

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

2021/HP/0220



BETWEEN:

**ALAMTARA GAS HAULIRES LIMITED****PLAINTIFF**

AND

**THE ATTORNEY GENERAL  
ZAMBIA METEOROLOGY AGENCY  
THE NATIONAL PROSECUTION AUTHORITY**

**1<sup>st</sup> DEFENDANT  
2<sup>nd</sup> DEFENDANT  
3<sup>rd</sup> DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 18<sup>th</sup> DAY OF  
SEPTEMBER, 2023.**

*For the Plaintiff* : Ms. M. Mwiinga & Ms. M. Phiri, Messrs P N P  
Advocates

*For the 1<sup>st</sup> & 3<sup>rd</sup> Defendants:* Mr. F. M Sikazwe, Principal State Advocate

*For the 2<sup>nd</sup> Defendant* : Mr. B.C Mutale SC, Ms M. Mukuka, Mr T. Kashweshi  
& Ms S. Musengwa, Messrs Ellis & Co

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## **J U D G M E N T**

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### CASES REFERRED TO:

1. *Hicks v Faulkner* 1881 QBD 167
2. *Pandit Gaya Parshad Tewari v Sardar Bhagat Singh* 1908 24 T.L.R 884
3. *Tims v John Lewis & Co Ltd* 1951 2 KB 459
4. *Ginski v McIver* 1962 ALL ER 696
5. *Claude Samuel Gaynor v Cyril Robert Cowley* 1971 ZR 50
6. *Mubita Mbanga v The Attorney-General* 1979 ZR 234
7. *John Leonard Martin v Watson* 1995 UKHL 25
8. *Kvello v Miazga* 2010 W.W.R 45

### LEGISLATION REFERRED TO:

1. *The Weights and Measures Act Chapter 403 of the Laws of Zambia*

OTHER WORKS REFERRED TO:

1. ***Bullen & Leake & Jacobs Precedents of Pleadings, 16<sup>th</sup> Edition Volume 1 London Sweet & Maxwell, 2008***
2. ***Clerk & Lindsell on Torts, 20<sup>th</sup> Edition, Sweet & Maxwell Thomas Reuters (Legal) Limited, 2010***
3. ***Street on Torts, by Margaret Brazier, 9<sup>th</sup> Edition, London Butterworths, 1993***

**1. INTRODUCTION**

- 1.1 The dispute in this matter is centred on whether the Defendants in this matter, being the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority, without reasonable and probable cause, and with malice, prosecuted Alamtara Gas Hauliers Limited, a company that is incorporated in Zambia and carries on business as such, before the Subordinate Court.
- 1.2 The issues in controversy are also whether, as a result of the said prosecution, Alamtara Gas Hauliers Limited suffered damage and loss, is entitled to damages for malicious prosecution, as well as damages for the resultant loss.
- 1.3 Therefore, Alamtara Gas Hauliers instituted this action by Writ of Summons accompanied by a statement of claim and the other documents on 26<sup>th</sup> February, 2021, which were amended on 21<sup>st</sup> June, 2022 seeking:
  - i. *Damages, including aggravated and exemplary damages for malicious prosecution.*
  - ii. *Damages for loss of business.*
  - iii. *An Order for the settlement of the amount of K817, 771.92 being the average loss of business from Alamtara Gas Hauliers Limited's tanker truck*

*registration number ACZ 4482 not operating as a result of the Zambia Meteorology Agency's action from 1<sup>st</sup> April, 2017 until 19<sup>th</sup> December, 2019.*

- iv. Interest on any sums found due.*
- v. Any other relief that the Court may deem fit.*
- vi. Costs.*

## **2. STATEMENT OF CLAIM**

- 2.1 Alamtara Gas Hauliers Limited, states that on or around 24<sup>th</sup> April, 2017, the Attorney General acting through its' agent, the Zambia Meteorology Agency, then known as the Zambia Weights and Measures Agency (ZWMA) took a criminal complaint against it in the Subordinate Court, pursuant to **Sections 26 (1) (D) and 29 of the Weights and Measures Act, Chapter 403 of the Laws of Zambia.**
- 2.2 It is contended that the allegation was that Alamtara Gas Hauliers Limited had committed felonious offences of forgery of stamps and instruments. Alamtara Gas Hauliers Limited states that the Zambia Meteorology Agency maliciously sustained the criminal prosecution against it from May 2017 until October, 2018, through the National Prosecution Authority.
- 2.3 Therefore, during the said period, Alamtara Gas Hauliers Limited appeared before Magistrate J.S Chiyayika, and it was convicted by the said Court for the offences of Forgery of stamps contrary to **Section 26 (1) (D) of the Weights and Measures Act Chapter 403 of the Laws of Zambia,**

and for the offence of Using False Instruments contrary to **Section 29 of the said Weights and Measures Act.**

- 2.4 The averment is that Alamtara Gas Hauliers Limited appealed the decision of the Subordinate Court, and on appeal, the High Court on 6<sup>th</sup> May, 2020, acquitted Alamtara Gas Hauliers Limited on the charges, after the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority were represented by the National Prosecution Authority in opposing the appeal.
- 2.5 Consequently, it is contended that the charges were brought against Alamtara Gas Hauliers Limited maliciously and without reasonable and probable cause. In so alleging, Alamtara Gas Hauliers Limited states the particulars of the allegations as follows:

**MALICE/ABSENCE OF REASONABLE AND PROBABLE CAUSE**

- i. The Zambia Meteorology Agency, through its' agents and servants' insistence and unfounded allegations that Alamtara Gas Hauliers Limited's tanker registration number ACZ 4482, seal was tampered with by the said Alamtara Gas Hauliers Limited, without any cogent evidence at all.
- ii. The Zambia Meteorology Agency's insistence and unfounded allegation that Alamtara Gas Hauliers Limited forged a stamp of assize of fuel tanker truck registration number ACZ 4482.

- iii. The National Prosecution Authority's sustenance of the groundless prosecution to the detriment of Alamtara Gas Hauliers Limited.
- 2.6 It is contended that by reason of the above, Alamtara Gas Hauliers Limited suffered loss and damage as stated below:
- i. Alamtara Gas Hauliers Limited faced the fear and anxiety of a groundless prosecution and conviction against it.
- 2.7 The further contention is that as a result of the charges and prosecution of Alamtara Gas Hauliers Limited, its' tanker truck ACZ 4482 was stopped from operating by the Zambia Meteorology Agency from 13<sup>th</sup> April, 2017 until 19<sup>th</sup> December, 2018. The averment is that when the said tanker truck was operational, it used to deliver fuel mainly to Maamba Mine and other places in Zambia, and its' receipted income before it was grounded, was as follows:
- |                 |                     |
|-----------------|---------------------|
| December 2016-  | K42, 317.70         |
| January, 2017-  | K39, 467.40         |
| February, 2017- | K39, 372.00         |
| March, 2017-    | K34, 609.00         |
| <b>Total-</b>   | <b>K155, 766.00</b> |
- 2.8 The averment is that the average rate of income on the said tanker truck for hauling fuel on an 18, 000 litres capacity was K38, 941.52 per month. Alamtara Gas Hauliers Limited further states that during the period that the tanker truck registration number ACZ 4482, was grounded, its' other trucks, tanker truck registration number ACX

6028 brought in K1, 118, 951.42, while tanker truck registration number ACZ 4471 received payments in the amount of K998, 824.61. The particulars of loss for tanker truck registration number ACZ 4482 are stated as:

**PARTICULARS OF LOSS OF BUSINESS**

- i. Loss of business for the tanker truck which was not in operation from 13<sup>th</sup> April, 2017 to 19<sup>th</sup> December, 2018, culminating in a loss on average of K817, 771.92.

**3. ATTORNEY GENERAL'S DEFENCE**

- 3.1 The capacities in which Alamtara Gas Hauliers Limited has sued, and that in which the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority are sued is admitted. The assertion regarding the criminal prosecution of Alamtara Gas Hauliers Limited is admitted to the extent that the Zambia Meteorology Agency brought a complaint against the said Alamtara Gas Hauliers Limited as alleged.
- 3.2 It is further stated that Alamtara Gas Hauliers Limited was prosecuted at the Subordinate Court through the National Prosecution Authority, and that Alamtara Gas Hauliers Limited was convicted of the offences and appealed to the High Court. It is denied that the National Prosecution Authority represented the Attorney General, the Zambia Meteorology Agency and itself in opposing the appeal.
- 3.3 The defence by the Attorney General, is that it sustained the criminal prosecution of Alamtara Gas Hauliers Limited

with reasonable cause, based on the evidence that was provided by the witnesses that were called by the Zambia Meteorology Agency.

- 3.4 The Attorney General does not deny that Alamtara Gas Hauliers Limited suffered loss and damage as a result of the criminal prosecution. However, its' defence is that the charging of Alamtara Gas Hauliers Limited was necessary after an inspection of the fuel terminal by the Zambia Meteorology Agency revealed that there was alteration to the ullage mark on the said tanker.
- 3.5 The defence is further that the prosecution of Alamtara Gas Hauliers Limited followed an assessment by the Attorney General, on the basis of the evidence of the evidence that was provided by the Zambia Meteorology Agency. The allegations relating to the loss that Alamtara Gas Hauliers Limited incurred on account of the tanker truck registration number ACZ 4482 being grounded, is said to be within its' peculiar knowledge.
- 3.6 The Attorney General denies the income stated as having been brought in by Alamtara Gas Hauliers Limited's tanker trucks registration numbers ACX 6028 and ACZ 4471. It denies that Alamtara Gas Hauliers Limited is entitled to the reliefs sought.

#### **4. THE ZAMBIA METROLOGY AGENCY'S DEFENCE**

- 4.1 Like the Attorney General, the Zambia Meteorology Agency admits the capacities in which the parties have sued and have been sued. It admits that it brought a complaint

against Alamtara Gas Hauliers Limited as alleged, but denies the basis of the complaint.

- 4.2 The defence is that the complaint was that Alamtara Gas Hauliers Limited altered instruments so as to make it false or unjust contrary to **Section 26 (1) (D) of the Weights and Measures Act, Chapter 403 of the Laws of Zambia** and use of or being in possession for use in trade, or hire out, permitting or condoning the use in trade of false or unjust instruments, contrary to **Section 29** of the said Act. The Zambia Meteorology Agency denies that it sustained a malicious criminal prosecution against Alamtara Gas Hauliers Limited from May, 2017 until October, 2018.
- 4.3 Its' defence is that the decision to prosecute Alamtara Gas Hauliers Limited was made by the National Prosecution Authority, pursuant to its' mandate, as set out in the **Constitution of Zambia Act No 2 of 2016** and the **National Prosecution Act No 34 of 2010**. The Zambia Meteorology Agency states that it merely lodged a complaint against Alamtara Gas Hauliers Limited.
- 4.4 Thereafter, the National Prosecution Authority exercised its' professional Judgment, on the facts of the case leading to its' decision to prosecute Alamtara Gas Hauliers Limited. It is agreed that Alamtara Gas Hauliers Limited was convicted by the Subordinate Court, and that it appealed to the High Court and was acquitted. The Zambia Meteorology Agency however denies that on appeal, it was represented by the National Prosecution Authority.

- 4.5 It contends that it did not participate in the prosecution of Alamtara Gas Hauliers Limited in both the Subordinate Court and the High Court. On that basis, the particulars of malicious prosecution are denied. It is stated that the Zambia Meteorology Agency brought the complaint after a physical inspection of Alamtara Gas Hauliers Limited's tanker truck at the TAZAMA Lusaka fuel terminal, which revealed alteration of the ullage mark on the said tanker.
- 4.6 It reiterates that the decision to prosecute Alamtara Gas Hauliers Limited was made by the National Prosecution Authority following an assessment of the complaint and the evidence. The losses alleged to have been incurred are denied, and it is stated in the alternative, that the finding of fact by the Magistrate and the High Court that the seals were tampered with, confirmed that the Zambia Meteorology Agency, raised the complaint against Alamtara Gas Hauliers Limited with reasonable and probable cause.
- 4.7 Consequently, it is denied that Alamtara Gas Hauliers Limited was subjected to groundless prosecution and conviction, and that it is entitled to the reliefs sought.

