

- (i) the purchase of a new jaw crusher to replace the one removed by the Defendant – USD6,221 (Six Thousand Two Hundred and Twenty-One United States Dollars);
 - (ii) repairs and upgrades to the Impact Crusher. (Covered in the aforementioned quantum);
 - (iii) replacement and installation of conveyor belts – USD4,700 (Four Thousand Seven Hundred United States Dollars);
 - (iv) installation of tailings ponds and a 10,000 liter water tank to address the inadequate water supply – USD20,159 (Twenty Thousand One Hundred and Fifty-Nine United States Dollars);
 - (v) recovery of all costs relating to the installation of flotation cells and mixing tank foundation base – USD1,872 (One Thousand Eight Hundred and Seventy-Two Thousand United States Dollars);
 - (vi) recovery of all costs relating to the construction of the floatation ponds – USD9,899 (Nine Thousand Eight Hundred and Ninety-Nine Thousand United States Dollars);
 - (vii) recovery of costs relating to the excavated floatation ponds liners – USD1,000 (One Thousand United States Dollars);
3. Compensation for additional operational costs which include:
- (i) recovery on costs incurred to repair the Defendant's generator, which was ultimately defective – USD 500 (Five Hundred United States Dollars);
 - (ii) recovery of all electricity used – USD 892 (Eight Hundred and Ninety-Two United States Dollars); and
 - (iii) costs for engaging consultants to conduct trial, assess, and make necessary modifications to the processing plant vis Management Costs – USD4,500 (Four Thousand Five-Hundred United States Dollars).
4. Damages for loss of profits.
5. Damages for fraudulent misrepresentation.
6. An order of interim injunction pending determination of this matter.
7. Interest
8. Costs incidental to these proceedings.
9. Any other and/or further relief the court shall deem fit. ”

1.4 The Defendant contested the action and counterclaimed against the Plaintiff on 16th September 2024 for alleged rent arrears and recovery of other expenses said to have been incurred in respect of the demised property. The exact claims as featured in the defence and counterclaim were for:

- “(i) payment of USD75,000 being rental arrears;*
- (ii) payment of K7,270 the same being an amount incurred by the Defendant in facilitating change of ZESCO system from prepaid to postpaid, aforesaid;*
- (iii) payment of USD3,000 being rental arrears for the hire of the Generator, aforesaid;*
- (iv) payment of K90,726 being an amount the processing plant is owing to ZESCO at the instance of the Plaintiff;*
- (v) USD150,000 being damages for breach of the Lease Agreement to be assessed;*
- (vi) damages for trespass;*
- (vii) an order for interim attachment of all properties and/or items specified in the Summons for an Interim Order of Attachment of Property;*
- (viii) an order evicting the Defendant from Farm No.23, Makeni Konga, on ground of being in breach of Clauses 3.1, 3.2, 4.2 and 11.1 of the Lease Agreement;*
- (ix) costs of and incidental to this action;*
- (x) interest on amounts found due and payable; and*
- (xi) any other reliefs that the Court may deem fit.”*

1.5 Pleadings closed on 4th October 2024 with the Plaintiff's reply and defence to counterclaim.

2 CASE MANAGEMENT AND ISSUES

2.4 Following the close of pleadings, I proceeded to scheduling conference on 1st November 2024 at which the characteristic Bar-Bench consultation took place to foster a problem solving environment.

2.5 It bore fruit in form of streamlining the case into ten key contentions embodied in an Order for Directions of even date as:

- (i) was the lease pleaded (in paragraph 3 of the statement of claim and paragraph 1 of the defence and counterclaim) duly executed and registered, if not what governed the relationship between the Plaintiff and the Defendant over the demised premises and the mineral processing plant thereon;
- (ii) was the Plaintiff induced by a representation from the Defendant to occupy and use the demised premises and (if so) did it turn out to be a misrepresentation to the detriment of the Plaintiff;
- (iii) did the Plaintiff have any lawful justification for not honouring its rent obligations to the Defendant;
- (iv) was the Defendant justified at law in locking the Plaintiff out of the demised premises;
- (v) did the Defendant incur an expense of K7,270 at the instance of and on behalf of the Plaintiff for a change of electricity utility supply from pre-paid to post paid metering;
- (vi) did the Plaintiff accumulate an electricity utility bill of K90,726 and neglect to settle it;
- (vii) did the Plaintiff lease a generator from the Defendant for a fee and neglect to pay for it;
- (viii) was the construction of tailings ponds by the Plaintiff done with the knowledge and approval of the Defendant;
- (ix) has the Plaintiff suffered any injury for which the Defendant ought to atone, and/or has the Defendant suffered any injury for which the Plaintiff ought to atone; and
- (x) ultimately, is the Plaintiff entitled to any relief against the Defendant and/or the Defendant entitled to relief against the Plaintiff.

2.6 It is noteworthy that issues (i)-(iv) are related to the Plaintiff's claim, issues (v)-(viii) to the Defendant's counterclaim while issues (ix) and (x) related to both claim and counterclaim.

