

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

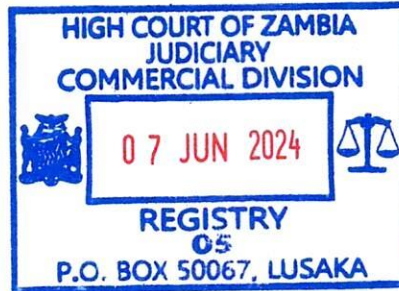
2023/HPC/0380

BETWEEN:

NELLY SAKALA

AND

ALBERT PHIRI



PLAINTIFF

DEFENDANT

Before the Honourable Mr Justice K. Chenda on 7th June 2024

For the Plaintiff : Mr T. Malama of Malama Kasase Advocates
For the Defendant : Mr T. Munalula of Lusenga Mulongoti Advocates

JUDGMENT

Primary legislation referred to:

1. The High Court Act, Cap. 27 of the Laws of Zambia

Rules of Court:

1. The High Court Rules, created under Cap. 27 of the Laws of Zambia

Case law:

1. *Galaunia Farms Limited v National Milling Company Limited* (2004) ZR 1 at page 9
2. *Chaudhry v Prabhakar* (1988) 3 All ER 718
3. *Frederick Kunongona Mwanza v Zambia Publishing Company Limited* (1981) ZR 234
4. *Konkola Copper Mines PLC v Mitchell Drilling International Limited and Another* (2015) Vol. 2 ZR 203 at p.221

5. *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited* (1942) 2 All ER 122 at page 135
6. *Afropo Zambia Limited v Anthony Chate & Ors* - Appeal No. 160/2013 at p.J16

Authoritative texts:

1. Chitty on Contracts, (2018) 33rd Edition. Vol. 2 (Specific Contracts) para.44-032, p.1912
2. Halsbury's Laws of England, 4th Edition, Reissue (1990), Vol 1(2) Butterworths: London, at p.66 para. 93
3. Black's Law Dictionary [2019] 11th edition in Bryan A. Garner, Chief Editor, Thomson Reuters: California
4. Chitty on Contracts, (2018) 33rd Edition. Vol. 2 (Specific Contracts) para.31-129, p.86

1 INTRODUCTION AND BACKGROUND

1.1 The Plaintiff engaged the Defendant for importation of a used vehicle from South Africa.

1.2 Following non-delivery of the vehicle, the Plaintiff took out this action by writ of summons and statement of claim on 31st May 2023 seeking:

- (i) USD14,000 as balance on the refund of monies advanced to the Plaintiff;
- (ii) damages for breach of contract;
- (iii) interest;
- (iv) costs; and
- (v) any other relief deemed fit by the Court.

- 1.3 The Defendant reacted with a defence filed on 26th June 2023 refuting the Plaintiff's claims and blaming the Plaintiff for non-fulfillment of their contract.
- 1.4 The Defendant also counter complained that the Plaintiff defamed him in the course of her complaint to the Police. He thus counterclaimed for damages for defamation, an injunction against further utterances, interest and costs.
- 1.5 In her reply and defence to counterclaim filed on 12th July 2023, the Plaintiff denied any fault in the failure of the contract and denied defaming the Defendant.
- 1.6 The pleadings closed with the Defendant's reply to defence to counterclaim filed on 20th July 2023 in which he reiterated his grievances against the Plaintiff.
- 1.7 Thereafter the matter progressed as set out below.

2 COMMON GROUND AND ISSUES FROM PLEADINGS

- 2.1 The following facts are common cause from the pleadings exchanged:
 - 2.1.1 the Plaintiff engaged the Defendant to help import a motor vehicle for her from South Africa;
 - 2.1.2 the make was a Toyota Fortuner;

2.1.3 the Plaintiff advanced the Defendant a global sum of USD16,600 for the importation;

2.1.4 the Defendant remitted part of the money to a third party ("**Mr Khan**") with a view to Mr Khan exporting the vehicle to Zambia;

2.1.5 the vehicle was not exported to Zambia; and

2.1.6 the Plaintiff reported the Defendant to the Zambia Police Service but no criminal proceedings resulted against the Defendant.