## **5. THE NATIONAL PROSECUTION AUTHORITY'S DEFENCE**

- 5.1 The National Prosecution Authority, also does not dispute the capacities of the parties in this matter. It admits that a complaint was lodged against Alamtara Gas Hauliers Limited by the Zambia Meteorology Agency on 4<sup>th</sup> April, 2017, pursuant to **Sections 26 (1) (D) and 29 of the Weights and Measures Act, Chapter 403 of the Laws of**

**Zambia.** It is however, denied that the criminal prosecution of Alamtara Gas Hauliers Limited was maliciously sustained.

- 5.2 It is admitted that the Subordinate Court convicted Alamtara Gas Hauliers Limited who appealed to the High Court and was acquitted. The National Prosecution Authority denies that the prosecution was undertaken without reasonable and probable cause, stating that there was such reasonable and probable cause. In that regard, the particulars of reasonable and probable cause are stated as:

**PARTICULARS OF REASONABLE AND PROBABLE CAUSE**

- i. The National Prosecution Authority led evidence from witnesses that were availed by the Zambia Meteorology Agency, which proved that Alamtara Gas Hauliers Limited's tanker truck registration number ACZ 4482's seal for compartment 3 was tampered with, and this was confirmed by the High Court Judgment, which was delivered on 6<sup>th</sup> May, 2020.
- ii. Evidence was led through witnesses that were availed by the Zambia Meteorology Agency that established the fact that the ullage mark level for compartment 3 of Alamtara Gas Hauliers Limited's tanker truck registration ACZ 4482 was about 21.5 cm and not 20.7 cm as stated on the Assize Certificate.

- iii. The National Prosecution Authority led sufficient evidence which proved the offence in count 2 to the effect that Alamtara Gas Hauliers Limited did use or had in its' possession for use in trade or permitted or condoned the use in trade of an instrument, namely stamp of assize of fuel tanker which was false or unjust.
- iv. The National Prosecution Authority established through evidence which is on the record of proceedings, which evidence was not discounted by the High Court Judge that Alamtara Gas Hauliers Limited used this tanker truck and was about to load fuel at TAZAMA when the random inspection was done by the Zambia Meteorology Agency on 29<sup>th</sup> March, 2017.
- v. The Judgment of the High Court did not evaluate or consider ground 6 of the appeal which assailed Alamtara Gas Hauliers Limited's conviction on count 2.

5.3 The particulars of loss and damage that are claimed, are denied, with the National Prosecution Authority contending that the prosecution of Alamtara Gas Hauliers Limited was not groundless. It is further contended that sufficient evidence was led, which proved that the seals were tempered with, and that the tempered instrument was in use by Alamtara Gas Hauliers Limited.

- 5.4 The assertion that as a result of the charges and the criminal prosecution of Alamtara Gas Hauliers Limited, its' tanker truck registration number ACZ 4482, was stopped from operating by the Zambia Meteorology Agency is admitted to the extent that during the prosecution of the matter, the said tanker truck was stopped from operating, because its' certificate had been rejected on account of the tempered seals.
- 5.5 The particulars of income that tanker truck registration number ACZ 4482, used to make before it was stopped from operating, are said to be within Alamtara Gas Hauliers Limited peculiar knowledge, as is the alleged monthly income for the said tanker truck, and what the other tanker trucks registration number ACX 6028 and ACZ 4471 made for the period 10<sup>th</sup> April, 2017 to 19<sup>th</sup> December, 2018. It is denied that Alamtara Gas Hauliers Limited suffered loss of business as result of tanker truck registration number ACZ 4482 not operating.

## **6. EVIDENCE LED AT TRIAL**

- 6.1 At trial, Alamtara Gas Hauliers Limited called Two (2) witnesses, while the Attorney General and the National Prosecution Authority called One (1) witness, and the Zambia Meteorology Agency called Two (2) witnesses.

## **7. EVIDENCE BY ALAMTARA GAS HAULIERS LIMITED**

### **PW1- MUSTAFA SIMWAYA**

- 7.1 This witness told the Court that he is General Manager for Alamtara Gas Hauliers Limited. He produced his witness

statement as his evidence before the Court, on amending paragraph 23 of the said witness statement, to read the amount as K1, 118, 951.42.

- 7.2 His evidence as contained in the witness statement, is that sometime in the year 2017, the Attorney General, through its' agent the Zambia Meteorology Department brought a complaint against Alamtara Gas Hauliers Limited before the Subordinate Court, for forgery of stamps and instruments as seen on the charge sheet at page 1 of Alamtara Gas Hauliers Limited's bundle of documents.
- 7.3 The allegation was that the criminal prosecution of Alamtara Gas Hauliers Limited was maliciously undertaken by the National Prosecution Authority, as an agent of the Attorney General. It was further Mustafa Simwaya's testimony, that the prosecution of Alamtara Gas Hauliers Limited was instituted without reasonable and probable cause, as its' truck which was alleged to have had a tampered seal, was on 3<sup>rd</sup> April, 2017, allowed to collect a quotation from the Zambia Meteorology Agency's accountant by Cornelius Njovu, and it was re-assized with new seals, which were installed at a fee of K1, 776.00.
- 7.4 He also testified that a temporary certificate with a life of Seven (7) days was issued, which allowed the said tanker truck to operate for Seven (7) days, after it was re-assized by an officer of the Zambia Meteorology Agency. The receipt evidencing the payment for re-assizing the tanker truck and the temporary certificate was said to be at page 692,

volume 2 of Alamtara Gas Hauliers Limited's bundle of documents.

- 7.5 His evidence was also that before the truck was re-assized, Dalla Simasiku and Cornelius Njobvu who were officers of the Zambia Meteorology Agency, on 29<sup>th</sup> March, 2017 inspected the said tanker truck at the TAZAMA depot in Lusaka, before it could refuel.
- 7.6 He stated that according to the said officers, the tanker truck could not load fuel because the seals on its' third compartment had been tampered with. Mustafa Simwaya further in his evidence, testified that the tanker truck in issue was on 29<sup>th</sup> March, 2017, being driven by Moses Musakata, and when it was directed that the tanker truck could not load fuel, the driver was issued with a form called *Tanker Truck Inspection Checklist*, which was at page 694, volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, and he was requested to sign it.
- 7.7 The assertion was that the driver signed the said document on the assumption that it was a procedural requirement, and not an admission that the tanker truck had a tampered seal. As to what else transpired on 29<sup>th</sup> March, 2017, Mustafa Simwaya testified that the tanker truck was inspected for fire safety by a fireman, who checked the fire extinguishers, as well as the seals, and the ullage mark. It was further his testimony, that the driver of the tanker truck signed to show that the truck had been checked.

- 7.8 The continued testimony was that after the tanker truck was inspected for fire safety, the tanker truck underwent a second inspection by Societe Generale de Surveillance (SGC) and Socotec International Inspection (Z) Limited, which are both entities that are contracted by the Government of Zambia to test, inspect and certify fuel tankers.
- 7.9 The evidence that was also given, was that inspection by the Two (2) entities was conducted in conjunction with inspectors from Tanzania, and the measurements that were taken, corresponded with the readings on Alamtara Gas Hauliers Limited's Assize Certificate. Therefore, the tanker truck's seals were certified to be fine, and the driver was allowed to load, after he signed in a book. Page 709, volume 2 of Alamtara Gas Hauliers Limited's bundle of documents was identified as the Assize Certificate with the readings thereon.
- 7.10 Mustafa Simwaya, also in his evidence, stated that Dalla Simasiku and Cornelius Njovu stopped the tanker truck from loading fuel, after SGC and SOCOTEC had inspected it, on the allegation that the seals on the third compartment were tampered with. He went on to testify that on the same 29<sup>th</sup> March, 2017, other inspectors from the Energy Regulation Board (ERB), the Road Transport and Safety Agency (RTSA), the Zambia Bureau of Standards (ZABS) and the Zambia Police had conducted inspection of the said tanker truck without any adverse reports.

- 7.11 It was testified that, after Dalla Simasiku and Cornelius Njovu inspected the tanker truck, the driver of the said tanker truck was informed that the seal on the third compartment was tampered with, where the ullage mark level for the said third compartment was reading 21.5 cm and not 20.7 cm, as indicated on the Assize Certificate, and the Zambia Meteorology Agency's servants proceeded to seize the tanker truck, but they did not issue a Seizure Certificate.
- 7.12 Then from there, Alamtara Gas Hauliers Limited's representatives were summoned to an enforcement meeting on 30<sup>th</sup> March, 2017, at the Zambia Meteorology Agency offices, where a hearing on the alleged tampering of the seals was held. Mustafa Simwaya contended that the basis for the Zambia Meteorology Agency causing the prosecution of Alamtara Gas Hauliers Limited, was that it had tampered with the seals.
- 7.13 However, the said seals were never taken to Court, and Mustafa Simwaya alleged that the Zambia Meteorology Agency did not pay due regard that margins of error are allowed in readings and weights in the ***Weights and Measures Act, Chapter 403 of the Laws of Zambia***.
- 7.14 It was also Mustafa Simwaya's testimony that other factors such as human tampering could have caused the seals to produce different readings. He alleged that the criminal prosecution was malicious, as no basis existed for doing so. Mustafa Simwaya testified that the criminal prosecution

lasted from May 2017 to October, 2018, in the Subordinate Court at Lusaka, whose result was that Alamtara Gas Hauliers Limited was convicted of the offence of Forgery of Stamps contrary to **Section 26 (1) (D) of the then Weights and Measures Act**, and using false instruments contrary to **Section 29 of said Act** with pages 645-673 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, being identified as the Judgment of the Subordinate Court.

- 7.15 The evidence also given by Mustafa Simwaya, was that Alamtara Gas Hauliers, being dissatisfied with the Judgment of the Subordinate Court, appealed to the High Court, which Court in the Judgment and the Certificate of Acquittal, at pages 674-688 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, quashed the conviction.
- 7.16 Mustafa Simwaya also testified that as a result of the charges and the prosecution by the National Prosecution Authority on the complaint that was made by the Zambia Meteorology Agency, Alamtara Gas Hauliers Limited's tanker truck registration number 4482 was stopped from operating by the said Zambia Meteorology Agency, from 13<sup>th</sup> April, 2017 until 19<sup>th</sup> December, 2018, which resulted in loss of business.
- 7.17 It was stated that during the period that the said tanker truck was in operation, it used to deliver fuel to Maamba Mine and other places in Zambia, with its' income between December, 2016 to March, 2017, before it was grounded

being K155, 766.00, as evidenced at page 5 volume 1 of Alamtara Gas Haulier Limited's bundle of documents.

7.18 Mustafa Simwaya repeated the averment in the statement of claim, stating that Alamtara Gas Hauliers Limited's other tanker trucks registration number ACZ 4471 and ACX 6023 earned the amounts of K998, 824.61 and K118, 951.42 respectively, as income during the period that the tanker truck registration number ACZ 4482 was grounded. He referred to pages 3,4, and 6 of volume 1 and pages 336 to 644 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents as the various invoices, Delivery Notes and monthly truck performances in support of the said averment.

7.19 It was stated, that the tanker truck registration number ACZ 4482, would have earned the total sum of K1, 118, 951.42 during the period.

**CROSS EXAMINATION OF MUSTAFA SIMWAYA BY  
COUNSEL FOR THE ATTORNEY GENERAL AND THE  
NATIONAL PROSECUTION AUTHORITY**

7.20 In cross examination, Mustafa Simwaya testified that the tanker truck registration number ACZ 4482 belonged to Alamtara Gas Hauliers Limited. He also stated, that the said tanker truck was expected at the Zambia Meteorology Agency on 29<sup>th</sup> March, 2017. Mustafa Simwaya agreed that on the tanker truck being inspected by officers from the Zambia Meteorology Agency, the Rejection Certificate, which was at page 7 of the Zambia Meteorology Agency's

bundle of documents was issued, on the basis of the issues that were highlighted therein.

