In the 3rd Defendant's Defence filed on 3rd June, 2022, it was stated that the 3rd Defendant is not privy to the facility between the Plaintiff and the 1st Defendant. That it shall aver that the quotations submitted by the Plaintiff disclose that the Motor Vehicle did not warrant being written off.

1.27. The 3rd Defendant avers that the Plaintiff's claim was dealt with in accordance with the terms and conditions of the Insurance Policy. That it is on the premise of the said settlement that it did not breach any contract as the Plaintiff's claim was settled accordingly. Further that the 3rd Defendant denied any negligence on its part in dealing with the Plaintiff's claim and averred that the damage sustained to the Vehicle did not warrant it being written off as demonstrated by the quotations.

1.28. The 3rd Defendant denied causing any damage and loss claimed by the Plaintiff in its Statement of Claim.

1.29. The Plaintiff filed both its Reply to the 1st and 2nd Defendant on one hand and on the 3rd Defendant on the other, on 30th August, 2022.

1.30. The Plaintiff stated that the 1st and 2nd Defendants would be put to strict proof regarding certain aspects of their Defence. Further that the Plaintiff would aver that its interests were totally neglected by the 1st Defendant whose only concern was getting indemnified by the 3rd Defendant at the expense of the Plaintiff.

1.31. The Plaintiff denied being responsible for the delay in the 3rd Defendant's settling of the claim and would put the 1st and 2nd Defendants to strict proof thereof. That the 1st Defendant was responsible for the delay in settling the claim and by reason thereof should have suspended payouts and charging of interest on the Facility in view of the fact that the Motor Vehicle that was used to generate income had not been replaced as per Insurance Policy.

1.32. That the Plaintiff would aver that the 1st and 2nd Defendants had an obligation under the Insurance Policy to pursue the 3rd Defendant and replace the Motor Vehicle in question. The Plaintiff averred further that it had informed the 1st and 2nd Defendants that the Vehicle was not reparable within the Republic but they continued to dispute that fact for over a year and still arrived at the same conclusion thereafter. The Plaintiff avers that the 1st and 2nd Defendant's delay in replacing the Vehicle denied the Plaintiff the benefit of the Motor Vehicle.

1.33. In the Reply to the 3rd Defendant's Defence, the Plaintiff avers that it was essential for the 3rd Defendant to honor the claim, owing to the fact that the Plaintiff fulfilled its obligations under the Insurance Policy.

1.34. The Plaintiff avers that the 3rd Defendant was negligent by failing to expeditiously honour the Plaintiff's claim. That the Plaintiff suffered loss of right of use of its core business asset as a result of the 3rd Defendant's delay to indemnify the Plaintiff following the occurrence of an insurance event.

2.0. THE HEARING

2.1. At the commencement of the hearing held on 20th June, 2024, Ms. Edith Z. Nawakwi **(PW)**in her capacity as Director in the Plaintiff's Company testified as the sole witness.

2.2. In her Witness Statement, she largely repeated the averments in the Statement of Claim and these will not be repeated in their entirety. She testified that after the accident, the Plaintiff notified the Defendants of the same and the Motor Vehicle was assessed as a technical write off

and instead of treating it as a write off, the 1st, 2nd and 3rd Defendants proposed that it should be taken to South Africa for repairs.

2.3. According to **PW**, after consultation with Action Auto Limited, the registered dealer for Izuzu, they were advised that a refrigerated Motor Vehicle that had been subject to an accident could not be warranted because the impact on the chasis of the Motor Vehicle could not be ascertained and the vehicle should be replaced as a whole as opposed to repairing it. That upon finding out that the cost of repairing the Motor Vehicle in South Africa was the same as replacing the whole Vehicle, the 1st Defendant approached and informed the Plaintiff after a year that the 3rd Defendant was willing to settle the claim.

2.4. It was her testimony that the 1st and 2nd Defendant thereafter refused to replace the Motor Vehicle or to reimburse the Plaintiff in order to put them in a position they would have been prior to the accident in accordance with the principle of restitution. Further that the Plaintiff was not given the 1st right of refusal to purchase the Motor Vehicle as is the predominant practice in Insurance Policies.

2.5. Her further testimony is that the 1st Defendant continued illegally charging interest on the loan during the period in which the Plaintiff could not exercise its right of use of the asset owing to it being dysfunctional after the accident. That by reason of professional negligence of the Defendants, the Plaintiff had lost the business it had with

chain stores namely Shoprite, Food lovers, Game Stores and Pick and Pay.

2.6. In Cross Examination and when referred to the 1st and 2nd Defendant's Bundle of Documents, **PW** confirmed that the application for the facility was made by Mr. Phiri as an employee of the Plaintiff to raise working capital for the Plaintiff. That the loan was supposed to be repaid in monthly instalments over 36 months as indicated in the amortization schedule appearing at Page 6 of the 1st and 2nd Defendant's Supplementary Bundle availed to the company. Further that according to the schedule, the facility was for 36 months from 2018 to 2021.

2.7. **PW** confirmed in response that the Motor Vehicle was involved in an accident around January, 2019 and by that time 6 instalments had been paid leaving a balance of K831,284.43. She confirmed that she had taken time to read the facility offered encapsulating the terms and conditions of the lease obtained from the Bank. That Page 2 of the 1st and 2nd Defendant's Bundle of Documents which had been referred to relates to the other part of the facility which was a filler and mincer where the company sold to the Bank and in return got a payment from the Bank. Further that Pages 4 to 6 relate in the terms and conditions and that the company signed at the bottom.

2.8. In further Cross Examination on what the terms and conditions stated on what would happen when there was any damage to goods, **PW** stated that the goods would be fully insured. When referred to clause 8.4 on damage of

goods and who the lessee was, **PW** admitted that the lessee was Legana and the company was supposed to be paying for the goods involved in an accident. Further that the obligation to insure the goods was placed on the lessee and confirmed that it was a requirement that the Bank be endorsed as first loss payee which in her understanding means that in the event of the goods and the assets being destroyed, the lessor (1st Defendant) would be paid first.

2.9. When asked whether the Plaintiff furnished the Bank with a Cover Note indicating that the 1st Defendant was the first loss payee, **PW** responded in the affirmative which was the more reason it wrote to Goldman Insurance on the company's advice that the Motor Vehicle was fully insured by Goldman Insurance as the company's underwriter. **PW** conceded that the company did not furnish the 1st Defendant with a Cover Note from Goldman Insurance indicating the 1st Defendant as the first loss payee because they were in the process of getting the Bank endorsed as such.

2.10. **PW** confirmed that in her Witness Statement at Paragraph 7 she had indicated that Insurance by the 1st Defendant was done without her consent. When referred to page 10 of the 1st and 2nd Defendant's Bundle of Documents and asked what it was, **PW** read out a letter by the Plaintiff which authorized the 1st Defendant to insure the asset, but not to debit her account.

2.11. In further Cross Examination **PW** confirmed that she had testified that the premium for Insurance done by the 1st

Defendant was K41,000.00 which was higher than K27,000 they were paying to Goldman Insurance. **PW** was referred to Page 11 of the 1st and 2nd Defendant's Bundle of Documents which she said was a Cover Note for K952,107.39 for the Isuzu Truck by Madison in the name of Legana Investments as policy holder. When referred to Page 14 of the Plaintiff's Bundle of Documents, she confirmed that the document is a certificate of Motor Insurance showing the Premium as K27,928.00 which was supposed to run from August 2018, to 30th June, 2019. On further reference to Page 37 of the Plaintiff's Bundle of Documents, **PW** confirmed the Premium done on renewal as K28,765.89. When asked whether the Premiums by Madison Insurance were in the same range as Goldman Insurance, **PW** responded in the negative.

2.12. When asked what to her knowledge was the claim, **PW** stated that the process was that they went to the Bank because they were the lessors and they informed them that the Vehicle was damaged and asked who they were insured with and were told it was Madison General. That they approached Madison General who told them that they could not deal with them since the Bank and the 2nd Defendants were the ones who had approached Madison Insurance to do the Insurance. Further that they went to the Bank who subsequently informed them that they had sent inspectors from Madison to view and assess the asset.

2.13. **PW** conceded that the insurer is the one who determines whether the assert can be repaired or replaced. She stated that the Bank told them to get quotations for the repairs

which where not submitted. **PW** was referred to Page 71 of the Defendant's Bundle of Documents which she said looked like an e-mail within the Bank. When asked to tell Court which it was from, **PW** responded that it was from Musonda M. Kasanga from Madison General Insurance. She confirmed that she did not submit quotations for repairs.

2.14. **PW** confirmed that in her witness statement, she stated that the 1st Defendant refused to honor its obligations. That she drew that obligation from the fact that there were no repairers for the Motor Vehicle in the country. When asked whether in her Witness Statement she wanted a new Vehicle, **PW**'s response was that she did not want a new Vehicle but that there was no garage in this country that could repair the damaged Motor Vehicle.

2.15. **PW** stated that interest and all charges were not written off as they were applied to the Bank as first loss payee. She conceded that the lease provided for the Bank to continue charging. She confirmed that she had stated that she was not given the right to purchase the Motor Vehicle and stated that she was not aware that where there is a write off, the insurer keeps the salvage.

2.16. **PW** when referred to Page 86 of the 1st and 2nd Defendant's Bundle said it was a total loss/cash in lieu of repairs dated 28th November, 2019, which indicates an amount of K856.896.66 as having been paid in respect of the damage to the Isuzu Truck. When asked to confirm that this amount tallies with the amortization schedule at Page 6 of

the 1st and 2nd Defendant's amortization, PW1's response was that the amount on the amortization schedule is for 36 months so it did not tally.

2.17. In continued Cross Examination by Mr. Sikazwe on behalf of the 3rd Defendant, **PW** agreed that the relationship of the 3rd Defendant mainly lies with the 1st and 2nd Defendants and that if any duty was owed, it would be to the 1st and 2nd Defendants. She also agreed that in Paragraph 8 of her Witness Statement what was damaged was the refrigerated container.