2.7 After a series of delays, pre-trial preparations finally concluded and the matter was set down for trial.

3 TRIAL AND CLOSING SUBMISSIONS

3.4 Trial took place today at which the Plaintiff did not tender any evidence or even appear, which resulted in dismissal of its case for want of prosecution.

3.5 Thus, trial was for all intents of the Defendant's counterclaim and the evidential catalogue was as follows.

3.6 The Defendant called one of its managers, Ms Nadia Patel (DW) as sole witness. Her testimony was based on a witness statement filed 28th January 2025, supported by the Defendant's bundle of documents of even date.

3.7 Ms Patel was not cross examined and the Defendant proceeded to close its case. Counsel then addressed me *viva voce* in closing.

4 ANALYSIS AND FINDINGS

4.4 I wish to thank Counsel for rising to the occasion to prepare and advance such useful submissions.

4.5 That said, I have closely studied the material on record, evidence and submissions. After a careful consideration thereof my decision is as follows.

The contention of rent arrears

- 4.6 The Plaintiff in para. 3, 4 and 6 of the statement of claim avers that it entered into the lease with the Defendant and that the agreed rent was USD25,000 per month. The Defendant in paras. 1 and 3 of its defence and counterclaim admits the Plaintiff's averments.
- 4.7 In para. 27 of the defence and counterclaim, the Defendant alleges that the Plaintiff fell into rent arrears for June, July and August 2024, to which the Plaintiff reacted in para.35 of its reply (and defence to counterclaim) with a bare denial.
- 4.8 Order 53 Rule 6(2) of the **High Court Rules**, under Cap. 27 requires a defence to specifically traverse all allegations of fact in a claimant's pleading; Rule 6(3) provides that a general/bare denial is not a traverse; and Rule 6(4) prescribes that any allegations not traversed shall be deemed to be admitted. This can be grounds for entry of judgment on implied admission pursuant to Rule 6(5).
- 4.9 It follows that based on the state of the pleadings, there is an implied admission that the Plaintiff fell into rent arrears of US\$75,000 (for June, July and August 2024).
- 4.10 Furthermore, given the unchallenged evidence of Ms Patel which in para. 13 indicates that the Plaintiff last paid rent before June 2024, I find it established as a fact that the Plaintiff has failed to honour its rent obligations since then without lawful justification. I also accept Ms Patel's evidence and find that the rent arrears soared to USD100,000 when September 2024 is included.

The contention of the ZESCO account change charge of K7,270

- 4.11 In para. 23 of the defence and counterclaim, the Defendant alleges that the electricity utility account was changed from pre-paid to post-paid at the instance of the Plaintiff and at a cost of K7,270.
- 4.12 However, no evidence has been brought by the Defendant to substantiate any such request by the Plaintiff and drill down to the circumstances under which the electricity account changed.
- 4.13 It is not the province of this Court to speculate and fill in the blanks through assumptions where the evidence is deficient. I am fortified in that regard by the decision of the Constitutional Court in ***Richwell Siamunene v Sialubalo Gift*** - Vol. 3 (2017) ZR 335 at 354.
- 4.14 I thus find the allegation to be unsubstantiated.

The contention of an unpaid ZESCO utility bill of K90,726

- 4.15 Clause 4.2(e) of the lease cast the obligation to meet the electricity demands of the demised premises on the Plaintiff (see p. 6 of the Defendant's bundle).
- 4.16 In para. 25 of the defence and counterclaim, the Defendant accuses the Plaintiff of deserting the demised premises and leaving behind a bill of K90,726 owed to ZESCO. The allegation is fleshed out in para. 17 of the witness statement of Ms Patel and also para. 12 which avers that the Plaintiff even terminated the lease agreement as per letter at p.14 of the Defendant's bundle

4.17 In its reply and defence to counterclaim, the Plaintiff did not traverse that allegation let alone offer any reaction to it.

4.18 Accordingly based on the deemed admission pursuant to 53 Rule 6(2) and (4) of the **High Court Rules**, and the unchallenged evidence of Ms Patel, I find that the Plaintiff terminated the lease, incurred and left an unpaid electricity utility bill of K90,726 in respect of the demised premises.

The contention of a generator charge of US\$3,000

4.19 In para. 24 of the defence and counterclaim, the Defendant alleges that it leased a generator to the Plaintiff at a cost of US\$1,000 per month, which accumulated to US\$3,000.

4.20 The Plaintiff has in para. 33 of its reply and defence to counterclaim averred that there was no agreement to pay for the generator.

4.21 It is noteworthy, that besides the bare averment of Ms Patel in para. 19 of her witness statement no evidence has been brought by the Defendant to explain the exact terms under which the generator was provided to the Plaintiff.

4.22 Again rather than stray into speculation, through assumptions (proscribed by binding jurisprudence like **Richwell Siamunene v Sialubalo Gift**, cited earlier), I decline to make a finding that there was any agreement that the generator be leased for US\$1,000 per month.