- 7.21 It was agreed that the first issue stated in the Rejection Certificate was the tampered seal. The evidence that was further given by Mustafa Simwaya in cross examination, was that the National Prosecution Authority prosecuted Alamtara Gas Hauliers Limited, based on the issues that were contained in the Rejection Certificate. He did not recall whether the Rejection Certificate was produced during the trial in the Subordinate Court.
- 7.22 However, when referred to pages 10-11 of Alamtara Gas Hauliers Limited's bundle of documents, Mustafa Simwaya told the Court that in the last paragraph on page 10, the witness identified the Rejection Certificate, and in the first paragraph at page 11, the Rejection Certificate was marked as 'ID1'.
- 7.23 It was further Mustafa Simwaya's testimony that his prayer was that Alamtara Gas Hauliers Limited be paid as he had stated at the beginning of his testimony, being the amount of K155, 766.00 as income earned between the period between December, 2016 to March, 2017, before the tanker truck was grounded. He also testified that they had Two (2) other tanker trucks that earned the amount of K998, 824.61 and K1, 118, 951.42 between April 2017, and December, 2018, the period during which the tanker truck registration number ACZ 4482 was grounded.

- 7.24 Still in cross examination, Mustafa Simwaya's testimony was that if the amount of K155, 000.00 from December, 2016 to March, 2017, was multiplied by the number of months that the tanker truck was parked, it would have earned income that was close to Four (4) times that of Four (4) trucks. His evidence was that the amount of K155, 000.00 was for Four (4) months, and that if that amount was divided by the Four (4), it gave the monthly income.
- 7.25 Mustafa Simwaya further in cross examination, testified that during the rainy season, the deliveries were less, and that the peak period for deliveries was between April and November. He agreed that the amount of K781, 000.00 that Counsel had calculated was based on the documents in the bundle of documents, being the delivery notes and the invoices. His position was that the tanker truck supposedly had tampered seals when in fact not.
- 7.26 Further in cross examination, Mustafa Simwaya's testimony was that the tampered seals were not produced in Court and that was why, the High Court on appeal quashed the conviction by the Subordinate Court.

**CROSS EXAMINATION BY COUNSEL FOR THE ZAMBIA METEOROLOGY AGENCY**

- 7.27 Mustafa Simwaya, when cross examined by Counsel for the Zambia Meteorology Agency told the Court, that in his witness statement, he had stated that officers had inspected the truck and they cleared the ullage mark. He named these officers who cleared the ullage mark as being

a Safety Officer from Tanzania, whose expertise he did not know, and the other from SGC, whose name he did not know as well. It was his testimony that officers from SGC are competent to inspect.

7.28 When cross examined further, Mustafa Simwaya's evidence was that a safety officer checks the safety of the truck and haulage. On other officers that also inspected the tanker truck, he stated that there was a fire officer from TAZAMA, who also inspected the truck, prior to it loading. He added that the fire officer inspected the safety of the truck, and in particular, the ullage mark of the Assize Certificate, the validity of the mechanical certificate, the driver's licence, tyres, the fire extinguisher and the off-loading pipe.

7.29 Mustafa Simwaya agreed that he was not present during the inspection, and that he had no evidence to show that the officers had inspected as he had testified. As to what the duties of the Meteorology Officer are, Mustafa Simwaya stated that it is to ascertain the quantities that are supposed to be delivered to the consumers. He did not know what the effect of altering the ullage mark downwards is.

7.30 Mustafa Simwaya did however, tell the Court that where the ullage mark was adjusted upwards, it would give wrong readings. Still in cross examination, his testimony was that the impact of an upward alteration of the ullage mark on a customer, is that the volume of fuel that is delivered, will not be as indicated on the ullage mark.

- 7.31 The clarity that Mustafa Simwaya gave was that if there is upward alteration of the ullage mark, more volume of fuel would be delivered, and less volume is delivered, if there is downward adjustment on the ullage mark. Further, that if there is upward alteration of the ullage mark, the customer will not receive the volume of fuel that they paid for, entailing that they will receive more.
- 7.32 Thus, if the adjustment is downwards, the customer will receive less volume of fuel than they paid for. Mustafa Simwaya agreed that it is the duty of the Meteorology Officer to ensure that a customer receives the volume of fuel that they pay for. He agreed that it is an offence to adjust the ullage mark, and that it has always been.
- 7.33 In continued cross examination, Mustafa Simwaya agreed that where a Meteorologist discovers that a seal has been tampered with, they have the right to take appropriate action against the driver of the tanker truck and the company that owns the said tanker truck, by way of imposing a fine for first offenders, and prosecuting repeat offenders. He also testified that the Meteorologist has discretion to still fine a repeat offender.
- 7.34 Mustafa Simwaya testified that in this case, Alamtara Gas Hauliers Limited was a repeat offender. He however, took the view that there was no reason for the Zambia Meteorology Agency to lay a complaint against Alamtara Gas Hauliers Limited, stating that the matter should have been determined administratively, as the Zambia

Meteorology Agency threw away the seals, and the minutes of the meeting that was held on 30<sup>th</sup> March, 2017, were not circulated.

- 7.35 Mustafa Simwaya told the Court that Moses Musakata, the driver for Alamatarra Gas Hauliers Limited, who was driving the tanker truck in question and Dalla Simasiku, a Meteorologist from the Zambia Meteorology Agency signed the Rejection Certificate. It was further, his testimony that Moses Musakata was still employed by Alamtara Gas Hauliers Limited.
- 7.36 Mustafa Simwaya agreed that Dalla Simasiku performed the responsibilities of inspecting the truck for the validity of the Assize Certificate and the readings of the ullage mark by comparing that reading, with that which was on the Assize Certificate. The evidence that was also given, was that the Rejection Certificate signified that compartment No 3 had a tampered seal with a reading that was different from that which was on the Assize Certificate.
- 7.37 Mustafa Simwaya agreed that a meeting was held on 30<sup>th</sup> March, 2017, at which officers from the Zambia Meteorology Agency, Abdul Simwaya and Moses Musakata were present. He testified that the National Prosecution Authority handled the prosecution of the matter, and that himself, Moses Musakata, Hayden Banda from Spectra Oil Corporation and Broadley Mwando testified on behalf of Alamtara Gas Hauliers Limited.

7.38 Mustafa Simwaya also agreed that the Subordinate Court found Alamtara Gas Hauliers Limited was found with a case to answer and was convicted by the High Court for the offence of tampering with the seals.

**RE-EXAMINATION OF MUSTAFA SIMWAYA**

7.39 In re-examination, Mustafa Simwaya clarified that officers from the Zambia Meteorology Agency informed Moses Musakata the driver, that the seal on compartment No 3 was tampered with, and that it had a reading which was different from that which was on the Assize Certificate. Thereafter, Moses Musakata handed over the Assize Certificate. He also clarified in re-examination, that the other offence involved a different driver and truck.

**PW2-MOSES MUSAKATA**

7.40 He also produced his witness statement as his evidence before the Court. The evidence as contained in that witness statement, is that Moses Musakata is employed by Alamtara Gas Hauliers Limited as a driver, having commenced work on 19<sup>th</sup> February, 2017. Therefore, in relation to his duties, on or about 21<sup>st</sup> February, 2017, Moses Musakata loaded 18, 000 litres of fuel from the TAZAMA depot in Solwezi, in the tanker truck registration number ACZ 4482 which he was given to drive.

7.41 Moses Musakata further, testified that he drove the said tanker truck on 29<sup>th</sup> March, 2017, to Lusaka to load fuel from the TAZAMA depot, that is located in the Heavy Industrial Area. He stated that on arrival there, he found

that his Loading Order or ticket was ready at the main gate, and he parked the tanker truck there. He went on to testify that the first inspection of the tanker truck was done by the fireman, who inspected his driver's licence, the Assize Certificate for the tanker truck, and the Dangerous Goods Certificate.

- 7.42 It was also Moses Musakata's testimony that the fireman checked for the fire extinguisher and he went on top of the vehicle, where Moses Musakata was required to open the top so that the seals and ullage mark could be checked. Thereafter, he was asked to sign in a book. Moses Musakata still in his testimony, testified that from there, inspectors from SGC and Tanzania Security inspected the tanker truck, and they all asked for the Assize Certificate for the tanker truck, which was issued by the Zambia Meteorology Agency, and indicated the readings which were stamped at the ullage mark in each compartment of the vehicle.
- 7.43 He identified page 689 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents as the Assize Certificate. It was also Moses Musakata's testimony, that the officer from SGC went up the tanker truck with a ruler and he took measurements and read out the readings to the security officer from TAZAMA, who had a copy of the Assize Certificate and who was on the ground.
- 7.44 He added that all the Five (5) compartments of the tanker truck were checked, and that the readings were compared

with those that were contained on the Assize Certificate. Moses Musakata's further evidence was that this was done in his presence, and that the readings were confirmed as being correct. Thereafter, Moses Musakata was asked to sign in the book, and he was allowed to proceed to the loading bay to load the fuel, on being given a Loading Order by the security guard.

7.45 His continued testimony was that it was while he had parked at the loading bay, that he was approached by Dalla Simasiku, who informed him that he was conducting random inspection and he requested for the Assize Certificate for the tanker truck. Thereafter, Dalla Simasiku inspected the tanker truck, and whilst he was on top of the said vehicle, he had called his colleague, Cornelius Njobvu. It was stated that whilst he was measuring, Dalla Simasiku had informed Moses Musakata that the tanker truck would not load, as the seal on the third compartment had been tampered with.

7.46 Moses Musakata testified that he was given an inspection checklist to sign, to show that the tanker truck had been inspected, and the tanker truck's Assize Certificate was seized. Also, in his testimony, Moses Musakata stated that, inspectors from the Energy Regulation Board (ERB) inspected the vehicle, while those from the Road Transport and Safety Agency (RTSA) checked the insurance for the vehicle, the tyres, and Moses Musakata's driving licence.

- 7.47 Then the officers from the Zambia Bureau of Standards checked the interior of the tanker truck, as well as the fire extinguishers, and the position of the ullage marks. It was stated that thereafter, Moses Musakata signed the various inspection check lists. Moses Musakata's continued evidence was that he had earlier driven the tanker truck to Solwezi where he had loaded fuel twice, and the same procedural checks were carried out on the vehicle, which included checking the seals and ullage mark, and he was issued with a Loading Order.
- 7.48 He went on to testify that on the tanker truck being seized, he had called Mustafa Simwaya and informed him about what had transpired. It was also his evidence, that he had denied having tampered with the seals when asked by Mustafa Simwaya. Moses Musakata told the Court that the next day, they were called to a meeting at the Zambia Meteorology Agency which he attended with the Chairman of Alamtara Gas Hauliers Limited, Adbul Rwigara Simwaya. There, he had denied having tampered with the seals or changing the readings. It was stated that they were informed in the meeting, that the Zambia Meteorology Agency would write to Alamtara Gas Hauliers Limited, which they did in the letter at pages 698-699 of Alamtara Gas Hauliers Limited's bundle of documents.
- 7.49 Thus, on 2<sup>nd</sup> April, 2017, when Moses Musakata went to the Zambia Meteorology Agency, Cornelius Njobvu who attended to him, on recording the registration number for

the tanker truck and the number of compartments on a small piece of paper, asked Moses Musakata to take it to the Accounts Office, and to collect a proforma invoice there. On doing so, Cornelius Njobvu informed Moses Musakata that Alamtara Gas Hauliers Limited could pay the amount during the same week and the tanker truck could be re-assized.

7.50 His further evidence was that the next day, he was allowed to load at the TAZAMA depot in Lusaka on the strength of the Re-Assize letter, as he did not have a Re-Assize Certificate. Moses Musakata testified that Gabriel Mwape of the Zambia Meteorology Agency then went on top of the truck and removed the cover, and he measured and changed the readings on the ullage mark.