2.2 The pleadings however show serious controversy on:

2.2.1 what became of the monies remitted by the Plaintiff to the Defendant, with the Defendant alleging that the Plaintiff had direct contact with Mr Khan and coerced the Defendant to remit to Mr Khan against the Defendant's advice while the Plaintiff denies any such pressure or involvement on her part with Mr Khan;

2.2.2 who is to blame for the failed contract, with the Plaintiff insisting that it is the Defendant who even refunded her in part (USD2,600) while the Defendant blames the Plaintiff for getting involved with Mr Khan and overriding the Defendant's reservations on transacting with Mr Khan; and

2.2.3 whether the Plaintiff has said anything defamatory of the Defendant following the failed contract, with the Defendant alleging that the Plaintiff accused the Defendant of conniving with the Zambia Police to thwart her complaint and of telling people around that the Defendant defrauded her of thousands of dollars while the Plaintiff denies it.

2.3 After close of pleadings, a scheduling conference was held on 6th July 2023 and the characteristic Bar-Bench consultation yielded fruit in form of streamlining the case into the following core issues for interrogation at trial-

- i) what became of the monies remitted by the Plaintiff to the Defendant as pleaded in paragraph 5 of the statement of claim;
- ii) is the Defendant and/Plaintiff blameworthy for non-fulfillment of the contract referred to in paragraph 4 of the statement of claim;
- iii) has the Plaintiff subsequently uttered any statement/s that are defamatory of the Defendant; and
- iv) is the Plaintiff entitled to any relief from the Defendant or is the Defendant instead entitled to any relief against the Plaintiff.

2.4 This was later embodied in an order for directions sealed the same day, which also contained the agreed timetable for preparatory steps.

2.5 After conclusion of all preparatory steps, trial was held on 7th February 2024 and judgment reserved to 7th June 2024 after the agreed deadline of 13th March 2024 for filing of the last submissions.

3 SUMMARY OF EVIDENCE

3.1 The Plaintiff testified as sole witness on her own behalf. Her evidence in chief was embodied in a witness statement filed on 5th September 2023 supported by her bundle of documents of 22nd August 2023.

3.2 The said evidence can be summarised that in about March 2022 the Plaintiff and the Defendant verbally agreed that the Defendant would import the vehicle (Toyota Fortuner) from South Africa and supply it to the Plaintiff. The global consideration was USD16,600.

3.3 It was the Plaintiff's evidence that she remitted the money to the Defendant through his account at Standard Chartered Bank Lusaka.

- 3.4 The Plaintiff testified that the Defendant misinformed her about the progress of the importation causing her to travel to Kazungula twice in vain for purposes of collecting the vehicle.
- 3.5 She stated that she later discovered that the Defendant was aiding Mr Khan to cover up for having defrauded her. She demanded a refund from the Defendant who acknowledged indebtedness and reimbursed her in part to the tune of USD2,600 through her account at First National Bank and she has a bank statement to prove it.
- 3.6 She concluded her evidence in chief by stating that the Defendant owes her the balance of USD14,000 and that she did not defame him either at the Police Station or at their work place.
- 3.7 When cross examined by Mr Munalula, the Plaintiff testified that on the basis of her relationship with the Defendant, who was also her workmate at ZRA, she alleges that the Defendant held himself out as having expertise and experience in importing vehicles, clearing and transportation from South Africa.
- 3.8 There was no agreement that the Plaintiff would pay the Defendant for his services but she was going to show appreciation after delivery but she did not tell him so.

3.9 This was the first time he was helping her order a vehicle and she does not personally know any people who he has assisted to get vehicles. The Defendant identified the Toyota Fortuner for her and she did not have a dollar account to process the funds, so she deposited in the Defendant's account.