4.23 Instead I will hold the Plaintiff to clause 4.2(e) of the lease with a finding that if there was any costs of fuel incurred by the Defendant over the 3 month period that the Plaintiff used the generator, the Defendant is entitled to recover that cost.

The contention of trespass to land

4.24 The contention is based on an allegation in para. 26 of the defence and counterclaim that the Plaintiff strayed beyond the land covered by the lease and built tailing and recirculation ponds, albeit on land also owned by the Defendant. The Plaintiff did not just deny the allegation but mounted an affirmative defence (in para. 34 of the reply and defence to counterclaim), alleging that the Defendant approved and participated in the design and construction of the said structures.

4.25 It follows that whilst by the pleadings it is common cause that the Plaintiff did constructions on a portion of the Defendant's land not covered by the lease, the Plaintiff bears the burden to prove that the same was indeed clothed with the approval and participation of the Defendant.

4.26 I am fortified by the learned authors of **Principles of the Law of Evidence in Zambia** (John Hatchard with O'Brien Kaaba, (2022), Cape Town: Juta and Company (Pty) Ltd, p.106 at para. 1), who armed with jurisprudence from the Court of Appeal (**Hitech Logistics Ltd. v Ugondo Italian Style Ltd.** - Appeal 92 of 2020), give the following useful discussion on the discourse of burden of proof in civil matters -

*“In civil cases the general rule is that ‘they who assert must prove’. In most cases the legal burden of proof lies on the plaintiff although in some situations, both parties may assume the legal burden on an issue(s). This recognizes that civil cases do not involve a criminal conviction nor punishment. **In Hitech Logistics Limited v Ugondo Italian Style Limited, Chishimba JA referred to the placing of the burden of proof as follows:***

The legal burden of proof as to any fact in issue in a civil case lies upon the party who affirmatively asserts that fact in issue and to whose claim or defence proof of the fact in issue is essential.... If the plaintiff fails to prove any essential element of his claim, the defendant will be entitled to judgment. The position of the defendant is somewhat different. **Since the plaintiff affirmatively asserts his claim, the plaintiff bears the burden of proving the claim and the defendant assumes no legal burden of proof by merely denying the claim. However, if the defendant asserts a defence which goes beyond a mere denial (sometimes referred to as an affirmative defence) the defendant must assume the legal burden of proving such defence.** An affirmative defence is most easily recognised by the fact that it raises facts in issue which do not form part of the plaintiff’s claim.”

(Emphasis added)

- 4.27 There is no evidence that has been adduced by the Plaintiff in this matter to support its allegations under this contention.
- 4.28 Instead all this Court has is the unchallenged evidence of Ms Patel in para. 18 of her witness statement complaining of the encroachment.
- 4.29 It follows that in the absence of any evidence from the Plaintiff to prove the alleged lawfulness of the relevant constructions, I find it safe and sound to find that the Plaintiff trespassed on the Defendant’s land.

5 CONCLUSION AND ORDERS

5.4 The Defendant has largely succeeded in proving its counterclaim against the Plaintiff on a balance of probabilities.

Relief 29 (i) in counterclaim

5.5 The Defendant is entitled to payment of US\$75,000 from the Plaintiff for rent arrears for June, July and August 2024 and also to payment for any additional period of occupation by the Plaintiff at the monthly rate of US\$25,000 or prorated.

Relief 29. (ii)

5.6 The Defendant failed to establish any right to reimbursement of the sum of K7,270 for change of electricity account from pre-paid to post-paid.

Relief 29. (iii)

5.7 The Defendant is not entitled to US\$3,000 for the generators but only to a refund of the cost of fuel, if any incurred by the Defendant whilst the generators were being used by the Plaintiff. Such cost shall be assessed.

Relief 29. (iv)

5.8 The Defendant has proven its right to recover the sum of K90,726 from the Plaintiff for an accumulated electricity bill.

Relief 29. (v)

5.9 The Defendant has proven breach of the lease agreement by the Plaintiff's failure to honour its rent obligations. The Defendant is thus entitled to damages to be assessed.

Relief 29. (vi)

5.10 The Defendant has proven that the Plaintiff trespassed on the Defendant's portion of land not covered by the lease. The Defendant is thus entitled to damages to be assessed.

Relief 29(viii)

5.11 The Defendant having proven that the Plaintiff terminated the lease, is entitled to recover possession of the demised premises.

Relief 29(ix)

5.12 The Plaintiff shall bear the Defendant's costs hereof, save for any instances during the proceedings where the Defendant was condemned to bear the Plaintiff's costs.

Relief 29(x)

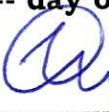
5.13 Reliefs 29(i) and (iv) shall bear interest at respectively:

- (i) the secured overnight financing rate from date of writ to payment; and
- (ii) the average of the short-term deposit rate per annum prevailing from date of writ to judgment and thereafter at the current bank lending rate determined by the Bank of Zambia from date of judgment to payment.

Relief 29(xi)

5.14 The Defendant is not entitled to any other relief against the Plaintiff.

Dated at Lusaka this 16th day of April 2025



K. CHENDA
Judge of the High Court