7.51 It was testified that Gabriel Mwape thereafter, issued Moses Musakata with a temporary Assize Certificate, which both of them signed, and which was at page 689, volume 2 of Alamtara Gas Hauliers Limited's bundle of documents.

7.52 Then from there, Moses Musakata went and offloaded the diesel that he had loaded. He testified that after Two (2) days, he went to load using the temporary Assize Certificate at the TAZAMA depot in Lusaka.

**CROSS EXAMINATION OF MOSES MUSAKATA BY  
COUNSEL FOR THE ATTORNEY GENERAL AND THE  
NATIONAL PROSECUTION AUTHORITY**

7.53 When cross examined, Moses Musakata agreed that on 29<sup>th</sup> March, 2017, he was driving tanker truck registration

number ACZ 4482, and he went to load fuel in the said tanker truck at the TAZAMA depot in Lusaka. His evidence was that he had all the documents that would have enabled him to load fuel. Moses Musakata agreed that Dalla Simasiku of the Zambia Meteorology Agency inspected on top of the tanker truck, and that he made observations.

7.54 Then after that, Dalla Simasiku asked him to sign the certificate. He agreed that he signed the Rejection Certificate, which was at page 7 of the Zambia Meteorology Agency's bundle of documents, and the document at page 8 of the said bundle of documents. He denied that Dalla Simasiku informed him that the seal or the ullage mark had been tampered with, but that Cornelius Njobvu informed him so.

7.55 It was further agreed, that as a result of the same, Moses Musakata was not allowed to load fuel, and his position was that himself and his employer were prosecuted. On being referred to paragraph 24 of his witness statement, Moses Musakata testified that it stated that Gabriel Mwape of the Zambia Meteorology Agency asked for a Re-Assize letter. He denied that it was true that the Assize Certificate could not be used as the seal was tampered with, and that the reading on the Assize Certificate was different. It was stated that Moses Musakata was told that the seal was tampered with, but that the Assize Certificate had no issue.

**CROSS EXAMINATION BY COUNSEL FOR THE ZAMBIA  
METEOROLOGY AGENCY**

- 7.56 It was Moses Musakata's evidence in cross examination by Counsel for the Zambia Meteorology Agency, that there was no evidence before the Court to show that officers from the other agency's inspected the tanker truck. He told the Court that on the material day, he had his driver's licence, certificate for dangerous goods, a loading order from Spectra and the Assize Certificate.
- 7.57 Whilst agreeing that the certificate of test was taken away from him by the Zambia Meteorology Agency, Moses Musakata denied that this was done in Order to prevent him from driving the tanker truck after it was inspected. His evidence was that he drove the tanker truck from the depot up to the garage, but he agreed that he was prevented from loading fuel, as he did not have the certificate.
- 7.58 Moses Musakata further, agreed that on 30<sup>th</sup> March, 2017, he attended a meeting at the Zambia Meteorology Agency in Lusaka which office handled everything. He also agreed that he was told that the tanker truck had to be re-assized. Moses Musakata further admitted that, he testified before the Subordinate Court, but he denied that Alamtara Gas Hauliers Limited was found guilty before that Court of tampering with the seal, stating that to his knowledge, it was for improper hand over.

**RE-EXAMINATION OF MOSES MUSAKATA**

7.59 On being re-examined, Moses Musakata clarified that he was informed at the enforcement meeting, that Alamtara Gas Hauliers Limited would be communicated to on the re-assizing, as until that was done, one could not load fuel.

7.60 That marked the close of the case for Alamtara Gas Hauliers Limited.

**8. EVIDENCE BY THE ATTORNEY GENERAL AND THE NATIONAL PROSECUTION AUTHORITY****DW1- DALLA SIMASIKU**

8.1 Dalla Simasiku produced his witness statement as his evidence before the Court. He further told the Court that as at 29<sup>th</sup> March, 2017, he was working at the Zambia Weights and Measures as a Meteorologist. Dalla Simasiku's testimony was that he was employed as a Meteorologist by the Zambia Meteorology Agency from 2016 to 2017. His evidence was that at the time of his testimony, he was working at the Zambia Bureau of Standards.

8.2 In respect of this matter, he stated that he was part of the team of inspectors, being Meteorologists, whose work included calibration, verification and inspection of compliance of measuring instruments that are used in trade.

**CROSS EXAMINATION OF DALLA SIMASIKU BY COUNSEL FOR THE ZAMBIA METEOROLOGY AGENCY**

8.3 It was his evidence in cross examination, that when he inspected the tanker truck on 29<sup>th</sup> March, 2017, he had

informed the driver of the said tanker truck. Dalla Simasiku further testified, that he had asked the driver to avail him the Certificate of Assize after he had introduced himself, and he had explained the purpose of the inspection.

- 8.4 He told the Court that his inspection established that compartment number 3 of the tanker truck had an adjustment in the quantity from the certified 20.7 centimeters to 21.5 centimeters. He explained that the said reading signified the volume of the fuel that the compartment is certified to hold. It was also Dalla Simasiku's testimony that a compartment is certified to hold 4000 litres of a product at a reading of 20.7 centimeters.
- 8.5 Therefore, when the reading is adjusted to 21.7 centimeters, the compartment will hold less volume of fuel than the 4000 litres, and ultimately, the recipient will not get the 4000 litres of fuel that they would have paid for.
- 8.6 Dalla Simasiku further in cross examination, testified that he told the driver Moses Musakata that he had found that compartment number 3 was non-compliant, as the quantity indicator had been unlawfully adjusted, and that the seal of assize had been unlawfully tampered with, which was contrary to the ***Weights and Measures Act***. Therefore, Dalla Simasiku, in line with that Act, issued a Certificate of Rejection to Moses Musakata, and he withdrew the Certificate of Assize.

- 8.7 It was his position that Moses Musakata understood and he signed the Certificate of Rejection, as Dalla Simasiku confiscated the Certificate of Assize. Still in cross examination, Dalla Simasiku's testimony was that the Southern Region handled the issue, and that he was based at the head office under Legal Meteorology. He explained that the said department handled instruments that are used to facilitate trade.
- 8.8 The evidence that was further given, was that Lusaka fell under the Southern Region at the time, while Ndola fell under the Northern Region. Dalla Simasiku also stated that in terms of enforcement, the Northern Region was different from the Southern Region, even if clients from the two different regions loaded fuel there. It was also explained that where a charge of non-compliance was pending in the Southern Region, it would take the Southern Region Fourteen (14) days to conclude the investigations and communicate to the Northern Region on their findings.
- 8.9 His evidence as to when he left the Weights and Measures Agency, was that it was in November, 2017. Dalla Simasiku testified that he appeared as a witness before the Subordinate Court around June 2017, after the National Prosecution Authority interviewed him as a witness.

**CROSS EXAMINATION OF DALLA SIMASIKU BY  
COUNSEL FOR ALAMTARA GAS HAULIERS LIMITED**

- 8.10 Dalla Simasiku, when cross examined by Counsel for Alamtara Gas Hauliers Limited, testified that their

inspections were random, and were not done daily at the depot. He stated that there were inspections that were done at TAZAMA by third parties, whose specific names he did not recall. As to what transpired on the material day, Dalla Simasiku told the Court that the tanker truck registration number ACZ 4482, which was driven by Moses Musakata was in the queue waiting to load, when he inspected it.

- 8.11 It was stated that Dalla Simasiku could not confirm whether the other institutions had already inspected the tanker truck at the time. He did however, confirm that without a Certificate of Assize, a tanker truck will not be allowed to load fuel. He stated, that he was unaware of the arrangements between TAZAMA and the third parties. Dalla Simasiku confirmed that he was with Cornelius Njobvu when he apprehended the tanker truck, and that himself and Cornelius Njobvu in addition to Mr. Shandavu were from the same institution.
- 8.12 It was agreed that Dalla Simasiku climbed on top of the tanker truck to perform the inspection, and that he did so alone. However, he testified that he had called Cornelius Njobvu to confirm his findings, as he was on top of the tanker truck. The evidence that was further given, was that Dalla Simasiku informed Moses Musakata who climbed on top of the tanker truck to confirm his findings.
- 8.13 He denied that the said evidence was an afterthought as it was not contained in his witness statement. Dalla Simasiku also stated that Moses Musakata denied having tampered

with the seals even though he signed the Rejection Certificate. Dalla Simasiku testified that the other institutions inspected the tanker truck within their mandates, and he agreed that no third party confirmed his and Cornelius Njobvu's findings.

- 8.14 He admitted having seized the tanker truck at the time, but clarified this, stating that he did not physically do so. In that regard, Dalla Simasiku stated that he took away the Certificate of Assize, and therefore, the truck could not be used. Otherwise, the driver, Moses Musakata remained in physical possession of the tanker truck. Dalla Simasiku agreed that he did not mention criminal prosecution to Moses Musakata.
- 8.15 Still in cross examination, Dalla Simasiku testified that he partially attended the enforcement meeting the next day, and he admitted that at that point, no prosecution was mentioned. He denied that Alamtara Gas Hauliers Limited was informed that it could re-assize, stating that there was no such discussion when he was present in the meeting. He was unaware whether minutes of the meeting were taken, but he was aware that Alamtara Gas Hauliers Limited re-assized the tanker truck, and it was ready for loading.
- 8.16 Dalla Simasiku when referred to page 1 of the Zambia Meteorology Agency's bundle of documents, testified that it was a letter dated 13<sup>th</sup> April, 2017, about Two (2) weeks after the meeting of 30<sup>th</sup> March, 2017. He agreed that as

the minutes of 30<sup>th</sup> March, 2017 were not before Court, they did not know whether Alamtara Gas Hauliers Limited was allowed to re-assize during the meeting.

- 8.17 Whilst agreeing that he was a witness during the trial at the Subordinate Court, Dalla Simasiku told the Court that the seal of assize was not produced before that Court. He told the Court that the seal went with the driver. He explained that as the seal was adjusted from 20.7 centimeters to 21.5 centimeters, it meant that the customers would receive less fuel. Dalla Simasiku agreed that they did not check with Alamtara Gas Hauliers Limited's clients to see whether they had received less products.
- 8.18 His evidence was further that they did not receive any complaints from any clients alleging receipt of less fuel. Dalla Simasiku told the Court that he was unaware that a tanker truck could not leave TAZAMA if it had a higher or lower ullage mark. He further expressed ignorance on the assertion that loading Orders were processed in Ndola and that for quotations that were issued in Lusaka, the payments were made in Ndola.
- 8.19 Dalla Simasiku agreed that he did not have any evidence to show that Alamtara Gas Hauliers Limited obtained a second quotation to re-assize in a wrong manner. It was also his evidence that the Zambia Weights and Measures was one institution, but an agency, and that it depended whether a third party would deal with the Agency as one.

8.20 Dalla Simasiku did not know whether Alamtara Gas Hauliers Limited was refunded for the second quotation, but he told the Court that he heard that it was acquitted on appeal.

8.21 That marked the close of the case for the Attorney General and the National Prosecution Authority.

## **9. EVIDENCE BY THE ZAMBIA METEOROLOGY AGENCY**

### **DW2-KENNEDY SIMUTOWE**

9.1 In his testimony, Kennedy Simutowe told the Court that he filed a witness statement on 5<sup>th</sup> September, 2022. He stated that the letter referred to in paragraph 21 of the said witness statement, started at page 698, and that the second page of that letter was at page 699. Then with regard to paragraph 22 of his witness statement, he testified that it referred to page 699 of Alamtara Gas Hauliers Limited's bundle of documents, when it should in fact have referred to page 704 of the said bundle of documents.

9.2 He thereafter produced his witness statement as his testimony before the Court, after the witness statement was accordingly amended, there being no objection to the application.

9.3 The evidence as contained in the witness statement, is that Kennedy Simutowe is a Senior Meteorologist, who was employed by the Zambia Meteorology Agency in 2011. He testified that he had been a Senior Meteorologist since 2014, and was based at the Lusaka station, which fell

under the Southern Region. Kennedy Simutowe further in his statement, told that the Court, that in that capacity, he was in charge of supervising a team of inspectors (Meteorologists), whose work included calibration, verification and inspection for compliance of measuring instruments that are used in trade.