2.18. When referred to Page 9 of her Witness Statement and asked if she had proof of the assertion that instead of treating it as a write off the 1st, 2nd and 3rd Defendants proposed that it be taken to South Africa for repair, **PW** responded in the negative. She also responded in the negative to the question whether she had proof that the contents of Paragraph 10 of her Witness Statement to the effect that they were advised, after consultation with the registered dealer that because of the impact no the chasis, the Motor Vehicle should be replaced as a whole as opposed to repairing it.

2.19. In Re- Examination by Ms. Kabalata regarding the damage, **PW** clarified that the damage was to the refrigerator, the actual unit and the body including the fiber glass of the containerised truck.

2.20. In relation to Page 86 of the 1st and 2nd Defendant's Bundle of Documents on the amount applied to the loan as at January, 2019, **PW** stated that she borrowed K600,000.00 and was to repay it over 36 months and that in each of those

instalments there is interest chargeable on the principal. That therefore, the Statement is if she kept the asset for 36 months, she would pay the amount indicated. Further that she had the asset for 6 months and according to that calculation paid this amount as though she rented the asset for 36 months.

2.21. When asked to clarify on the issue that no Cover Note was provided **PW** stated that the Bank was informed that the Truck was new and fully insured by Goldman Insurance and that the Bank wrote to Goldman Insurance by e-mail requesting to be endorsed as the first loss payee.

2.23. The 1st and 2nd Defendant's sole witness was 34 year old **Lamine Chibawe**, Business Development Manager at Stanbic Zambia Limited in the Vehicle and Asset Finance Department (herein referred to as **DW1**).

2.24. **DW1** testified that sometime in 2018, the Plaintiff approached the Bank requesting a loan facility of K1,000,000.00, as working capital. That the 1st Defendant after considering the loan application declined the same but suggested to the Plaintiff asset financing as another route to access the funds that were being requested. That this was a better route because it is self secured against an asset that can easily be liquidated in the event of default and would give the Plaintiff the funding required without putting the 1st Defendant at a high risk.

2.25. It was **DW1's** evidence that on 1st June, 2018, the Plaintiff made an application to the 1st Defendant to enter into a Sale and Lease Back Agreement in order to raise working capital

for the business. That the agreement was meant to cover three of the Plaintiff's assets namely a Meat Mincer, a Sausage Filler and an Isuzu Truck, Registration No. BEA 7171. Further, that the lease facility offered was to be repaid over a period of 36 months payable on the 25th day of each month commencing on 25th September, 2018.

2.26. According to **DW1**, the Plaintiff then sent the 1st Defendant a Tax Invoice on 8th August, 2018, showing the grand total of K1,160,000.00 as the value for the assets listed in the Finance Lease Facility as shown at page 7 of the 1st and 2nd Defendant's Supplementary Bundle of Documents. That on 14th August, 2018, the loan amount of K1,160,000.00 was transferred to the Plaintiff's Bank Account by the 1st Defendant. Further that a pre – condition to the Finance Facility being granted to the Plaintiff was that the Vehicle be comprehensively insured until the end of the agreement, with a registered Insurer of the Plaintiff's choice subject to the approval of the 1st Defendant.

2.27. Related to the above, **DW1**'s testimony is that prior to the Motor Vehicle being subject to the Finance Lease Facility the Plaintiff had insured the Vehicle with Goldman Insurance Limited and was therefore requested to provide proof that the Vehicle was comprehensively insured. That the Plaintiff failed to provide evidence of comprehensive insurance following which the Plaintiff's Director Mrs. Edith Z. Nawakwi on 9th August, 2018 wrote to the 1st Defendant authorizing the 1st Defendant to place Insurance Cover for the Plaintiff's assets listed in the Finance Lease Facility.

2.28. Testifying further, **DW1** stated that the Plaintiff through the 2nd Defendant then insured the Motor Vehicle on 18 the August, 2018, with valid cover until 30th June, 2019 and the 1st Defendant was endorsed as first loss payee on the Insurance Policy because it had an interest having advanced the Plaintiff the sum of K965,332.08 being the value of the Truck.

2.29. It was **DW1**'s evidence that on 18th January, 2019 while making deliveries, the Motor Vehicle was involved in a road traffic Accident when the driver erred in judgment and hit the roof of the filling station and the Plaintiff informed the Defendants of the accident of 21st January, 2019. That the 2nd Defendant as broker immediately began talks with the underwriter Madison General Insurance, the 3rd Defendant herein to aid in processing the Plaintiff's claim.

2.30. **DW1**'s testimony is that the Plaintiff was requested to provide three (3) repair quotations by the 2nd Defendant but failed to do so. That in March and April, 2019, the Plaintiff was offered cash in lieu of discharge as shown at Pages 65 to 67 of the 1st and 2nd Defendant's Bundle of Documents. Further that the Plaintiff only accepted the 3rd Defendant's offer on 28th November, 2019 and the acceptance was communicated to the 2nd Defendant on 31st December, 2019, when the acceptance form was delivered to the 2nd Defendant's premises. Finally, that the Defendant paid the claim amount of ZMW 856,896.66 to the 1st Defendant as first loss payee on 15th January, 2020.

2.31. **DW1's** concluding evidence was that the 1st Defendant was not negligent in the manner in which it dealt with the Plaintiff. That the delay, if any, was because the Plaintiff 's company did not make decisions on settlement of the claim promptly. Further that, the 1st Defendant was the first loss payee having advanced the Plaintiff the value of the vehicle and was therefore entitled to recover the insurance money to cover the Plaintiff's outstanding obligation on the Finance Lease Account.

2.32. In Cross Examination, **DW1** agreed that the Motor Vehicle was allocated K666,000,00, the Filler K28,665.00 and the Mincer K307,859 in terms of the breakdown of the K1, 000,000.00 advanced to the Plaintiff. He confirmed that each of the three assets were insured and also that there was no claim on the two assets by Stanbic as only the claim for the Motor Vehicle was processed following the Accident.

2.33. He testified that the two other assets were not paid for fully by the Plaintiff as they were written off although he could not remember exactly when they were written off somewhere around 2019. **DW1** confirmed knowing Mrs. Dorris Tembwe as the Company Secretary for the 1st and 2nd Defendants.

2.34. In response to the question whether he was able to confirm the period of interest paid by the Plaintiff, **DW1**'s response was that interest was accrued for the period from the start to the time payment came through from the underwriter. He confirmed that it would not be true that the payment was applied as at January, 2019. That the application of the funds was not as at January, 2019, because they had not yet

received the funds which were only received in January, 2020.

2.35. **DW1** when referred to Pages 47 to 57 of the Plaintiff Bundle of Documents stated that the document was a letter to Chalwe Kabalata from the Bank enclosing a Statement from the Bank. He confirmed that Pages 49 and 50 show how the funds were applied to clear the loan and that on Page 57, on 17th January, 2020, there was an application of K839,363.47. He confirmed that prior to the accident in January, 2019, the Plaintiff had not defaulted on its obligations.

2.36. It was **DW1**'s confirmation that for the Lease, it was a requirement that the customer should provide insurance as a precondition to be advanced the loan. He stated that insurance was not received from the customer and therefore the Plaintiff gave them an instruction to proceed and place insurance cover on their behalf. That they did not have any communication with Goldman Insurance as they were engaging the customer. When referred to Page 11 of the Plaintiff's Bundle of Documents for the e-mail prepared by Mr. Harris Manza, **DW1** confirmed that he knew Mr. Mwanza as he was the witness he had substituted that the e-mail was sent by Mr. Mwanza and shows that the Motor Vehicle was insured by Goldman Insurance. He declined to confirm that there were other interested parties because then, it was the property of the Bank. He confirmed that there was the Bank as Absolute Owner and Legana.

2.37. **DW1** agreed that the money paid by the 3rd Defendant was supposed to be applied to the Truck. That it was correct for

avoidance of doubt that on Pages 47 to 51 and 52 onward of the Plaintiff's Bundle, all debits on the other assets were first debited with no payments from the Plaintiff.

2.38. When referred to Page 56 of the Plaintiff's Bundle, the statement relating to the filler, **DW1** responded that it was correct that the instalments were paid by the Plaintiff and that there was no write off on that statement.

2.39. Answering the question whether on a Facility such as the one in dispute, one year was reasonable period within which to honour the claim, **DW1** responded in the negative. He contended that the payment was processed in 2020 and agreed that the 3rd Defendant wrote off the Motor Vehicle. He confirmed that he was aware that the Motor Vehicle was a refrigerated Truck intended for cooling and it was damaged so it could not cool. On whether **DW1** agreed that the Truck was written off, **DW1** stated that the reason the Truck was written off is that there was no agreement between the underwriter and Legana as regards the refrigerated component of the Truck. Further that the option they had was to take it to South Africa because they did not have anyone who could fix it here in Zambia. That he was aware that the Plaintiff was given this option but she was not agreeable because it would accumulate mileage.

2.40. **DW1** declined to confirm that the Insurance taken out by the 1st Defendant on behalf of the Plaintiff was extraterritorial. When asked whether there was any part of the insurance document that stated that it extends to other jurisdictions, he stated that the document does not state that.

2.41. When referred to Page 30 of the Plaintiff's Bundle, **DW1** agreed that the form was issued by Madison Insurance to accept money in lieu of repairs. On the question whether the Plaintiff was within her rights to reject the offer, **DW1**'s response was that this was the cost that was required to actually take it to South Africa. He agreed that it took a year for the decision to be reached that the vehicle should be written off. That the reason why it had to be written off is that there was no agreement between Legana and the Underwriter.

2.42. On whether **DW1** agreed that the Plaintiff from the onset rejected the transportation of the Vehicle to South Africa, **DW1** responded affirmatively. **DW1** did not agree with the assertion that the cost of transportation would be the same as the replacement cost.