- 9.4 He also testified that he was also responsible for coordinating enforcement matters and meetings between the Zambia Meteorology Agency and alleged offenders. With regard to this matter, his evidence was that on 29<sup>th</sup> March, 2017, the Zambia Meteorology Agency conducted a joint inspection of fuel tankers at the Lusaka TAZAMA Fuel terminal with the Energy Regulation Board (ERB), the Zambia Bureau of Standards (ZABS), the Road Transport and Safety Agency (RTSA) and the Zambia Police Service (ZP).
- 9.5 It was stated that Fifteen (15) fuel tankers, including that for Alamtara Gas Hauliers Limited, whose registration number was ACZ 4482 were inspected. He named the criteria for the inspections as including the following:
- i. Checking for compliance on the authenticity of the Certificate of Assize (Meteorology Certificate)
  - ii. Checking for compliance of the status of the lead seals which are used in affixing the holding capacity of each tank compartment.
  - iii. Checking for compliance of the holding capacity level indicator (also referred to as the ullage mark depth)

on each compartment against that which is stated on the Assize Certificate (Meteorology Certificate)

- iv. Checking for compliance of capacity labelling of each tank compartment.

9.6 It was stated that on inspection of the tanker truck ACZ 4482, the following non-compliance issues were observed:

- a) The lead seal which secures the ullage mark seal depth level was tampered with, in compartment number 3. The ullage mark depth level is what determines the certified capacity of the tanker truck compartment. The capacity for compartment 3 was 4000 litres.
- b) The ullage mark depth level of compartment 3 had been altered from the original position of 20.7 centimeters as represented on the Certificate of Assize to a new position of 21.5 centimeters, thereby rendering false representation of the quantity held in the compartment.

9.7 He further testified that Dalla Simasiku, the Meteorologist who conducted the inspection of Alamtara Gas Hauliers Limited's tanker truck, explained the observed non-compliance to the driver for the tanker truck, Moses Musakata, and the nature of the offences that were committed. It was stated that Dalla Simasiku issued a Rejection Certificate to Moses Musakata.

9.8 The continued testimony by Kennedy Simutowe, was that Moses Musakata acknowledged receipt of, and signed the

Rejection Certificate, which was at page 7 of the Zambia Meteorology Agency's bundle of documents. It was stated that the Zambia Meteorology Agency withdrew the original tanker vehicle certificate of test from Moses Musakata, which certificate was at page 9 of the Zambia Meteorology Agency's bundle of documents.

- 9.9 Further in his evidence, Kennedy Simutowe testified that an enforcement meeting was held on 30<sup>th</sup> March, 2017 at the Lusaka station, where the inspection had taken place. He explained that present in the meeting, were representatives from Alamtara Gas Hauliers Limited, who included Abdul Simwaya and Moses Musakata, Humphrey Nkobeni, the then Director Operations for the Zambia Meteorology Agency and Kennedy Simutowe.
- 9.10 He stated that Dalla Simasiku was invited to the meeting, and he narrated the events of 29<sup>th</sup> March, 2017, explaining the findings of the inspection, after which he was excused from the meeting. Kennedy Simutowe testified that in the meeting, Alamtara Gas Hauliers Limited was informed that it would be informed in writing on the course of action that would be taken against it, once a decision was reached.
- 9.11 However, before any official communication could be made to Alamtara Gas Hauliers Limited, by the Lusaka office that was dealing with the case, Alamtara Gas Hauliers Limited presented proof of payment of verification fees for the tanker truck in issue, at the Zambia Meteorology Agency office in Ndola for physical inspection.

- 9.12 It was added that the Ndola office was at the time not aware of the commission of the offence by Alamtara Gas Hauliers Limited, and it issued a note to the said Alamtara Gas Hauliers Limited to verify for certification the said tanker truck, at the TAZAMA fuel terminal. Then on 4<sup>th</sup> April, 2023, during an operation at the TAZAMA fuel terminal at Lusaka, Alamtara Gas Hauliers Limited presented the note to verify for certification of a tanker truck, to a Meteorologist Gabriel Mwape, who was undertaking other verification works at the said fuel terminal. The evidence given was that the said Gabriel Mwape issued Alamtara Gas Hauliers Limited a temporary loading permit.
- 9.13 It was further Kennedy Simutowe's testimony, that on or around 11<sup>th</sup> April, 2017, Alamtara Gas Hauliers Limited attempted to use the said tanker truck despite it having had its' original certificate withdrawn. Kennedy Simutowe stated that this prompted the Zambia Meteorology Agency to suspend Alamtara Gas Hauliers Limited's tanker truck from loading fuel, as shown on the letter of suspension at pages 698-699 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents.
- 9.14 Kennedy Simutowe also stated that upon review of the matter, it came to the Zambia Meteorology Agency's attention that Alamtara Gas Hauliers Limited was a repeat offender, and in that regard, page 704 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents

referred. Then on 25<sup>th</sup> April, 2017, by the letter which was at page 3 of the Zambia Meteorology Agency's bundle of documents, the Zambia Meteorology Agency informed Alamtara Gas Hauliers Limited of its' intention to prosecute it.

9.15 He stated that thereafter, the Zambia Meteorology Agency's Inspection Report was transmitted to the National Prosecution Authority for assessment and determination of possible prosecution. It was also testified that the National Prosecution Authority upon review of the report, prosecuted Alamtara Gas Hauliers Limited, which was convicted by the Subordinate Court at Lusaka.

9.16 Kennedy Simutowe testified that the decision to prosecute Alamtara Gas Hauliers Limited was made by the National Prosecution Authority, and the Zambia Meteorology Agency was called as a witness, referring to page 5 of the Zambia Meteorology Agency bundles of documents in that regard. He added that the prosecution of Alamtara Gas Hauliers Limited was not malicious, as it was premised on the facts stated above.

**CROSS EXAMINATION BY COUNSEL FOR THE  
ATTORNEY GENERAL AND THE NATIONAL  
PROSECUTION AUTHORITY**

9.17 Kennedy Simutowe, when cross examined, testified that the non-compliance led to the prosecution of Alamtara Gas Hauliers Limited before the Subordinate Court. He stated that Dalla Simasiku reported the non-compliance to him,

and he confirmed the said non-compliance. It was further Kennedy Simutowe's evidence in cross examination, that following the non-compliance, the tanker truck could not load fuel.

9.18 His evidence was that he testified before the Subordinate Court where he had explained the basis upon which the client was taken to Court.

**CROSS EXAMINATION BY COUNSEL FOR ALAMTARA GAS HAULIERS LIMITED**

9.19 The testimony that was given by Kennedy Simutowe, when he was cross examined by Counsel for Alamtara Gas Hauliers Limited, was that he confirmed the non-compliance that was reported by Dalla Simasiku. Thereafter, an enforcement meeting was held. He agreed that he was not at the site of the inspection, but rather Dalla Simasiku was. Therefore, he did not physically inspect the tanker truck.

9.20 It was Kennedy Simutowe's testimony that his presence only began during the enforcement meetings, and that he was only told about what happened during the physical inspection. He stated that he was informed that there were other agencies at the site, who executed their mandates. It was further his evidence that the tanker truck was inside the TAZAMA premises, but he did not know if it was at the loading bay.

9.21 His continued evidence in cross examination, was that after the officer inspected the tanker truck, the driver was called

to see what had been found. Kennedy Simutowe stated that he was not told that the driver was not called on top of the tanker truck as the inspection was being done. His position was that only officers from the Zambia Meteorology Agency were mandated to confirm weights and measures, and it did not require a third party to confirm.

- 9.22 Still in cross examination, Kennedy Simutowe testified that he was not informed that the driver was not shown the seals that had issues. He however told the Court that he was aware that the Zambia Police was part of the combined inspection team, even though his officers did not report the issues to them. He attributed the non-reporting to the police as being because the **Weights and Measures Act** is complete on what the officers can do, as they can relay their findings to the prosecuting agency.
- 9.23 Kennedy Simutowe on being referred to paragraph 26 of his witness statement, reiterated that the National Prosecution Authority decided to prosecute Alamtara Gas Hauliers Limited, and that the Zambia Meteorology Agency was called as witness. As regards the letter at pages 3-4 of the Zambia Meteorology Agency's bundle of documents, Kennedy Simutowe testified that the Chief Executive Officer wrote it on 27<sup>th</sup> April, 2014, advising that the Zambia Meteorology Agency had taken the matter to Court.
- 9.24 His position was that the Zambia Meteorology Agency communicated the decision to take the matter to Court. He agreed that the alleged tampered seals, and the tanker

truck were not produced before the Subordinate Court as exhibits. Kennedy Simutowe stated that paragraph 17 of his witness statement was correct. He told the Court that he was not aware that the tanker truck was in Lusaka during the period, and his evidence was that upon proof of payment, the Ndola office approved the re-assizing of the tanker truck.

- 9.25 When referred to paragraph 20 of his witness statement, Kennedy Simutowe testified that Alamtara Gas Hauliers Limited attempted to use the tanker truck despite its' certificate being withdrawn. He was unaware that between 4<sup>th</sup> April, 2017 and 11<sup>th</sup> April, 2017, the said tanker truck made Three (3) fuel deliveries. It was further Kennedy Simutowe's testimony that it was his belief, although he could not remember, that the Lusaka office issued the invoice for payment.
- 9.26 He went on to state that if the tanker truck was not allowed to operate, Cornelius Njobvu would not have issued an invoice to pay. However, there was lapse in communication between the officers over the case. Kennedy Simutowe was not sure whether payment was made in Ndola after an invoice was issued in Lusaka, as accounts handled payments. His evidence was that the Ndola office coordinated loading orders, but that it did not issue Assize letters that go to TAZAMA for issuance.
- 9.27 Kennedy Simutowe agreed that it was unusual that Alamtara Gas Hauliers Limited which had been suspended

went to the Ndola office. He testified that there was an on-going case, and Alamtara Gas Hauliers Limited had been communicated to. Further in cross examination, Kennedy Simutowe agreed that he was in the enforcement meeting, and that the minutes of that meeting were not before Court.

9.28 He explained that the evidence that the tanker truck was stopped from operating, was at page 1 of the Zambia Meteorology Agency's bundle of documents dated 13<sup>th</sup> April, 2017. Kennedy Simutowe testified that before the Subordinate Court, the documentary evidence linked Alamtara Gas Hauliers Limited to the tampering of the seals, hence the conviction before that Court.

9.29 When cross examined further, Kennedy Simutowe testified that he was aware that the driver was acquitted by the Subordinate Court, and that the High Court on appeal acquitted Alamtara Gas Hauliers Limited, but not that there was an appeal against the acquittal.

9.30 It was also stated that Kennedy Simutowe was not aware that there was no complaint from Alamtara Gas Hauliers Limited's clients that they received less fuel, stating that the Zambia Meteorology Agency did not investigate clients. On the role that the Zambia Police played during the inspection, Kennedy Simutowe stated that they looked at safety. He agreed that the ullage mark was not taken as evidence before the Subordinate Court.

9.31 With reference to pages 3-4 of the Zambia Meteorology Agency's bundle of documents, Kennedy Simutowe's

evidence was that the other matter that was referred to at page 3 was not taken to Court, but was dealt with administratively by the Zambia Meteorology Agency.

**RE-EXAMINATION OF KENENDY SIMUTOWE**

9.32 By way of re-examination, Kennedy Simutowe clarified that there were reports that were done by the officers, which led to the enforcement meeting being held, and at which meeting he confirmed the findings. He also stated that the non-compliance was not reported to the Zambia Police, as ***the Weights and Measures Act*** gives the Zambia Meteorology Agency power to act.

9.33 It was also clarified that after an enforcement meeting, there is lapse in time in communicating to the officers by email. Further, that it was strange that Alamtara Gas Hauliers Limited, whose representatives were present during the enforcement meeting, and was communicated to on the suspension, went to Ndola to obtain a re-assize certificate.