2.43. In Cross Examination by Mr. Sikazwe, **DW**1 stated that as a condition for the lease that was given, there was a requirement that the Plaintiff provide insurance that met with their conditions. That the insurance from Goldman Insurance did not meet the requirement and therefore they got an instruction to go ahead and place the insurance on behalf of the client and that is how a placement with Madison was done. Further that it was agreed from the report that the Motor Vehicle would be fixed by a South African installer. That he agreed that there was no agreement between the Plaintiff and the 3rd Defendant. Further that the 3rd Defendant was placed in an awkward position to process the claim and the delay was because there was no agreement.

2.44. In Re- Examination by Mrs. Simachela, **DW1** stated that the insurance money was applied to the Truck. That the money was received in 2020 and that is when it was applied to the balance as at 2020.

2.45. The 2nd Defendant's witness was 36 year old **Kondwani Mzumara**, Manager in the 2nd Defendant's Bancassurance and Claims Department (hereinafter referred to as (**"DW2"**). He testified that the Plaintiff entered into a Sale and Lease Back Agreement with the Defendant, and insured the vehicle with the 3rd Defendant through the 2nd Defendant acting as Broker.

2.46. According to **DW2**, on 18th January, 2019, while making deliveries, the Motor Vehicle was involved in a road traffic accident on Mungwi Road Engen Filling Station when the driver erred in judgment and hit the roof of the filling station. That the Plaintiff informed the Defendants of the accident on 21st January, 2019, and that the 2nd Defendant immediately begun talks with the Underwriter, Madison General Insurance, the 3rd Defendant, to aid in processing the Plaintiff's claim.

247. It was **DW**2's testimony that as of 6th February, 2019, the inspection of the Vehicle was done and the 2nd Defendant informed the Plaintiff to obtain three quotations for repair of the Vehicle because this was standard procedure in insurance claims as can be seen from Pages 34 and 62 of the 1st and 2nd Defendant's Bundle of Documents. That the Plaintiff provided replacement quotations as opposed to repair quotations when the Motor Vehicle was repairable.

2.48. **DW2** testified that on 8th February, 2019, the 2nd Defendant sent to the 3rd Defendant, the claim documentation it had received from the Plaintiff including quotations as shown at Page 61 of the 1st and 2nd Defendant's Bundle of Documents. That on 12th February, 2019, the 3rd Defendant e-mailed the 2nd Defendant requesting them to inform the Plaintiff to submit repair quotations because their motor assessor advised them the vehicle was very much repairable.

2.49. According to PW2, the 2nd Defendant informed the 3rd Defendant that although the Motor Vehicle was repairable, the damage to the refrigerated container could not be repaired by the garages in Zambia. That due to the Plaintiff's failure, and/or delay to obtain quotation for repair, the 3rd Defendant did provide the Plaintiff, through the 2nd Defendant with various quotations. Further that the 3rd Defendant offered to have the Plaintiff's vehicle put on a truck bed and transported to South Africa so that a replacement container could be placed on the Vehicle by a garage in South Africa.

2.50. It was **DW2**'s testimony that the 3rd Defendant undertook to bear any risks and associated costs for taking the Vehicle to South Africa and various quotations were obtained between 7th March, 2019 to 26th March, 2019 including one from Serco Industries in South Africa who would fit the container on the Vehicle. That the Plaintiff rejected the suggestion to have the vehicle sent to South Africa to have the container replaced.

2.51. According to **DW2**, between March and April, 2019 numerous reasonable offers as can been seen from Pages 3 to 5 of the 3rd Defendant's Bundles by the Defendant to settle

the claim. That on 31st May, 2019, the Plaintiff sent a letter to the 2nd Defendant to settle the claim. That on 31st May, 2019, the Plaintiff sent a letter to the 2nd Defendant rejecting the 3rd Defendant's offer (the Letter is at Page 19 of the Plaintiff's Bundle). That the Plaintiff only accepted the 3rd Defendant's offer on 28th November, 2019, and the acceptance was only communicated to the 2nd Defendant on 31st December, 2019 when the acceptance form was delivered to the 2nd Defendant.

2.52. **DW2**'s further testimony was that the 3rd Defendant paid the claim amount of ZMW 856,896.66 to the 1st Defendant on 15th January, 2020. That the 1st Defendant was paid the said sum because they were first loss payee under the Insurance Policy as provided for under clause 7.1 of the Schedule to the Finance Lease Agreement. Further that the 2nd Defendant was not negligent in the manner in which it dealt with the Plaintiff's claim; the role of the 2nd Defendant as a Broker was to facilitate the claim, which role the 2nd Defendant performed and that any delays were occasioned by the Plaintiff itself when it failed to make decisions relating to claim settlement. That the Plaintiff is not entitled to any of the reliefs sought in her claim.

2.53. In Cross Examination by Mrs. Kabalata, **DW2** agreed that both the Absolute Owner and the owner of the Vehicle have to consent on the Insurance Company to be insured with. He also agreed that what was damaged on the Truck was the refrigeration component, but denied that even the chasis could have been impacted. He agreed that the refrigeration

was necessary because the items carried required a low temperature.

2.54. Responding to the question whether the Truck was repairable in Zambia, **DW2** stated that the repairers were very few, if any at all and that it was possible to repair the Truck in Zambia. When referred to his e-mail at Pages 74 to 75, **DW2** stated that in relation to the e-mail, they have a list of repairers and on that list none of them could repair the Vehicle. He admitted that he gave the Plaintiff's Director the list from which she should have obtained the quotations.

2.55. **DW2** responded that he was aware that quotations were obtained as he had seen correspondence on the quotations provided by Isuzu as shown at Page 29 of the Plaintiff's Bundle of Documents. He confirmed that the quotation from Isuzu was for taking the Vehicle to South Africa.

2.56. When referred to Page 1 of the 3rd Defendant's Bundle of Documents and asked whether that was extra territorial insurance, **DW2**'s response was that it was a local insurance cover as the insurance relating to the vehicle had to be performed in Zambia. He confirmed that the cost of repair was as provided at Page 5 of the 3rd Defendant's Bundle of Documents and the date was 27th March, 2019. He agreed that the Plaintiff had rejected the offer and that the subsequent offer to settle the claim came on 28th December, 2019, which was a discharge to answer the question plainly. He stated that if the Plaintiff rejected the transportation of the Vehicle, he had no expectation that something would happen before writing off as Claims Offer.

2.57. When referred to Page 65 of the 1st and 2nd Defendant's Bundle of Document, **DW2** identified the document as a cash lieu form and agreed that the Plaintiff was being offered money in lieu. **DW2** agreed that at that stage, the Plaintiff had rejected and did not sign for the offer. He agreed that there was no other discharge form apart from this one and the one given to the Plaintiff's Director in December, 2019.

2.58. **DW2** confirmed that the discharge was for the Truck and he was aware that other items were insured as well but did not know whether there was a claim on the other items. He confirmed that the allocation of the funds for the Isuzu Truck was K666,473.17, Filler K28,665 and for the Mincer K304,859. He said he was not fully aware that the money belonging to the Defendant was K666,473.17 plus interest. **DW2** also confirmed that the Plaintiff was buying back the Truck at that point and thought that the brokerage at the time covered all the three items.

2.59. **DW2** confirmed that there were two parties, Owner and Absolute Owner appearing on the White Book. That the claim could not be honoured earlier because one of the parties was not ready to sign off. He denied that they had any obligation to tell the parties on how the funds from Insurance were applied.

2.60. Answering the question whether it was not true that the Plaintiff had rejected the option for the Vehicle to be taken to South Africa, **DW2** stated that the rejection was implied. That the client Legana had indicated that they would only be comfortable with repairs if the Insurance Company had

tabulated everything that needed to happen for the Vehicle to go to South Africa. Further that since the offer was made through Isuzu, they sat back waiting for a response which never came from the Plaintiff. That due to non-signing of the discharge form the claim took long because they were waiting. **DW2** agreed that the discharge form that came in November, should have come earlier given that the Plaintiff had made it clear that the Vehicle could not go to South Africa.

2.61. In Cross Examination by Mr. Sikazwe, **DW2** confirmed that the processing of the claim commenced around 11th February, 2019, the claim was still being processed and that even before the claim could be processed, the Plaintiff had already filed a complaint. He confirmed that there was an attempt to reach out to the Action Auto by the 3rd Defendant to get a quotation and confirmed that Action Auto provided the Proforma Invoice on 28th February, 2019. That by 3rd March, 2019, there was an instruction to adjust the claim and that the Plaintiff was given an offer for discharge by the 3rd Defendant and that he was not aware if there was any response to the offer.

2.62. When referred to the email at Page 22 of the 3rd Defendant's Bundle of Document, **DW2** agreed that the 3rd Defendant had already discharged the claim and that the only response they got was a letter from the Plaintiff appearing at Page 17 of the Plaintiff's Bundle of Documents. That the Plaintiff raised several issues of wear and tear and expertise. **DW2** stated that the 3rd Defendant's preferred solution was to put the Vehicle on a low bed and then transport it to South Africa and there would be no question of wear and tear.

2.63. **DW2** in response to a question on whether he was aware of extra territorial insurance, answered in the affirmative. That it is additional cover to the existing Insurance to extend the Insurance beyond the current boarders of Zambia. Further that it is not possible to export a car out of jurisdiction without extra territorial cover. **DW2** responded that to the best of his knowledge, the Plaintiff was not asked to incur extra costs for the transportation of the Vehicle.

2.64. According to **DW2**, he was aware that the Plaintiff had reported the 1st and 3rd Defendants to the Consumer Protection Commission Further that he got to learn that the Plaintiff had written a letter to the Pensions and Insurance Authority. **DW2** confirmed that the Plaintiff had written a letter appearing at Page 17 of the Plaintiff's Bundle and that he could not recall an amicable settlement having been reached as at 4th June, 2019.

2.65. In Re Examination by Ms. Simachela, and when referred to the email at Pages 74 and 75 of the 1st and 2nd Defendant's Bundle of Documents, **DW2** claimed that after advising the client concerning repairs, he had given them a list and they came back. That they informed him that none of the garages could repair the Motor Vehicle and that is what he indicated to the company being the Broker. Further that with regard to the Truck being repaired in Zambia, the vendors had said it could not be done.

2.66. The 3rd Defendant's sole witness was 50 year old **Kelvin Mwale**, the General Manager – Technical at the 3rd Defendant Company **(DW3)** who testified that the 3rd Defendant insured

Motor Vehicle BAE 7171 under Policy Number P/01/4002/246219/2018 at the request of the 2nd Defendant and that the Motor Vehicle was involved in a road traffic Accident on 7th January, 2019.

2.67. According to **DW3** the Plaintiff notified the 3rd Defendant of the accident and the 3rd Defendant requested the Plaintiff to submit three (3) quotations and other documents required to process the claim which the Plaintiff's Director subsequently did through Stanbic Insurance Brokers and that a perusal of the quotation clearly discloses that the Motor Vehicle did not warrant being written off as it was repairable. Further that the Plaintiff demanded that the Vehicle be written off despite it being reparable at less than quarter of the sum insured of K1,087,000.00 by the local repair companies.

6.68. **DW3**'s evidence is that the Plaintiff complained to Mr. Martin Libinga, the Registrar of Pensions and Insurance Authority (PIA) who came for a meeting at the 3rd Defendant's Offices seeking details about the claim and that after briefing the Registrar they requested for a meeting at the Registrar's Office with the Plaintiff which meeting did not meterialise for reasons beyond their knowledge.

2.69. It was **DW3**'s evidence that the 3rd Defendant engaged Action Auto Zambia, the suppliers of the Motor Vehicle to confirm if the damages to the Motor Vehicle warranted it being written off, to which they advised that it was repairable as there was no structural damage to the Vehicle other than the refrigerated container. Reference was made to Pages 1 to 24 of the 3rd Defendant's Supplementary Bundle of Documents.

2.70. According to **DW3**, the Plaintiff demanded that the Vehicle be repaired by Action Auto Zambia though the three submitted quotations were not from Action Auto Zambia. That however, Action Auto advised that such jobs are subcontracted to approved body shop companies by Isuzu South Africa (PTY) Limited in South Africa as shown at Pages 16 to 21 of the 3rd Defendant's Bundle of Documents. Further that the 3rd Defendant was ready and willing to take the Vehicle to South Africa for repairs and was issued with a quotation by SCERO (PTY) Limited, an approval body shop in South Africa. That the quotation was to supply and fit a new refrigerated container by replacing the refrigeration unit which was damaged in the accident at an equivalent of about K250,000.00 in South African Rands, all inclusive.

2.71. **DW3** testified that the 3rd Defendant arranged transport and all other logistics, required when taking a Vehicle out of the country on a low bed Truck. That the 3rd Defendant issued a Repair Authorisation Order Claim Discharge Form to discharge to the insured Stanbic Bank Zambia Limited for the signature. However, they waited for over three months for a signed copy to facilitate the taking of the Vehicle to South Africa.

2.72. According to **DW3**, the 3rd Defendant was called to a meeting with the advocates for the Plaintiff and Stanbic Bank Legal Team during which meeting the 3rd Defendant was excused after the first session of discussing the Insurance claim. That they were advised that the matters to be discussed in the second session were between the Bank and the Plaintiff.

2.73. **DW3**'s testimony was that the 3rd Defendant seeing that the claim was dragging for reasons beyond their comprehension and in exercise of the provisions and terms of the Insurance Policy, opted to settle the claim on total loss basis despite the Motor Vehicle being repairable to avoid the matter dragging any further. That the 3rd Defendant dealt with the Plaintiff's claim in accordance with the terms and conditions of Insurance Policy and that a Discharge Form was executed, and payment was processed in full up to the amount provided for in the Policy. Reference was made to Page 30 and 31 of the 3rd Defendant's Bundle of Documents.

2.74. **DW3** testified that the 3rd Defendant was not in any way negligent in dealing with the Plaintiff's claims and that the damage sustained to the Vehicle did not warrant it being written off as demonstrated by the quotation thus, the alleged delay was at the instance of the Plaintiff.

2.75. In Cross Examination, **DW3** was referred to Page 11 of the 1st and 2nd Defendant's Bundle of Documents and confirmed that it showed the valid insurance for the Motor Vehicle and that the Premium was K35, 907.49. He told Court that the client, Stanbic Zambia, paid the premium and that the Truck was insured for K952,107.39 according to the document. When asked to look at Page 11 and say who was the Insured, **DW3**'s response was that it was Legana Investment. **DW3** said it was his testimony that the 3rd Defendant had no relationship with the Plaintiff but agreed that the Plaintiff had an insurable interest.

2.76. When referred to Page 9 of the Plaintiff's Supplementary Bundle Documents filed on 26th June, 2023, **DW3** confirmed that the Policy was underwritten by Madison and the equipment covered was a Meat Mincer. When referred to Page 8, **DW3** confirmed that he wrote the letter appearing at the Page and that the letter was written to Ms. Edith Nawakwi. **DW3** maintained that despite that evidence and the Plaintiff having an insurable interest, the 3rd Defendant had no relationship with the Plaintiff.

2.77. **DW3** referred to Page 2 of the 3rd Defendant's Bundle and asked who was indicated as the owner and absolute owner responded that it was Legana Ltd and that according to the document the Plaintiff was the only owner. That the Truck was insured for K952,107.39 and that **DW3** did not know that the Truck was less than a year old at the time it was insured. When asked whether from his 20 years experience, the 1st Defendant leased or bought vehicles that are old or new, **DW3**'s responses was that sometimes they do and sometimes not. Pressed further whether it was his testimony that a person can get an old vehicle and lease it under buy back arrangement, **DW3** said he did not know. **DW3** agreed that a prudent insurer would check what the vehicle is insured for and also agreed that this helps determine how exposed the asset is as that is what is called underwriting.

2.78. **DW3** agreed that the Truck was not being used by Stanbic and that it was correct that they had assessed and understood the nature of the business the Plaintiff was engaged in which was that of processing meat. That **DW3** had seen the Truck and that the distinguishing feature was

that it was a refrigerated Truck. Further that he agreed that it was used to deliver products at a regulated temperature and that the nature of the asset was that it was often on the road and that it was an integral part of the Plaintiff's business. **DW3** did not agree that because of that after and the damage, it needed to be replaced quickly. While agreeing that the Truck was in use by the Plaintiff, **DW3** stated that it was not his testimony that there was no need for continuity.

2.79. Responding to the question how long it takes to process a claim all things being equal, **DW3**'s response was that according to the Policy, a damaged asset must be repaired or replaced within 90 days. He agreed that if a claim took 12 months, it was inordinate and long. He confirmed that the money was paid out by the insurer in January, 2020. On the question whether he agreed that during the period that the business had no Truck, the Plaintiff was affected, **DW3** replied that he did not know that.

2.80. **DW3** confirmed what he had stated in Paragraph 7 of his Witness Statement that the Plaintiff had complained to the Pensions and Insurance Authority. He denied the assertion that part of the complaint was because of the delay. He confirmed that he knew Mr. Chabala Lumbwe who was his Managing Director and was referred to Page 15 of the Defendant's Bundle of Documents filed on 21st September, 2022 for the email from Pensions and Insurance Authority to his Managing Director. He conceded that the email was genuine and that according to that e-mail sent on 22nd February, 2019, part of the claimant's complaint was that the

claim was delayed. He agreed that as at 22nd February, 2019, the Plaintiff was pushing for settlement of the claim.

2.81. **DW3** denied that as the claim was being processed the view of the 3rd Defendant was that the Truck should be taken to South Africa for repairs. That the view was that it was fully repairable in Zambia. He conceded that the Report was important but that it was just an omission. **DW3** stated in response to the question that he did not know that the Plaintiff had rejected the idea about taking the Truck to South Africa for repairs.

2.82. When asked whether the 3rd Defendant refused to deal with the Plaintiff because they wanted to deal with the broker, **DW3**'s response was in the negative. That the documents did not go directly from the Bank to the Plaintiff but through the Broker. He agreed that it was the Broker who informs the Insurer of the views of the claimant. He maintained that he was not aware that the Plaintiff had rejected the offer for the Truck to be taken to South Africa. When referred to Page 19 of the Plaintiff's Bundle of Documents showing a letter dated 30th May, 2019 to the Company Secretary for Stanbic Insurance Broker, he agreed that the proposal to take the Vehicle to South Africa was rejected according to that letter.

2.83. **DW3** agreed that the Discharge Form for Repairs was not signed by the Plaintiff. He sated in response to a question that the brilliant idea to transporting the Truck to and from South Africa and be repaired came from him. He agreed that there were only two offers from Madison Insurance, that is to say, to either repair the Truck or to pay the Plaintiff in lieu by

way of discharge. **DW3** responded that the first offer was made on 27th March, 2019, and between that time and November, 2019, when the second offer was made, there was no action on the claim.

2.84. On whether it was a term of Insurance that the Truck would be taken to South Africa for repairs, **DW3** responded affirmatively. **DW3** agreed that he knew the term extra territorial insurance and that it is not automatic and also that it is endorsed on the Insurance Policy. He stated that he had no evidence that in the Insurance relating to this case before the accident, it was endorsed on the Policy. When asked whether it was his testimony that it was mandatory to take the Vehicle to South Africa for repairs, DW3, responded in the negative.

2.85. **DW3** when asked whether he agreed that the Plaintiff was well within her rights to have rejected the offer to transport the Vehicle to South Africa, responded in the negative. That the Plaintiff did have her tole to play, namely to consent and that the Plaintiff's rejection of the offer was not accepted. He agreed that the damage to the Vehicle was to the refrigeration unit and that without it the Truck could not cool and would not serve its purpose. He also agreed that the purpose of insurance is to protect against financial loss and in this case it was for purposes of having the Truck repaired or replaced.

2.86. **DW3** agreed that these Trucks are not manufactured in Zambia but did not know that if the Plaintiff was to replace the Truck, there would be an aspect of Foreign Exchange involved. On whether **DW3** agreed that one of the options

was to repair the Truck or to write it off, his response was that there was no option but to repair the Truck. When pressed further **DW3** admitted that the Truck was not repaired, instead it was written off. He however did not agree that there was more than one option.