**DW3-HUMPHREY NKO BENI**

9.34 Humphrey Nkobeni, the Director Legal Meteorology amended paragraph 8 of his witness statement by adding that when the seal is tampered with, the ullage mark moves down. He further amended paragraph 11 of his witness statement, to read that the inspection report was transmitted to the National Prosecution Authority. Thereafter, he tendered his witness statement as his evidence before the Court.

- 9.35 It was his testimony in that witness statement, that his duties included measuring instruments, which are used in commercial transactions, law enforcement as well as safety and environmental management. He further stated that he supervised the technicians who calibrated and installed measuring instruments.
- 9.36 With regard to this matter, Humphrey Nkobeni's testimony like Kennedy Simutowe's evidence, was that on 29<sup>th</sup> March, 2017, the Zambia Meteorology Agency in conjunction with the Energy Regulation Board, The Zambia Bureau of Standards, the Road Transport and Safety Agency and the Zambia Police, conducted a joint inspection of fuel tankers at the TAZAMA fuel installation. He confirmed that Alamtara Gas Hauliers Limited's tanker truck registration number ACZ 4482, was among the Fifteen (15) tanker trucks that were inspected.
- 9.37 Humphrey Nkobeni stated that the said tanker truck was found to have the lead seal, that is used to measure the quantity of fuel that is to be transported, tampered with. In that respect, he testified that the inspection team found that the seal was open, and had been adjusted, so as to indicate a false reading of the actual quantity of fuel that was being transported to a particular client.
- 9.38 Humphrey Nkobeni further testified that upon the discovery, the driver of the said tanker truck, Moses Musakata, was interviewed and he signed the Rejection Certificate, which was at page 7 of the Zambia Meteorology

Agency's bundle of documents. That was how the Zambia Meteorology Agency withdrew its' Tanker Vehicle Certificate of Test, which was at page 9 of the Zambia Meteorology Agency's bundle of documents from Moses Musakata.

9.39 Further in his evidence, Humphrey Nkobeni testified that on 30<sup>th</sup> March, 2017, an enforcement meeting was held with representatives of Alamtara Gas Hauliers Limited at which the following findings were communicated:

- i. Forgery of the seal-the seal was tampered with, and the ullage mark was adjusted from the reading on the Certificate of Assize.
- ii. Continued use of the tanker with the adjusted seal. This would mean that the seal would move deeper into the tanker with the effect that the volume above the seal could not be accounted for, as the client would only concern themselves with the volume below the seal.

9.40 The continued testimony by Humphrey Nkobeni, was that on or about 11<sup>th</sup> April, 2017, Alamtara Gas Hauliers Limited attempted to use the said tanker truck despite its' certificate having been seized by the Zambia Meteorology Agency. Thus, the Zambia Meteorology Agency suspended Alamtara Gas Hauliers Limited's tanker truck from loading as evidenced the letter of suspension, which was at pages 1-2 of the Zambia Meteorology Agency's bundle of documents.

- 9.41 He also stated that by the letter dated 25<sup>th</sup> April, 2017, which was at page 3 of the Zambia Meteorology Agency's bundle of documents, the Zambia Meteorology Agency informed Alamtara Gas Hauliers Limited of its' intention to prosecute it. It was thereafter, that the Inspection Report was transmitted to the National Prosecution Authority for assessment and possible prosecution.
- 9.42 In concluding his testimony, Humphrey Nkobeni stated that the National Prosecution Authority, on reviewing the report, proceeded to prosecute Alamtara Gas Hauliers Limited which entity was convicted. He denied that the prosecution of Alamtara Gas Hauliers Limited was malicious, but rather was founded on the facts that had been outlined above.

**CROSS EXAMINATION BY COUNSEL FOR THE ATTORNEY GENERAL AND THE NATIONAL PROSECUTION AUTHORITY**

- 9.43 Humphrey Nkobeni, when cross examined by Counsel for the Attorney General and the National Prosecution Authority, stated that following the transmission of the Inspection Report to the National Prosecution Authority, Alamtara Gas Hauliers Limited was arrested.

**CROSS EXAMINATION BY COUNSEL FOR ALAMTARA GAS HAULIERS LIMITED**

- 9.44 On being referred to paragraphs 3-7 of his witness statement, Humphrey Nkobeni agreed that he was not present at the scene. He further agreed that he was not in

the meeting of 30<sup>th</sup> March, 2017, but testified that there were minutes of the meeting that were in the possession of the Zambia Meteorology Agency. Humphrey Nkobeni maintained that Alamtara Gas Hauliers Limited attempted to use the truck despite it being seized.

9.45 He was unaware that Alamtara Gas Hauliers Limited was allowed to re-assize the tanker truck. It was his evidence that the minutes of the meeting of 30<sup>th</sup> March, 2017 were not before Court, but that after the said meeting, the Zambia Meteorology Agency was still handling the matter, and that it relied on the initial finding on the ullage mark. Humphrey Nkobeni agreed that in the Subordinate Court, the ullage mark and the tanker truck were not presented as evidence.

9.46 He further agreed that clients of Alamtara Gas Hauliers Limited were not engaged to find out whether they had any complaints on the quantities of fuel that they received. It was also agreed that Alamtara Gas Hauliers Limited attempted to resolve the matter amicably with the Zambia Meteorology Agency. Humphrey Nkobeni stated that the Zambia Meteorology Agency was satisfied with the evidence that it had.

9.47 He agreed that the letter suspending Alamtara Gas Hauliers Limited's tanker truck which was at page 1 of the Zambia Meteorology Agency's bundle of documents was only written on 13<sup>th</sup> April, 2017. However, he stated that there was Rejection Certificate that was dated 30<sup>th</sup> March,

2017, which was at pages 7-8 of the said bundle of documents. Whilst agreeing that the Rejection Certificate called for a meeting, Humphrey Nkobeni testified that it did not speak to the contents of the meeting or the events leading to the suspension letter being written.

9.48 Still in cross examination, Humphrey Nkobeni agreed that the letter at pages 3-4 of the Zambia Meteorology Agency's bundle of documents, stated that Alamtara Gas Hauliers Limited's tanker truck was suspended on 13<sup>th</sup> April, 2017, but that the minutes of the meeting that made the resolution were not attached to the said letter. He also agreed that another tanker truck for Alamtara Gas Hauliers Limited was found with issues during the inspection.

9.49 In wrapping up the cross examination, Humphrey Nkobeni testified that only Alamtara Gas Hauliers Limited was prosecuted, and that the Zambia Meteorology Agency did not communicate the said prosecution.

#### **RE-EXAMINATION OF HUMPHREY NKO BENI**

9.50 In re-examination, it was clarified that the Rejection Certificate is the initial suspension, and that only Alamtara Gas Hauliers Limited was prosecuted due to the reasons that were stated in the letter at page 3 of the Zambia Meteorology Agency's bundle of documents.

### **10. ANALYSIS AND DECISION**

10.1 I have considered the evidence and the submissions.

**COMMON CAUSE FACTS**

- 10.2 It is common cause that Alamtara Gas Hauliers Limited was prosecuted before the Subordinate Court sitting at Lusaka, together with Moses Musakata its' driver, for the offence of Forgery of Stamps on Instruments contrary to ***Section 26 (1) (D) of the Weights and Measures Act Chapter 403 of the Laws of Zambia.***
- 10.3 It is also not in contention, that Alamtara Gas Hauliers Limited stood charged with the offence of ***Use of false or Unadjusted Instruments Contrary to Section 29 of the Weights and Measures Act Chapter 403 of the Laws of Zambia*** before the Subordinate Court. The facts that are further common cause, are that Alamtara Gas Hauliers Limited was convicted by the Subordinate Court of the said offences, and that on appeal to the High Court, the conviction was quashed.
- 10.4 It is not in dispute, that Moses Musakata was acquitted of the charge that he was facing.

**FACTS IN DISPUTE**

- 10.5 It is in contention that the prosecution of Alamtara Gas Hauliers Limited was maliciously carried out, and without reasonable and probable cause, and that Alamtara Gas Hauliers Limited suffered damage and loss as a result.

**WHETHER THE CRIMINAL PROCEEDINGS AGAINST ALAMTARA GAS HAULIERS LIMITED WERE INSTITUTED WITHOUT REASONABLE AND PROBABLE CAUSE?**

- 10.6 The fact that criminal proceedings were instituted against Alamtara Gas Hauliers Limited before the Subordinate Court, which resulted in it being convicted is not disputed. Further, it is not in dispute, that Alamtara Gas Hauliers Limited appealed the conviction to the High Court where it was acquitted. The issue for determination is whether the criminal prosecution of Alamtara Gas Hauliers Limited before the Subordinate Court was carried on without reasonable and probable cause?
- 10.7 Mustafa Simwaya, in his testimony, contended that the prosecution was carried on without reasonable and probable cause, as even after the allegation was made that the seal was tampered with on 29<sup>th</sup> March, 2017, Alamtara Gas Hauliers was on 3<sup>rd</sup> April, 2017, allowed to collect a quotation from the accountants at the Zambia Meteorology Agency by Cornelius Njobvu, and thereafter, the tanker truck registration number ACZ 4482 was re-assized with new seals, after it paid the fee of K1, 776.00.
- 10.8 His further testimony was that the tanker truck was issued with a temporary certificate, which had a life of Seven (7) days. Mustafa Simwaya's evidence was that by virtue of that certificate, the tanker truck could operate. The other assertions made by Mustafa Simwaya in his testimony, was that prior to Dalla Simasiku and Cornelius Njobvu inspecting the tanker truck, it was inspected by the fireman, SGC and Socotec, as well as officers from the Energy Regulation Board, the Road Transport and Safety

Agency, the Zambia Bureau of Standards and the Zambia Police, who gave no adverse reports.

- 10.9 In defence, Dalla Simasiku stated that his inspection revealed that the lead seal, which secures the ullage mark depth level, was tampered with in compartment number 3, and that the ullage mark depth level of compartment number 3 had moved from the original position of 20.7 centimeters to 21.5 centimeters, thereby rendering a false presentation of the quantity of fuel, that was held in the compartment. He therefore issued the Rejection Certificate, which entailed that the tanker truck could not operate.
- 10.10 Kennedy Simutowe, on behalf of the Zambia Meteorology Agency, testified that after Dalla Simasiku issued the Rejection Certificate, an enforcement meeting was called on 30<sup>th</sup> March, 2017, at which Alamtara Gas Hauliers Limited's representatives, who included Abdul Simwaya and Moses Musakata were present, and they were informed that Alamtara Gas Hauliers Limited would be informed in writing of the action that would be taken against it.
- 10.11 Kennedy Simutowe explained that while the Lusaka office of the Zambia Meteorology Agency was dealing with the case, Alamtara Gas Hauliers Limited presented to the Ndola office of the Zambia Meteorology Agency, proof of payment of verification fees, and the said tanker truck for inspection.
- 10.12 His position was that the Ndola office was not aware of the commission of the offence by Alamtara Gas Hauliers Limited, and it issued the said Alamtara Gas Hauliers

Limited with a note to verify for certification the said tanker truck at the TAZAMA fuel terminal. Then on 4<sup>th</sup> April, 2017, Alamtara Gas Hauliers Limited presented the note to verify for certification of the tanker truck, to Gabriel Mwape a Meteorologist, who upon undertaking other verification works at the said fuel terminal, issued Alamtara Gas Hauliers Limited with a temporary loading permit.

10.13 His testimony was that it was only on or around 11<sup>th</sup> April, 2017, when Alamtara Gas Hauliers Limited attempted to use the said tanker truck, that the Zambia Meteorology Agency was prompted to suspend the tanker truck from loading. It was also testified that after further review, it was discovered that Alamtara Gas Hauliers Limited was a second offender, and a decision was made to prosecute it.