2.87. Answering the question as to who makes the decision of what must happen on how to settle a claim, **DW3** stated that it is the Insurance Company. That it was the Insurance Company that made the decision to pay Legana. He agreed that this was not communicated to the Plaintiff. That he came to learn that there was a Lease between the 1st Defendant and the Plaintiff on the Truck but that he was not aware of the other items subject of the Lease. Further that there were no other claims on the Mincer and other items on the Lease.

2.88. **DW3** testified in response that there was no attempt to replace the Truck. He confirmed that the issue of the salvage is at the sole discretion of the Company. When asked why at Page 30 of the 3rd Defendant's Bundle of Documents the discharge Form gives the option and whether it doesn't mean that the issue is subject to discussion, **DW3** responded in the negative. He conceded that he had heard of the term right of first refusal and that it means the owner of the asset is given the first option to accept or reject the salvage. Further that the Plaintiff was not given the first right of refusal.

2.89. It was **DW3**'s response when asked, that the 3rd Defendant was not influenced to make the decision to write off the Truck. That when the funds were released by Madison, they were paying for the Motor Vehicle and nothing else and that

it just took a week to make the decision to write off the Vehicle. When pressed whether from April to November, somebody just woke up and decided to pay, **DW2**'s response was that there was a careful consideration before the decision was made.

2.90. On whether he was aware of the documents between the Plaintiff and the 2nd Defendant, **DW3** responded in the negative. That it was not **DW3**'s view that the Plaintiff did not suffer any loss despite the Plaintiff having submitted the claim. **DW3** was not able to tell Court if the Plaintiff entered into contract with the 3rd Defendant voluntarily. On whether he was able to tell Court whether there are documents that show that the 1st Defendant was endorsed as the first loss payee, **DW3**'s response was that only the discharge shows that and that he agreed that this should have indicated the 1st Defendant as the first loss payee.

2.91. **DW3** agreed that in the event that they had been endorsed as first loss payee the money would have been paid directly to them. He confirmed that payment was made to the Plaintiff, the Insured, Legana Investments.

2.92. In Cross Examination by Mrs. Simachela on what happens when the insurable event happens, **DW3** stated that it is clear in the preamble how a claim is settled. That whether the vehicle is assessed as repairable or a write off is a preserve of the Insurance Company and not the Insured. Further that when a claim arises, the Broker is informed after which the Insurance Company requests for documents such as Claim Form, Police Report, Driver's Licence and

quotations for either repairing or replacement. That a write off is a situation where the repair cost of the Vehicle will be somewhere around 70% of the sum insured.

2.93. On when the claim was made, **DW3** stated that it was fully documented around March, 2019, when they made the offer. He was referred to Pages 33 to 51 of the 1st and 2nd Defendant's Bundle of Document for the documents and claim submitted on 26th March, 2019. That the steps they took included doing a computation of the repair costs because at that time, they were told that the Plaintiff did not want to Vehicle to be worked on by any other garage other than Action Auto as it was relatively new. That they went to Action Auto to get an expert auto report whether it would be repairable or they could do a write off. That they were told the Vehicle was repairable except the works could not be done locally and were connected to a related company for Isuzu as shown at Page 50 of the 1st and 2nd Defendant's Bundle of Documents.

2.94. It was stated that the connection was done sometime in February, 2019, but the quotation was given on 26th March, 2019. That the computations were done on 27th March, 2020 as can be seen on Pages 4, 5 and 6 of the 3rd Defendant's Bundle of Documents where the email was explaining the adjustment and proposing a way for resolving the matter.

2.95. On what response they got after that, **DW3** stated that they never got a response, that the period of dealing with claims is 90 days after the claim was made.

2.96. Responding in respect of when extra territorial policy is invoked, **DW3** stated that the cover given is within the jurisdiction of Zambia and that when a client wants to travel outside the country, they give that extension of cover at an additional premium. That this is only granted at the time a client is leaving the country and so in relation to this case, the extra territorial cover would have been given at the point of taking the Vehicle to South Africa and not any other time. That this was going to come at an additional cost to the Plaintiff and in this instance, Madison was going to bear the cost.

2.97. Explaining the relation between the 3rd Defendant the 1st Defendant, **DW3** stated that in this contract, Stanbic are the client to Madison General Insurance. That the Bank insures all their clients through Stanbic Insurance Brokers, be it through asset finance or just any other clients not necessarily those that got loans from the Bank. On what a first loss payee is, **DW3's** response was that this is the financier of an insured property which could be a vehicle or a house. That the interest that the first loss payee has is to secure the finance which they have put in a particular asset.

2.98. **DW3** was referred to Page 44 of the 1st and 2nd Defendant's Bundle of Documents which document he said was the Registration Book of the Motor Vehicle in question. That according to what he was seeing on the Registration Book, there were two entities as the owner, namely Legana Investments and below Stanbic Zambia.

2.99. On the issue of repairs, it was **DW3**'s position that the vehicle was repairable in Zambia. That they did not have the Vehicle repaired because their offer to have it repaired was not signed. Further that the offer was only signed off in December, 2019 from what he was able to see.

2.100. In Re – Examination by Mr. Sikazwe, and clarifying on the role played by the Plaintiff, if any, **DW3** stated that when they do adjustment for a claim, they issue a claim Discharge Form either for repairs or total loss. That this follows after the claim has been assessed and they have determined that the claim is either a write off or it is repairable which is their prerogative as an Insurance Company. That the Plaintiff's role in the settling of the claim is that they were not responsive to the 3rd Defendant's offers as can be seen in the 3rd Defendant's Bundle of Documents at Page 23 where the Managing Director was asking.

2.101. Clarifying on what he meant by saying that the only option was to repair the Motor Vehicle, **DW3** stated that each claim reported is dealt with on its own merit and in this particular case, having received all the documentation and having assessed the Vehicle and being in touch with the Franchise dealer, Action Auto, it was established that the Vehicle was repairable.

3.0. SUBMISSIONS

3.1. The Plaintiff filed written submissions on 15th August, 2024.

3.2. The 1st and 2nd Defendants filed Submissions on 4th September, 2024.

3.3. Following a Consent Order executed and filed by the Parties on 9th October, 2024, and endorsed by the Court on 10th December, 2024, the 3rd Defendant filed its written Submissions on 13th December, 2024.

3.4. The Plaintiff filed Submissions in Reply to the 1st and 2nd Defendants' Submissions on 24th January, 2024 following an *Ex-parte* Application for Leave to file the Reply out of time which I granted on 25th January, 2025.

3.5. The copious Submissions by all the Parties will not be reproduced in full as they are on Record. Suffice to state that the Submissions will be referred to in my Judgment where necessary.

4.0. CONSIDERATION AND DECISION OF THE COURT

4.1. I have carefully considered the Parties' respective Pleadings, Bundles of Documents, testimonies and Submissions. I am grateful to the Parties for their industry.

4.2. In relation to Submissions, I note that the 1st and 2nd Defendants have taken issue with the arguments advanced on behalf of the Plaintiff on matters that were not pleaded. A careful perusal reveals that certain arguments canvassed by the Plaintiff are indeed not anchored on the Pleadings as enumerated in the Amended process filed on 18th July, 2022.

4.3. For avoidance of doubt and in my estimation, the following claims were not pleaded by the Plaintiff.

4.3.1. *The 1st Defendant breached its duty in the lease by applying funds for the Truck to the entire lease which covered other items.*

4.3.2. *The 1st Defendant breached its duty by failing to recognise that the Plaintiff had paid lease charges prior to the accident and was entitled to a portion of the sum paid by the Insurance Company. The 1st Defendant was only entitled to ZMW600,000 which was their portion from the Truck.*

4.3.3. *The 1st Defendant breached its duty by applying the funds as though the client was enjoying the facility yet the Plaintiff was not.*

4.3.4. *The 1st Defendant breached it duty by not looking out for the Plaintiff's interests.*

4.3.5. *The 1st and 2nd Defendants breached their statutory duties under the* ***Banking and Financial Service Act*** *when they forced the Plaintiff to engage Madison Insurance as the Insurer.*

4.4. It is a well settled principle that the essence of Pleadings is to enable litigants to come to trial well equipped to meet the case of the other Party. The import of this is that Pleadings must contain clear and material facts on which the pleader relies for the claim, defence or reply as articulated by the Learned Author, **Patrick Matibini** in **Zambia Civil Procedure: Commentary and Cases** at Page 565.

4.5. In the Supreme Court case of **Mwale v Mtonga and Another**[1], Malila JS, as he then was, expressed the functions of Pleadings as follows:

> ***"Pleadings are intended to prevent either party from springing up a surprise at trial, or allowing an issue to creep out of the woodwork. They serve the additional purpose of isolating the issues of law and fact that will fall to be determined by the Trial Court. We have been very consistent in restating the significance of Pleadings and there is now a rich corpus juris of judicial dicta by this Court on the subject".***

4.6. In another case of **Mazoka and Others v Mwanawasa and Others**[2] Sakala, CJ cited with approval the dicta of Chirwa J, in **Mundia v Sentor Motors Limited**[3] as follows:

> ***"The function of pleadings is very well known, it 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 matter in dispute between the parties. Once the pleadings have been closed, the parties thereto are bound by their pleadings and the Court has to take them as such".***

4.7. In the Submission in Reply on behalf of the Plaintiff, I have been referred to **Section 13 of the High Court Act Chapter 27** of the Laws and **Article 118 (2)** of the **Constitution of Zambia Act No. 2 of 2016** for the position that I have powers to grant reliefs that are in the interest of justice and

equity and that adequate compensation shall be awarded where it is payable. This is in reference to unpleaded issues which in my view includes alleged breach of statutory duties under the **Banking and Financial Services Act** said to have come into effect on 18th May, 2017 and which the Plaintiff argues governed the Finance Lease Agreement.

4.8. The view I take is that a correct reading and understanding of **Section 13** of the **High Court Act** and **Article 118 (2)** of the **Constitution** can not be used to circumvent the need for parties to plead their cases in manner that does not undermine the Supreme Court guidance in the decisions of **Mwale v Mtonga and Another**[1] and **Mazoka and Others v Mwanawasa and Others**[2] in Paragraphs 4.5 and 4.6 of this Judgment. Taking **Section 13** of the **High Court Act** as an example, it provides inherent jurisdiction for the Court to grant remedies or reliefs on legal or equitable claims properly brought before Court. Similarly, **Article 118 (2) (c) (e)** of the **Constitution** is not meant to cure deficiencies in pleadings. In the case of **Kapoko v The People**[4], the Constitutional Court held that:

> "***Article 118 (2) (e) can not be treated as a 'one size fits all answer' to all manner of legal situations. Article 118 (2) (e) is a guiding principle of adjudication framed in mandatory terms. It is a basic truth applicable to different situations. The Article's beneficial value is an electic fashion depending on the nature of the rule before it.***

Each Court will need to determine whether in the particular circumstances of the particular case, what is in issue is a technicality and if so compliance with it will hinder the determination of a case in a just manner".

The Court further stated at Page J33 that:

Article 118 (2) is not intended to do away with existing principles, laws and procedures, even where the same may constitute technicalities. It is intended to avoid a situation where a manifest injustice would be done by paying unjustifiable regard to a technicality". *(Emphasis mine)*

4.9. The import of the guidance is that there must be a level playing field for all parties to litigation and one can not resort to the provisions of **Article 118** of the **Constitution** as a panacea for deficiencies in the prosecution of their case. If that were the case, there would be no requirement for adherence to the rules on pleadings, as we know them.

4.10. It is evident to me that the Plaintiff fell short of the guidance provided in the cases regarding pleadings. Be that as it may, I am inclined to deal with the ancillary issues, for what they are worth in the context of this matter.

4.11. Regarding the issue whether the 1st Defendant breached its duty by applying the funds as though the client was enjoying the facility yet the Plaintiff was not, recourse must

be had to the relevant provisions of the Finance Lease Agreement particularly Clause 8.4 couched in the following terms.

> ***"8.4.1 The Lessee shall pay all amounts due at the time and in the manner herein provided and continue to pay the same on the occurrence and during the subsistence of:***
>
> ***8.4.2. any accident involving the goods, whether such accident was the Lessee's making or otherwise....."***

4.12. Quite clearly the Plaintiff was under obligation to service the lease by way of payments regardless of whether the vehicle was in use or had been involved in an accident.

4.13. On the issue that the 1st and 2nd Defendants breached the statutory duties under the **Banking and Financial Services Act** when they forced the Plaintiff to engage Madison Insurance as the Insurer, I have addressed my mind to the evidence placed before me. By Letter dated 1st June, 2018 appearing at Page 1 of the 1st and 2nd Defendant's Bundle of Documents, the Plaintiff applied for a Sale and Lease Back Facility from the 1st Defendant. The 1st Defendant in its Facility Letter dated 3rd August, 2018 appearing in the Plaintiff's Bundle of Documents at pages 2 to 8 advised the Plaintiff that the credit facility had been approved. An excerpt of the letter is couched as follows:

> ***"Please read this offer letter and the attached Lease Agreement carefully and if you want to***

proceed with this application for Finance please sign and return this Offer Letter back to your Business Manager".

My understanding of that portion of the letter advising of the approval of the application is that it in fact placed the decision whether or not to proceed with the application for finance squarely into the hands of the Plaintiff. At that point, the prudent thing for the Plaintiff to have done was to engage the services of professional advisors to advise on the nature of the transaction it was getting into.

4.14. One of the preconditions in the Facility Letter was that the assets subject of Lease should be comprehensively insured with an Insurance Company approved by the 1st Defendant with the Bank's interest noted as the first loss payee. A perusal of the Facility Letter shows that the facility was accepted on behalf of the Plaintiff by it's Director, Edith Nawakwi on 7th August, 2018, following a resolution exhibited at Page 9 of the Plaintiff's Bundle of Documents.

4.15. The 1st and 2nd Defendant's Bundle of Documents at Page 10 has exhibited a letter dated 9th August from Edith Nawakwi, in her capacity as the Director of the Plaintiff addressed to the 1st Defendant authorising the 1st Defendant to provide insurance cover for the Plaintiff's moveable assets as listed in the Lease Agreement. The Letter was silent on who the 1st Defendant should have used as the insurer for the assets meaning that it was given latitude to settle on any insurer, including the 3rd Defendant who was engaged by the 2nd Defendant as the agent for the Plaintiff and the 1st

Defendant. In fact what the letter did was to override the Insurance that the Plaintiff had earlier taken out on the asset with Goldman Insurance prior to execution of the Finance Lease Agreement. I have taken the liberty to reproduce the letter below for avoidance of doubt.

"To the Head Vehicle & Asset Finance

ATTN: Mr. H. Mainza

STANBIC BANK

LUSAKA H/Q

9th August, 2018.

Dear Sir,

INSURANCE OF MOTOR VEHICLE AND EQUIPMENT: LEGANA INVESTMENT LTD.

We hereby authorise the Bank to provide Insurance Cover for our Movable Assets as listed in the Lease Agreement. Further kindly renew annually to run alongside the Lease till written notice of termination of Insurance Cover from the undersigned.

Edith Z. Nawakwi

DIRECTOR

157258/47/1"

4.16. Given the position as outlined in Paragraphs 4.13 through to 4.15 above, it can not reasonably be argued that the

Plaintiff was coerced into engaging the 3rd Defendant as the Insurer. I am fortified by the case of **Colgate Palmolive (Zambia) Inc. v Abel Shemu and 110 Others**[5] usefully cited on behalf of the 1st and 2nd Defendants where the Supreme Court held that:

> ***"If there is one thing more than another which public policy requires, it is that men of full age and competent understanding shall have utmost liberty in contracting and their contract when entered into voluntarily shall be enforced by Courts justice".***

4.17. Further comfort is to be found in the case of **Mwamba v Nthenge and 2 Others**[6] where the Supreme Court at Page J96 while quoting Page 3 of the **Evan Mckendric**'s book on **Contract Law** held that:

> ***"The Law of Contract is perceived as a set of power conferring rules which enable individuals to enter into agreements of their own choice on their own terms. Freedom of contract and sanctity are the dominant ideologies. Parties should be as free as possible to make agreements on their own terms without the interference of the Courts or parliament and their agreements should be respected, upheld and enforced by the Courts".*** *(Emphasis mine)*

4.18. The consequence of my decision is that the arguments advanced on behalf of the Plaintiff in respect of the application of **Section 118** of the **Banking and Financial**

Services Act have no leg to stand on. It follows that the ***Contra Proferentum Rule*** and the several related authorities cited do not in any way aid the Plaintiff's case.

4.19. The 3rd Defendant contends that for the Plaintiff to succeed in a claim for breach of contract, it is incumbent upon them to clearly identify the terms of agreement allegedly breached and explain with particularity how the breach occurred. That a perusal of the Plaintiff's Pleadings reveals a fundamental omission fatal to their claim. Further that the omission is aggravated by the failure to adduce the contract itself at trial.

4.20. There appears to be no dispute, from my perusal of the Pleadings that the 3rd Defendant was engaged by the 2nd Defendant who is an insurance broker and an agent for both the Plaintiff and the 1st Defendant.

4.21. In my estimation, resolution of the dispute between the Plaintiff on the one hand and the 1st, 2nd and 3rd Defendants is to be found from the terms of contracts embodied in the Finance Lease Agreement dated 9th August, 2018 and the Motor Insurance Policy issued on 13th August, 2018. I say so because extrinsic evidence can not generally be admitted to give effect to the terms of a contract. The Learned Authors **John Hatchard and Muna Ndulo** at Page 319 of the **Law of Evidence in Zambia** state that:

> ***"Extrinsic evidence is generally inadmissible to (a) prove the contents of a document (b) to add, vary, contradict the terms of a document (c) to prove the meaning intended by the author***

of the document..... extrinsic evidence means any evidence outside the document itself and includes other documentary evidence as well as oral evidence".

4.22. It is trite and clear from the provisions of **Order 18 Rules of the Supreme Court** that existence of a valid contract with clearly outlined terms is required for a claim of breach of contract to be lodged let alone sustained. I have scrupulously perused the Plaintiff's Bundle of Documents and found that while the Plaintiff has exhibited the Facility Letter dated 3rd August, 2018, the Finance Lease Agreement executed between the Plaintiff and the 1st Defendant is conspicuously absent.

4.23. Ordinarily, this should have posed a challenge in the Plaintiff's case. However, my further perusal of the Bundle of Documents filed on behalf of the 1st, 2nd and 3rd Defendant's Bundle of Documents reveals that the Finance Lease Agreement has been exhibited so I am not precluded from considering this in my determination of the Plaintiff's claims before me.

4.24. What the Plaintiff has, save for Clause 2.1 of the Finance Lease Agreement, not exhaustively and clearly done, and here I must agree with Counsel for the 3rd Defendant, is to clearly identify all the terms of the Contract that were allegedly breached by the 1st, 2nd and 3rd Defendants respectively. This is particularly important as it gives Court a very clear position of the obligations that are said to have

been breached and for the Court to make a determination whether in fact any breach occurred.

4.25. In my reading, the election not to clearly and exhaustively identify all the terms of the contract alleged to have been breached may, to a large extent, explain the Plaintiff's approach to lean more towards negligence, which it is perfectly entitled to do in prosecuting its case in the manner done. To that extent therefore, it can not be accepted that the election by the Plaintiff not to set out all the terms of the alleged breach of contract undermines the Plaintiff's cause of action or that it compounds the deficiencies of the Plaintiff's case as argued by the 3rd Defendant.