10.14 Humphrey Nkobeni the Director Legal Meteorology confirmed the events as testified by Kennedy Simutowe.

10.15 In the submissions, Alamtara Gas Hauliers Limited relies on ***Bullen & Leake & Jacobs Precedents of Pleadings Volume I, 16<sup>th</sup> Edition in paragraph 2-12*** stating that it provides the elements of malicious prosecution, which a claimant must prove. These are:

- i. That the claimant was prosecuted by the defendant, i.e that proceedings on a criminal charge were instituted or continued by the defendant against him;
- ii. The criminal proceedings were terminated in favour of the claimant;

- iii. The proceedings were instituted without reasonable and probable cause;
- iv. The defendants instituted the proceedings;
- v. The claimant suffered loss and damage as a result.

10.16 The case of **Claude Samuel Gaynor v Cyril Robert Cowley**<sup>(5)</sup> is relied on, stating that the Court in that matter, observed that:

***“The foundation of the action (for malicious prosecution) lies in abuse of the process of the court by wrongfully setting the law in motion, and it is designed to discourage the perversion of the machinery of justice for an improper purpose.”***

10.17 Other authorities relied on in this regard, are **Margaret Brazier in Street on Torts, 9<sup>th</sup> Edition, London Butterworths, 1993 at page 476** where it is stated that:

***“The tort of malicious prosecution is not regarded with favour by the Courts because it runs counter to the policy of freedom to prosecute suspected criminals and to the interest in bringing litigation to a close.”***

10.18 The submission is that the learned author, notes that this is reflected in the development of the requirement, that there must be an absence of reasonable and probable cause, which was stated in the case of **Hicks v Faulkner** <sup>(1)</sup> by *Hawkins J* as;

***“An honest belief in the guilt of the accused based upon a full conviction founded upon reasonable grounds of the existence of a state of circumstances, which assuming them to be true, would reasonably lead any ordinary prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed.”***

- 10.19 The other case said to have stressed the establishment of lack of reasonable and probable cause, in a claim for malicious prosecution is ***Ginski v McIver***<sup>(4)</sup>. The basis of Alamtara Gas Hauliers Limited contending that there was lack of reasonable and probable cause, in instituting criminal proceedings against it, is that the persons who tampered with the seals on the tanker truck remain unknown, and that Moses Musakata, the driver of the said tanker truck was acquitted by the Subordinate Court.
- 10.20 The further submission is that Alamtara Gas Hauliers Limited, is alive to the fact that it is not enough for a claimant in an action for malicious prosecution, to claim that an acquittal is proof of absence of reasonable and probable cause, as they need to prove something more, which operates to establish the mind of the defendant.
- 10.21 In that regard, it is stated that a Plaintiff needs to show the circumstances in which the prosecution was instituted, and demonstrate that the defendant had personal

knowledge that the real facts did not establish criminal liability.

10.22 That in this case, the prosecution did not have overwhelming evidence against Alamtara Gas Hauliers Limited, and not even the seals that were removed from Alamtara Gas Hauliers Limited's tanker truck were taken to Court as exhibits. Further, Kennedy Simutowe told this Court that he did not inspect the tanker truck in issue, but rather Dalla Simasiku, did so with another person called Cornelius Njobvu. It is also submitted that even the tanker truck which was stopped from operating, was not tendered in Court as an exhibit.

10.23 The case of *Kvello v Miazga*<sup>(8)</sup> is relied on, as having held that reasonable and probable cause is not a question of the subjective belief in the guilt of the claimant. That as a public servant, a prosecutor must set aside their personal view as to likely guilt or innocence, and make a professional assessment of the strength of the case.

10.24 The submission is further that *Street on Torts at pages 477-478*, states that it is impossible to enumerate all the factors which may be relevant in deciding whether there was reasonable and probable cause. However, particularly important points, would be that the Defendant acted in good faith, on the advice of Counsel or on the advice of the police, and that the Defendant had taken care to inform himself of the true facts.

- 10.25 The contention by Alamtara Gas Hauliers Limited is that in this case, the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority did not act in good faith, as they have been blaming each other, with the Attorney General and the National Prosecution Authority stating that they acted on the instructions of the Zambia Meteorology Agency, when they should have conducted their own independent investigations, while the Zambia Meteorology Agency claims that it gave the inspection report to the National Prosecution Authority for assessment.
- 10.26 However, it should have satisfied itself, that there was a triable case on the merits, without even submitting the matter for prosecution, and not contend that it was just called as a witness in the matter. The submission is also that the position taken by the Zambia Meteorology Agency is contrary to the evidence that is on the record, as by the letter dated 25<sup>th</sup> April, 2017, it did make the decision to prosecute Alamtara Gas Hauliers Limited.
- 10.27 Therefore, there was no proper assessment of the evidence on the part of either the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority.
- 10.28 The Attorney General and the National Prosecution Authority, in their submissions on the other hand, in agreeing with the elements that need to be proved to satisfy a claim for malicious prosecution, contend that there was

reasonable and probable cause to institute the prosecution. This, they state is because Alamtara Gas Hauliers Limited had breached **Sections 26 (1) (D) and 29 of the Weights and Measures Act, Chapter 403 of the Laws of Zambia.**

10.29 They further, submit that the witness statement for Dalla Simasiku in paragraph 9, shows that upon inspection of the tanker truck for Alamtara Gas Hauliers Limited, the lead seal which secures the ullage mark depth level was found to have been tampered with, in compartment number 3. Further, the ullage mark depth level of compartment number 3 had been altered from the original position of 20.7 centimeters to 21.5 centimeters, thereby rendering false representation of the quantity held in the compartment.

10.30 Thus, in light of that evidence, a Rejection Certificate was issued, which indicated the non-compliance as tampered seals and ullage level, which was acknowledged by Alamtara Gas Hauliers Limited's driver, Moses Musakata. The Attorney General and the National Prosecution Authority also submit, that it is not in dispute, that the tanker truck in issue, was in use, and that is why it was driven to TAZAMA for it to load fuel.

10.31 Therefore, before the Subordinate Court, the National Prosecution Authority led evidence that proved the elements of the offences that were alleged to have been committed by Alamtara Gas Hauliers Limited, and it was consequently convicted. Also relying on the observation in

the case of ***Claude Samuel Gaynor v Cyril Robert Cowley*** <sup>(5)</sup> which has been quoted by Alamtara Gas Hauliers Limited, the Attorney General and the National Prosecution Authority, state that there was sufficient evidence to institute the criminal proceedings against Alamtara Gas Hauliers Limited.

10.32 Therefore, their contention is that they did not wrongly set the law into motion, and they cannot be said to have abused the process of the Court. It is also submitted that the lead seal which secures the ullage mark depth level was tampered with, in compartment number 3, and the ullage mark level of compartment number 3 had been altered from the original position of 20.7 centimeters, as represented on the Certificate of Assize, to a new position of 21.5 centimeters, thereby rendering false representation of the quantity of fuel that was held in the compartment.

10.33 It is thus, the submission by the Attorney General and the National Prosecution Authority, that there was reasonable and probable cause, as espoused in the case of ***Claude Samuel Gaynor v Cyril Robert Cowley*** <sup>(5)</sup>, which is genuine belief, based on reasonable grounds, that a criminal offence has been committed. In justifying the existence of reasonable and probable cause that a criminal offence was committed, it is stated that Musafa Simwaya admitted that Alamtara Gas Hauliers Limited was not a first offender.

10.34 In terms of what malicious prosecution is, **Clerk & Lindsell on Torts, 20<sup>th</sup> Edition, Sweet & Maxwell Thomas Reuters (Legal) Limited, 2010 in paragraph 16-07 at page 1069** provides that:

**“It remains then that it is the malicious preferring on an unreasonable criminal charge that is the usual foundation for the form of action under consideration, and that is what is ordinarily understood by the familiar title an action for malicious prosecution.”**

10.35 **Bullen & Leake & Jacobs Precedents of Pleadings, 16<sup>th</sup> Edition Volume 1 London Sweet & Maxwell, 2008** in **paragraph 2-12 at page 43** states what needs to be established to prove a claim for malicious prosecution as follows:

**“To establish a claim for damages for malicious prosecution, a claimant must plead and establish that:**

- (a) he was prosecuted by the defendant, i.e that proceedings on a criminal charge were instituted or continued by the Defendant against him;**
- (b) The proceedings were terminated in a claimant’s favour;**
- (c) The proceedings were instituted without reasonable and probable cause;**

***(d) That the Defendant instituted the proceedings maliciously; and  
(e) The claimant suffered loss and damage as a result.”***

10.36 The first Two (2) elements are not in dispute, as the law was set in motion, and Alamtara Gas Hauliers Limited was prosecuted on criminal charges before the Subordinate Court and it was convicted. It has also been seen that Alamtara Gas Hauliers Limited was acquitted of the charges on appeal to the High Court.

10.37 As to whether there was want of reasonable and probable cause in instituting the criminal proceedings, Alamtara Gas Hauliers Limited has submitted that while the assertion was that it tampered with the seals on compartment number 3 of the tanker truck, registration number ACZ 4482, the persons who did so remain unknown to date and its' driver Moses Musakata was acquitted of having done so.

10.38 Further, the removed seals and the tanker truck itself were not produced as evidence before the Subordinate Court. The allegation is further that the want of reasonable and probable cause, can be evidenced by the Attorney General and the National Prosecution Authority on the one hand blaming the Zambia Meteorology Agency for instituting the criminal proceedings, when they should have done their own investigations to establish whether there was in fact reasonable and probable cause.

- 10.39 It has further been submitted that the Zambia Meteorology Agency on the other hand, blames the National Prosecution Authority for the criminal prosecution of Alamtara Gas Hauliers Limited, stating that it merely forwarded the inspection report to the said National Prosecution Authority for assessment, and it was just called as a witness in the criminal prosecution.
- 10.40 Therefore, there was no reasonable and probable cause for the criminal prosecution.
- 10.41 It has been seen that the contention by the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority is that there was actual reasonable and probable cause, as Dalla Simasiku, the person that inspected the tanker truck, found that the lead seal for compartment number 3, which secures the ullage mark depth level was tampered with.
- 10.42 Further, this had resulted in the ullage mark depth level of compartment number 3 being altered from the original position of 20.7 centimeters to 21.5 centimeters. The submission is that this had the effect of giving a false representation of the quantity of fuel that was held in the said compartment.
- 10.43 As to who the prosecutor was, in this matter, ***Clerk & Lindsell on Torts, 20<sup>th</sup> Edition, Sweet & Maxwell Thomas Reuters (Legal) Limited, 2010 in paragraph 16-11 at page 1072*** states that:

***“To prosecute is to set the law in motion, and law is only set in motion by an appeal to a person clothed with judicial authority in regard to the matter in question, and to be liable for malicious prosecution, a person must be actively instrumental in so setting the law in motion.”***

10.44 The Court in the case of ***Pandit Gaya Parshad Tewari v Sardar Bhagat Singh*** <sup>(2)</sup> stated that if the complainant did not go beyond giving what he believed to be correct information to the police, and the police without interference on his part, except giving such honest assistance as they required, thought it fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution.

10.45 In the case of ***John Leonard Martin v Watson***<sup>(7)</sup>, the House of Lords observed that:

***“An important feature of that case is that there was no evidence of malice on the part of the Defendant against the Plaintiff...Where an individual falsely and maliciously gives a police officer information, indicating that some person is guilty of a criminal offence and states that he is willing to give evidence in Court of the matters in question, it is properly to be inferred that he desires and intends that the person he names should be prosecuted.”***

10.46 Thus, the question that arises in this matter is whether the Zambia Meteorology Agency did not have an honest belief that a criminal offence had been committed when it forwarded the inspection report to the National Prosecution Authority, and whether the National Prosecution Authority or indeed the Attorney General, on receipt of the inspection report did not assess whether there was reasonable and probable cause to institute the criminal prosecution?

10.47 ***The Weights and Measures Act, Chapter 403 of the Laws of Zambia***, pursuant to which Alamtara Gas Hauliers Limited faced the criminal charges, creates offences related to instruments of trade, which include the tampering of seals in ***Sections 26 (1)(D) and 29***.