4.26. It is trite that a breach of contract and negligence can both occur in the same contract. Negligence is a tort that involves a failure to exercise reasonable care, resulting in harm or injury to another party. A breach of contract, on the other hand, occurs when one party fails to perform their obligations under the contract, resulting in damages or losses to the other party. I note that the principles applicable to negligence have been well articulated by the Plaintiff on one hand and the 1st and 2nd and 3rd Defendants on the other who have usefully cited the cases of **Donoghue v Stevenson**[7], **Blyth v Birmingham Waterworks Company**[8] and **Attorney General v George Mwanza**[8] (***sued in his capacity personal representative of the Late Monica Mwanza) and Whiteson Mwanza (sued in his capacity as personal representative of the Late Grace Mwanza)***[9], all for the position that for an action in negligence to succeed, it must be shown that the Defendant

owed a duty of care to the Plaintiff, that duty had been breached and that the Plaintiff suffered damage as a result of that breach.

4.27. Flowing from the above, it becomes necessary for me to determine whether on the evidence before me, the Plaintiff has made out a case for negligence against the 1st, 2nd and 3rd Defendants respectively against the backdrop of the particulars of professional negligence as stated by the Plaintiff and set out in Paragraph 1.13 above of this Judgment.

4.28. The standard of proof required in civil matters is on the balance of probability and a Plaintiff can not rely on a failed defence to sustain a claim against the Defendant as held in the case of **BJ Poultry Farms Limited v Nutrifeeds Zambia Limited**[10] where the case of **Khalid Mohammed v Attorney General**[11] was cited with approval.

4.29. There is a meeting of minds by the parties that the Plaintiff was owed a duty by the 1st, 2nd and 3rd Defendants to provide their services with reasonable care and skill as an incident of contractual agreement. The point of departure appears to be on the standard of care as canvassed by the parties respectively. The Plaintiff and the 3rd Defendant cited the Learned author of **Black's Law Dictionary** on the definition of duty of care and negligence respectively, as:

> ***"The duty to act with diligence and the prevailing standards for the locality for the kind of work performed and to use any special skill***

the actor has to perform the work". *(emphasis mine).*

"The failure to use such care a reasonably prudent and careful person would use under similar circumstances; it is doing some act which a person of ordinary prudence would not have done under similar circumstances or failure to do what a person of ordinary prudence would have under similar circumstances". (emphasis mine)

4.30. On the other hand, the 1st and 2nd Defendants contend that while the Bank and Broker owe its duty to customers, the standard of care is that of an ordinary person of such skill. The Learned Author **Parker Hood** in **"Principles of Lender Liability"** at page 8 was cited for the explanation that:

> ***"the standard of care expected of a banker is such skill and care as an ordinary competent banker would be expected to exercise. It does not have to be the highest level of skill".***

4.31. I now would return to the Finance Lease Agreement, as this is what is helpful in the resolution of the matter in this regard. The Plaintiff's position is that it was owed a duty by the 1st Defendant to pursue the 3rd Defendant to settle the claim timely. I have not found any evidence from my review of the Record that the duty to pursue the insurance claim was placed on the 1st Defendant as the first loss payee. What I find instead is that the duty to pursue the claim was placed squarely on the Plaintiff and I am fortified in this position by

clause 8 on damage of the goods and particularly Clause 8.1 couched as:

> "***If the goods are damaged, destroyed or lost, the lessee must immediately advise the lessor in writing and must thereafter claim from the Insurance Company asking the Insurance Company to pay the insurance monies to the lessor".***

4.32. There is evidence that it was a term of the Finance Lease Agreement that as a precondition to funds being availed to the Plaintiff, the Plaintiff was required to provide comprehensive Insurance Cover on the Motor Vehicle endorsing the 1st Defendant as first loss payee. The Plaintiff's witness admitted in Cross Examination that the Plaintiff did not provide its own insurance as required under the Finance Lease Agreement and admitted that she authorized the 1st Defendant to provide insurance. The authorization is found at Page 10 of the 1st and 2nd Defendant's Bundle of Documents (see Paragraph 4.15 above).

4.33. There is evidence that following the authorization by the Plaintiff for the 1st Defendant to provide insurance, the 1st Defendant proceeded to do so through the 2nd Defendant. There is also confirmation by the 3rd Defendant, that the 3rd Defendant was engaged by 2nd Defendant who was an insurance broker and agent of both the Plaintiff and 1st Defendant to provide insurance cover for the Motor Vehicle among other assets subject of the Finance Lease

Agreement. I have found that the 3rd Defendant did in fact provide insurance under Policy Number P/01/4002/246119/2018 and indeed the Plaintiff had an insurable interest within the meaning of the case of **Nyimba Investments Limited v Nico Insurance Zambia Limited**[12] usefully cited by the Plaintiff.

4.34. Given the steps taken by the 1st, 2nd and 3rd Defendants, I do not see how the Plaintiff can be heard to reasonably argue that there was negligence and therefore breach of duty owed to the Plaintiff in providing insurance cover as sought to be argued. Furthermore, I have found evidence that the Plaintiff had reported the 1st and 3rd Defendants to the Competition and Consumer Protection Commission and the Pensions and Insurance Authority for anti-competitive conduct and the delay in processing the insurance claim respectively. I am inclined to take the view that if indeed there was anything wrong done by these Defendants, the two entities to which the complaint was lodged would have expeditiously acted on the matters as raised by the Plaintiff and not folded their arms as the Plaintiff appears to suggest by stating that the matter remains unconcluded. I say so because the matters subject of the complaint by the Plaintiff fall squarely within the respective mandates of the two entities.

4.35. I now proceed to deal with the germane issues as below:

i) ***Whether the Plaintiff is entitled to Damages for loss of use of the Asset and failure to indemnify the Plaintiff according to clause 2.1 of the lease and for***

loss of opportunity to restore ownership of the Asset after 36 months of the lease facility.

4.36. On this issue, the Plaintiff referred me to the case of **Esso Petroleum Co Ltd v Mardon**[13] for the position that one should look into the future so as to forecast what should have been likely to happen if he never entered into a contract. Additionally, the Learned Author of **Cheshire, Fifoot and Furnstones Law of Contract** was cited for the position that a breach of contract no matter what form it takes entitles the innocent party to maintain an action for damages. The prayer therefore was that damages be referred to assessment.

4.37. The 1st and 2nd Defendants on their part contend that the Plaintiff did not suffer any loss so as to give any rise to damages from the Defendants. Further that the Plaintiff had not adduced any evidence to that effect. The 3rd Defendant has also argued that the Plaintiff did not place the claim for loss of business in the Statement of Claim but only brought it out in the particulars and that the Plaintiff adduced no evidence to substantiate the assertion.

4.38. I have addressed my mind to the Pleadings and evidence before me and note that the Plaintiff has indeed indicated that it lost business opportunities from Pick and Pay, Shoprite, Food Lovers and Game Stores as a result of loss of use of the damaged Motor Vehicle. Other than that assertion, there is not an iota of evidence that points to the fact that it had running contracts with Pick and Pay and the

other chain stores. Because there is no evidence, the Plaintiff has not proved that it suffered damage entitling it to the award of damages for loss of business as by law required. I find comfort for my position in the case of **Morgan v Sim**[14] where it was held that:

> ***"The party seeking to recover compensation for damages must make out that the party against whom he complains was in the wrong, the burden of proof is clearly upon him, and he must show that the loss is attributed to the other. If at the end, he leaves the case in even scales and does not satisfy the Court that the loss was occasioned by the default of the other party he cannot succeed".***

4.39. In this jurisdiction I wholly adopt the guidance laid down by the Supreme Court in the case of **J. Z Car Hire v Chala Sirrocco Enterprises Limited**[15] that:

> ***"This Court has said it in a number of cases such as Zulu v Avondale Housing Project***[16] ***and Mhango v Ngulube and Others***[17] ***that it is for the party claiming damages to prove the damage, never mind the opponent's case".***

4.40. To amplify on the **Mhango v Ngulube**[17] case referred to in Paragraph 4.39 above, the Supreme Court stated that:

> ***"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.....

The result is that the evidence presented to the Court was unsatisfactory, and in our opinion, the Learned Judge would have been entitled either to refuse to make any award or to award a much smaller amount, 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". (emphasis mine)

4.41. Given, the state of the evidence adduced by the Plaintiff in respect of the claim for loss of business, I find no substratum that would, at the very least, entitle me to refer the matter for assessment of damages as I have been urged by the Plaintiff's Advocate.

4.42. Regarding the allied issue whether the Plaintiff was meant to be indemnified by the 1st Defendant, in accordance with clause 2.1 of the Finance Lease Agreement, I only have to look at the clause couched in the following terms:

> ***"The lessee will pay the lessor all the amounts due in terms of the agreement, on the due date, without any deductions unless required by law. Payments must be made at the address chosen by the lessor".***

4.43. My reading and understanding of this clause is that the payments ought to be made by the Plaintiff (Lessee) to the 1st Defendant (Lessor) and not the other way round. As far

as I am able to discern, the clause is not meant to be interchanged to make room for indemnification of the Plaintiff by the 1st Defendant. Further, clause 8 which I have referred to in Paragraph 4.8 of this Judgment which provides for what ought to happen in the event of damage to goods makes no mention of the 1st Defendant indemnifying the Plaintiff for any loss. Furthermore, clause 11 which is the provision on indemnity places the burden on the Plaintiff to ensure that the 1st Defendant is indemnified against any risk or loss.

4.44. Quiet clearly, proceeding along the lines argued on behalf of the Plaintiff would be going against the well settled principle of the law as guided in the case of **Holmes Limited v Build Well Construction**[18] that where the parties have embodied the terms of their written document, extrinsic evidence is not generally admissible to add to, vary, subtract from or contradict the terms of the written contract.

(ii) Whether the Plaintiff is entitled to a recomputation of the statement by the 1st Defendant taking into account the fact that payment was effected on January, 2020 instead of January, 2019.

(iii)Whether the Plaintiff is entitled to a reversal of the interest charged between January, 2019 and January, 2020.