10.48 The evidence on record, shows that Dalla Simasiku on inspecting the tanker truck registration number ACZ 4482, belonging to Alamtara Gas Hauliers Limited found that the lead seal which secures the ullage mark depth level in compartment number 3 of the said tanker truck was tampered with, with the result that the said ullage mark had been altered from the original 20.7 centimeters to 21.5 centimeters. He issued a Rejection Certificate which is at page 695, volume 2 of Alamtara Gas Hauliers Limited's bundle of documents and page 7 of the Zambia Meteorology Agency's bundle of documents.

10.49 It is noteworthy that under ***Sections 18 and 19 of the Weights and Measures Act***, it is only Meteorologists that are mandated to verify instruments of trade under the Act.

Therefore, the argument by Alamtara Gas Hauliers Limited that officers from entities such as SGC and Socotec verified the seals on compartment number 3 of the tanker truck registration number ACZ 4482, and raised no issue cannot stand, in the absence of adducing evidence to show that those officers were by law authorised to verify the same and act on the same.

10.50 It has further, been argued that the tampered seal and the seized truck were not produced as evidence before the Subordinate Court. Therefore, there was lack of reasonable and probable cause in instituting the criminal proceedings against Alamtara Gas Hauliers Limited. **Section 19 of the Weights and Measures Act** provides for the following with regard to inspections of instruments of trade:

***“19. (1) A Meteorologist who on test finds an instrument to be false, unjust, defective, or not in compliance with the provisions of this Act or any regulations made under this Act shall-***

***(a) reject it;***

***(b) mark it with the prescribed mark; and***

***(c) issue to the person in charge of the instrument a written statement to the effect that it has been rejected:***

***Provided that the Meteorologist may in his direction-***

***(i) adjust it;***

- (ii) return it to the owner for adjustment;  
or  
(iii) retain it with a view to proceedings  
being taken for its forfeiture.”**

10.51 Therefore, the provision gave Dalla Simasiku, discretion as to what to do with the tanker truck, in line with the above on inspecting it. Consequently, his exercise of discretion in relation to how the tanker truck was disposed of after he issued the Rejection Certificate, by returning it to the owner, cannot be said to be evidence of lack of reasonable and probable cause, as he did issue a Rejection Certificate which gave reasons for the rejection.

10.52 Alamtara Gas Hauliers Limited has also contended that margins of error are allowed in readings of the seals. The Subordinate Court in its' Judgment at page J27, which is at page 671 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, addressed that issue. In that regard, reference was made to **Regulation 31 (6) under Section 27 of the Weights and Measures Act**, which provides that:

**“(6) The limit of error allowed on a vehicle tank, compartment or dipstick is one-half per centum of its capacity at the indication tested.”**

10.53 It will be noted from the Judgment of the Subordinate Court that when Kennedy Simutowe testified before that Court, he stated that errors of margin are allowed in the amount of 1 centimeter due to expansion of fuel. However,

his position was that, that did not arise in relation to the matter, as the tanker truck was empty at the time of inspection.

10.54 As to the Zambia Meteorology Agency having informed Alamtara Gas Hauliers Limited of its' intention to prosecute it, in the letter dated 25<sup>th</sup> April, 2017, which is at page 706 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, it is noteworthy that **Section 32A of the Weights and Measures Act** provides as follows:

***“(1) Where in respect of an offence under this Act-***

***(a) any person is informed by the Director or Meteorologist that there is intention to institute criminal proceedings against that person for a particular offence; and***

***(b) the Director or Meteorologist has reasonable grounds to believe that the court which shall try the person referred to in paragraph (a) for the offence shall, on conviction, impose a fine exceeding two thousand penalty units;***

***the person may sign and submit to the Director or Meteorologist a document admitting guilt to the offence and pay to the Director or Meteorologist such amount as the Director or Meteorologist may determine but not exceeding two thousand penalty units.”***

- 10.55 It can be seen from the above, that the law in the Act, places an obligation on the Director or Meteorologist to inform any person who is intended to be prosecuted under the Act, of the notice of intention of such prosecution. Once that is done, the above provision enables a person against whom such criminal prosecution is intended, to pay an admission of guilt fine, should they wish.
- 10.56 Based on that, it cannot be said that by writing the letter notifying Alamtara Gas Hauliers Limited of the intended prosecution, then the Zambia Meteorology Agency was the prosecutor, but rather, under the ***Weights and Measures Act***, the Zambia Meteorology Agency is the institution that is mandated to notify an offender of any criminal prosecution under the Act, and to receive fines imposed under the Act.
- 10.57 It will be noted from the letter at page 706 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents, that the reason that was advanced for prosecuting Alamtara Gas Hauliers Limited, was given as being that it was second offender, as in the recent past, its tanker truck registration number ACZ 9421/ACZ 9422T, was found with tampered seals and a forged Certificate of Test.
- 10.58 Mustafa Simwaya in cross examination before this Court, admitted that Alamtara Gas Hauliers Limited was found to be a second offender. It will further be noted that Mustafa Simwaya's contention was that after Dalla Simasiku did the inspection of the tanker truck registration number ACZ

4482, the Zambia Meteorology Agency on 3<sup>rd</sup> April, 2017 issued a quotation that allowed for the tanker truck to be re-assized and a temporary loading permit was issued to it, which allowed it to operate.

10.59 However, the evidence that was given by Kennedy Simutowe and Humphrey Nkobeni which was largely undisputed, save for the fact that the letter which was officially written that suspended the tanker truck from operating, was authored on 13<sup>th</sup> April, 2017, which is at pages 698-699 of volume 2 of Alamtara Gas Hauliers Limited's bundle of documents. That letter states that Alamtara Gas Hauliers Limited was informed in the enforcement of 30<sup>th</sup> March, 2017, that the next course of action against would be communicated to it, in writing in due course.

10.60 Further Kennedy Simutowe's testimony was that once a Rejection Certificate is issued, a tanker truck cannot load fuel. Therefore, that is a first step in the suspension process. In the said letter, dated 13<sup>th</sup> April, 2017, which is also at page 1 of the Zambia Meteorology Agency's bundle of documents, the Chief Executive Officer of the Zambia Meteorology Agency, noted that Alamtara Gas Hauliers Limited was in the enforcement meeting of 30<sup>th</sup> March, 2017, directed to cease operating the tanker truck until the Agency had disposed of the matter, and that the Test Certificate number 20596, was withdrawn from it.

- 10.61 He went on to observe that however, it had come to the Agency's attention that Alamtara Gas Hauliers Limited had defied the directive by instituting the process of re-verification, having paid the re-verification fees for the tanker truck and obtaining a Temporary Loading Certificate on 4<sup>th</sup> April, 2017. By that letter, the Temporary Loading Certificate was withdrawn, and it was stated that the tanker truck registration number ACZ 4482 would not be allowed to uplift any products from TAZAMA fuel terminals until the matter was brought to its' logical conclusion.
- 10.62 Alamtara Gas Hauliers Limited did not dispute the contents of this letter, except state that it was only written on 13<sup>th</sup> April, 2017. The letter is clear that in the enforcement meeting of 30<sup>th</sup> March, 2017, Alamtara Gas Hauliers Limited was directed to cease operating tanker truck registration number ACZ 4482 until the Zambia Meteorology Agency had disposed of the matter.
- 10.63 Obviously, there were lapses in communication between the Lusaka and Ndola offices of the Zambia Meteorology Agency, that saw Alamtara Gas Hauliers Limited pay and obtain for a Certificate of Re-Assize, which was done, and it being given a Temporary Loading Permit. The fact that Alamtara Gas Hauliers Limited did in fact have the tanker truck registration number ACZ 4482 re-assized after a Rejection Certificate was issued, goes to show that in fact, there was a problem with the seal of compartment number 3, that saw it being re-assized.

10.64 The evidence as whole, establishes that the Zambia Meteorology Agency had a reasonable belief that Alamtara Gas Hauliers Limited had committed a criminal offence. The evidence further shows that the Zambia Meteorology Agency forwarded the inspection report to the National Prosecution Authority, which authority exercised its' independent assessment to prosecute Alamtara Gas Hauliers Limited.

10.65 I say so, because there was no evidence that was led before this Court, to show that other than forward the inspection report to the National Prosecution Authority, the Zambia Meteorology Agency with the full knowledge that it did not believe that a criminal offence had been committed, exerted undue influence in any way to have Alamtara Gas Hauliers Limited prosecuted.

10.66 It cannot therefore be said that there was lack of reasonable and probable cause, in the Zambia Meteorology Agency forwarding the complaint to the National Prosecution Authority for consideration of the prosecution, or indeed the National Prosecution Authority commencing the criminal proceedings before the Subordinate Court. That element of the tort of malicious prosecution has not been satisfied.

**WHETHER THE CRIMINAL PROCEEDINGS WERE  
INSTITUTED MALICIOUSLY?**

10.67 With regard to this element, the Attorney General and the National Prosecution Authority, submit that the Court in

the case of *Mubita Mbanga v The Attorney-General* <sup>(6)</sup> with respect to malice, noted that it is some motive on the part of the accuser other than the desire to bring to justice the person whom he believes to be guilty.

10.68 Their contention is that their desire was to bring Alamtara Gas Hauliers Limited to justice, as was demonstrated at trial, and that it was a second offender, who was not treated like the other truck owners whose trucks had issues.

10.69 As to what amounts to malice in a claim for malicious prosecution, *Clerk & Lindsell on Torts, 20<sup>th</sup> Edition, Sweet & Maxwell Thomas Reuters (Legal) Limited, 2010 in paragraph 16-27 at page 1081* states that:

***“A malicious prosecution may consist in a wrongful continuance of proceedings already set on foot by other persons. Such continuance will not in itself amount to ratification of the antecedent steps, and it may well be that in such circumstances, there may be good cause for the continuance of a prosecution, the initiation of which was wrongful.”***

10.70 In the case of *Tims v John Lewis & Co Ltd* <sup>(3)</sup> it was held that a prosecutor who continues, after discovering facts which show the prosecution to be groundless, will at any rate, if he does not inform the Court of these facts, be guilty of malice, and will probably have no reasonable and probable cause for continuing the prosecution.

- 10.71 The evidence before Court shows that there was reasonable and probable cause for instituting the criminal proceedings against Alamtara Gas Hauliers Limited. Further, Mustafa Simwaya as already seen, admitted that Alamtara Gas Hauliers Limited was a second offender. Having been a second offender, the Zambia Meteorology Agency was at liberty to have it prosecuted.
- 10.72 Therefore, the Attorney General and the National Prosecution Authority cannot be faulted for opting to prosecute Alamtara Gas Hauliers Limited, rather than exercise the other available legal remedies against it. Humphrey Nkobeni's evidence shows that even after the enforcement meeting, and Alamtara Gas Hauliers Limited was informed that its' operations had been suspended in relation to the said tanker truck, still went ahead and had the tanker truck ACZ 4482 which had issues, re-assized.
- 10.73 There could therefore not be any malice in prosecuting Alamtara Gas Hauliers Limited, as there is no evidence to show that the initial decision to prosecute it, was later found to have been baseless, even if it was acquitted on appeal. Further, the evidence does not establish that the prosecution of Alamtara Gas Hauliers Limited was instituted with motive, other than to bring it to justice.
- 10.74 The element that the prosecution was malicious consequently fails.

**WHETHER ALAMTARA GAS HAULIERS LIMITED  
SUFFERED LOSS AND DAMAGE AS A RESULT OF THE  
PROSECUTION?**

10.75 Having found that the prosecution was carried on with reasonable and probable cause, and that it was not maliciously done, the claim for damage and loss cannot be sustained, as it was anchored on the success of those Two (2) claims. That claim fails.

**11. CONCLUSION**

11.1 The elements of the tort of malicious prosecution not having been satisfied, the claims by Alamtara Gas Hauliers Limited fail, and they are dismissed with costs to the Attorney General, the Zambia Meteorology Agency and the National Prosecution Authority, which costs if not agreed, shall be taxed. Leave to appeal is granted.

**DATED AT LUSAKA THE 18<sup>th</sup> DAY OF SEPTEMBER, 2023**

*S. Kaunda*  
**S. KAUNDA NEWA  
HIGH COURT JUDGE**