4.45. I propose to deal with these two together, as in my view, they are related. The Plaintiff's position is that there is evidence that the Motor Vehicle was technically a write off in January,

2019, and had the 3rd Defendant settled the claim timely, the interest suffered on the account from February, 2019 to January, 2020 would have been avoided. According to the Plaintiff, the fairest way to resolve this is to order a recalculation of the Account Statement so as to exclude the interest and lease fees for the period of the inordinate delay. Further that the Account should not have been treated as though the asset was capitalized until the end but should show that it was prematurely settled.

4.46. The 3rd Defendant's position is that it was unable to discharge the claim as both the Plaintiff and 1st Defendant had not reached an agreement earlier on how the claim ought to be settled. The 1st Defendant's position is that it was the duty of the Plaintiff to pursue the insurance claim from which it failed and now seeks to shift the blame to the 1st Defendant. The 2nd Defendant's position is that it gave the Plaintiff all necessary details with regard to the insurance and made timely efforts to pursue the claim as soon as it was brought to its attention that the Motor Vehicle was involved in an accident.

4.47. I have found evidence that following the accident that occurred involving the Motor Vehicle on 7th January, 2019, the part that was damaged was the refrigerated container. That the Plaintiff was advised to obtain repair quotations by the 3rd Defendant as the insurer following a report by its assessors. There was evidence by the 3rd Defendant's witness that the prerogative whether to repair a damaged vehicle or to replace such a vehicle, as the case may be, lies

with the 3rd Defendant as the insurer. The Plaintiff's sole witness also conceded to this fact in Cross Examination.

4.48. There is evidence that no quotations for repair were obtained and submitted by the Plaintiff. Instead, there is evidence that the Plaintiff had communicated its desire for the Motor Vehicle to be written off because no garage could repair it locally. I have also found evidence by both the Plaintiff and the Defendants that there were no dealers locally who could repair the damaged refrigerated part of the Motor Vehicle.

2.49. I have found evidence that Action Auto Zambia, the authorized dealers of Isuzu vehicles in Zambia, had issued a Profoma Invoice appearing at page 46 of the 1st and 2nd Defendant's Bundle of Documents, for the repair of the Motor Vehicle in South Africa. Further that the 3rd Defendant had availed a Discharge Form for the settlement of the insurance claim and made proposals at its own cost that the Motor Vehicle be transported to South Africa on a bed Truck for repairs. Further, evidence is that there were meetings held and emails exchanged between the parties in the process of settling the insurance claim for the Motor Vehicle.

4.50. There is also evidence that the Plaintiff's Director, **PW**, had made it very clear to the Defendants that she had rejected the idea and proposal of the Motor Vehicle being transported to South Africa for repairs. Further evidence is that the offer for discharge was only signed by the Plaintiff's Director on 18th December, 2019 as appears in the 1st and 2nd Defendant's Bundle of Documents.

4.51. The question I pose to myself given the above chronology of events is this: can it reasonably be argued that the 1st Defendant or the 2nd Defendant or indeed the 3rd Defendant were responsible for the inordinate delay in resolving the Plaintiff's insurance claim following the accident? I answer this question in the negative. I say so because from my evaluation of the evidence, there was no evidence that the Motor Vehicle was a total write off. There was undisputed evidence that only the refrigeration unit was damaged and required repair in South Africa.

4.52. In my estimation, what stood between the timely resolution of the claim and the repair of the Motor Vehicle was the Plaintiff's Director's election not to have the Discharge Form signed earlier to facilitate the Motor Vehicle being transported to South Africa at the 3rd Defendant's own cost for repairs when the proposal was made. There is evidence and I take judicial notice that Isuzu Motor Vehicles are not manufactured in Zambia. It is therefore surprising, if not unreasonable, for the Plaintiff's Director to have vehemently refused to have the Motor Vehicle at no cost to the Plaintiff, transported to South Africa for repairs when she knew or ought to have known that the Motor Vehicle could not be repaired in Zambia as it was not manufactured here. I find it hard to exonerate the Plaintiff, through its Director, from having occasioned the delay in the circumstances of this case.

4.53. In any event, I find support for my position in the Finance Lease Agreement executed between the Plaintiff and the 1st

Defendant on the issues regarding interest charges and recomputation *vis a vis* the inordinate delay in the settling of the insurance claim for the Motor Vehicle. Clause 3 is couched in the following terms:

> "***The lessor will at all times remain the owner of the goods and the lessee acknowledges and confirms that it is a mere bailee of the goods. For avoidance of doubt, it is expressly understood and agreed that this Agreement is not a Hire Purchase Agreement or an Instalment Sale Agreement within the meaning of the Hire Purchase Act Chapter 399 of the Laws of Zambia***"

Clause 8 of the Finance Lease has been reproduced at paragraph 4.11 above and will not be repeated here

4.54. It is important therefore to understand the concept of Finance Leases. Though not binding on me, I find the High Court case of **Stanbic Bank v Jimmy Kalunga and Another**[19] very persuasive. Judge Mweemba in this case defined Finance Leases as follows:

> "***Finance Lease or Equipment Lease is a way of providing finance whereby the leasing company (the lessor or owner) buys the asset for the user (hirer or lessee) and rents it to the lessee for an agreed period. Ownership of the asset remains with the lessor at all times. The Agreement is structured so that the lessee pays off the whole value of the asset. An important feature of a***

finance lease is that if the lease is terminated for whatever reasons before its expiry date, the lessor is entitled to recover its capital investment and also its finance charges". (emphasis mine)

4.55. In the present case, Clause 8.4 and 8.4.1 are clear that the Lessee (Plaintiff) shall pay all amounts due at the time and in the manner provided and continue to pay the same on the occurrence and the subsistence of the agreement including when any accident involving the goods occurs, whether caused by the Lessee or otherwise.

4.56. Dealing with similar provisions in the case of **Stanbic v Jimmy Kalunga** case, Mweemba J, at Pages J46 to 47 had this to say:

> ***"The Respondent also objected to the rental amounts charged after the leased assets were rendered economically unusable and unrepairable by road traffic accidents. As rightly pointed out by counsel for Respondents, the 2nd Respondent was obliged to pay lease rentals for regardless of whether the assets existed or not. This is in fact the effect of Clause 8 of the standard terms of the Lease Agreement. Clause 8.4 of the Lease Agreement provides that "8.4. The lessee shall pay all amounts due at the time and in the manner herein provided and shall continue to pay the same on the occurrence of and during the subsistence, or 8.4.1. Any accident involving the goods, whether such***

accident was of the lessee's making or otherwise, or 8.4.2 Any event or effect that was not or could not have been anticipated or controlled by the parties."

It is the Respondent's contention and submission that allowing the Applicant to continue charging rentals for an asset that was damaged and whereof the Applicant had received payment of the salvage value from the Insurance Company is against equity, justice and commerce. That this amounts to unjust enrichment which is frowned upon by the law. The cases JEOFFERY KAPASHA CHISHA V EMILY HOLLAND and FIBROSA SPOLKA AKCYJNA V FAIRBAIRN LAWSON COMBE BARROUR LIMITED were relied on. It was submitted that all rental charges charged and in some respects, received after occurrence of accidents should be reversed and discounted from the claimed amount. As indicated above an important feature of a Finance Lease is that if the lease is terminated for whatever reason before its expiry date, the lessor is entitled to recoup its capital investment and also its finance charges. This means that a lessor will recover all of the cost of the asset plus its finance charges irrespective of whether the asset is damaged and even if insurance monies have been paid to it. However, any insurance monies which exceed the cost of the asset and

the lessor's finance charges must be paid to the lessee". *(emphasis mine)*

4.57. From the reading of the provisions of the relevant clause of the Finance Lease Agreement, that is to say Clause 8.4, the Plaintiff was under obligation to make the lease payments notwithstanding that the vehicle had been damaged. I am further fortified in taking this position by the case of **Jimmy Kalunga and Another v Stanbic Bank**[20] where Mchenga, DJP, on behalf of a panel of the Court of Appeal held that:

> ***"The first issue we will deal with are the charges associated with assets that were involved in the accidents. We agree with the trial Judge's holding that Clause 8.4 of the Lease Agreement obligated the appellants to continue paying for assets involved in accidents. The terms of the clause are in our view clear and do not require interpretation".***

4.58. It has been submitted in the Plaintiff's submissions in Reply that the case of **Stanbic Bank v Jimmy Kalunga and Another** which the 1st and 2nd Defendant relied upon was decided on old law that is now repealed. According to the Plaintiff's Advocates, this Judgment was delivered on 10th March, 2017, and the **Banking and Financial Services Act No. 7 of 2017** that is purported to have governed the agreement that the Plaintiff and the 1st Defendant signed came into effect on 18th May, 2018.

4.59. It would appear to me that the Plaintiff's Advocates may not have been aware that the High Court case of **Stanbic Bank v Jimmy Kalunga and Another**[19] referred to in Paragraph 4.56 was in fact escalated to the Court of Appeal which rendered, its Judgment referred to in Paragraph 4.57 above on 25th November, 2018 after the **Banking and Financial Services Act No. 7 of 2017** had come into effect. The Court of Appeal upheld the Judgment of the High Court. This is not to say that the relevant provisions of the **Banking and Financial Services Act** can not apply in a proper case where it is established as a matter of fact that these provisions have been violated. I have not found any violation in this matter as I have demonstrated.

5.0 CONCLUSION

5.1. Based on the evidence adduced by the parties and the authorities reviewed, I am not satisfied that the Plaintiff has proved its case on the balance of probabilities.

5.2. The concept of unjust enrichment as articulated by the Plaintiff does not apply to Finance Lease transactions entered into voluntarily, and therefore, there will be no recomputation of the statement by the 1st Defendant or reversal of all the interest charged between January, 2019, and January, 2020.

5.3. I find, on the whole, that the Plaintiff has not made out a case on its claims for damages and special damages on the balance of probabilities.

5.4. Consequently, the Plaintiff's case is dismissed in its entirety with costs to the Defendants to be taxed in default of agreement.

5.5. Leave to Appeal is granted.

DELIVERED AT LUSAKA THIS 7TH DAY OF FEBRUARY, 2025.

I. M. MABBOLOBBOLO

HIGH COURT JUDGE.