3.10 She communicated with Mr Khan who complained that the Defendant had not paid him the money they agreed for the vehicle to be delivered. She asked the Defendant about it who said there was a transaction limit that prevented him from remitting all at once.

3.11 The Plaintiff testified that she communicated with the Defendant even before he sent the email at p.7 of the Defendant's bundle. The background is that upon the Defendant's advice she travelled to Kazungula to get the vehicle but found it was not there. She then discovered from the Defendant about the dispute between him and Mr Khan. Also, that the Defendant had requested a recall of funds sent to Mr Khan's account, which could only be effected on Mr Khan's approval. Her emails to prove that Mr Khan's approval was needed are not before Court.

- 3.12 The Plaintiff also testified that the Defendant actually succeeded in blocking funds which he had sent to Mr Khan's account in South Africa. She conceded that the Defendant had detected that something was not right with the transaction.
- 3.13 She also conceded that after Mr Khan complained to her about not receiving the funds, she told the Defendant that he was delaying the purchase of the vehicle and that he ought to release the funds. Also, that thereafter the Defendant emailed First National Bank South Africa ("**FNBSA**") copied to her allowing the release of the funds (email at p.1 of the Defendant's bundle). She however denied that the Defendant had prevented the loss of the money when it was held at FNBSA.
- 3.14 The Plaintiff agreed that the Defendant spoke of suspected fraud in some of his emails copied to her.
- 3.15 She testified that she reported the Defendant to the fraud department at Lusaka Central Police and she was aware that there was a fraud at play.
- 3.16 When re-examined by Mr Malama, the Plaintiff clarified that while there was no written agreement to pay the Defendant for his services, there was a verbal agreement between them.

- 3.17 The Defendant was a very close personal friend and workmate so she knew that he was previously in the business of buying and selling cars.
- 3.18 The restriction that the Defendant had put on Mr Khan's account did not prevent Khan from withdrawing the money but only receiving deposits.
- 3.19 She agreed that there was suspected fraud because the Defendant had erroneously forwarded an email to her where the Defendant was asking for Khan's help with an email to get bail if arrested.
- 3.20 In one breath she said the emails showing that Mr Khan's approval were needed for recall of the funds but in another breath, she said emails are not in the bundle.
- 3.21 On that note the Plaintiff closed her case.
- 3.22 The Defendant testified as a first witness on his own behalf. His testimony in chief was embodied in his witness statement of 6th September 2023 supported by a bundle of documents filed on 23rd August 2023.
- 3.23 He stated that the Plaintiff was his workmate and approached him in February 2022 to help her purchase a Toyota Fortuner.

- 3.24 He contacted Mr Khan, a car dealer in South Africa who proposed USD20,000 but later reduced to USD16,000 to fit the Plaintiff's budget.
- 3.25 The Defendant testified that he shared Mr Khan's contact details with the Plaintiff who thereafter requested to use the Defendant's dollar account and did in fact do so by crediting it with USD16,000.
- 3.26 It was the Defendant's evidence that he remitted USD4,000 to Mr Khan on 7th March 2022 and USD10,000 on 9th March 2022. Further that the agreement was that the balance would be sent when the vehicle is delivered.
- 3.27 He stated that after receiving the USD10,000 credit, Mr Khan became unreachable on telephone and he (the Defendant) reported it as a suspected fraud to the relevant bank (FNBSA) and Mr Khan's account was restricted.
- 3.28 A back and forth process ensued involving Mr Khan, FNBSA, the Plaintiff and the Defendant. Mr Khan persuaded the Plaintiff that the Defendant was stalling the process for personal gain. The Plaintiff instructed the Defendant to request FNBSA to lift the restriction on Mr Khan's account. The Defendant did so and FNBSA allowed Mr Khan to transact after which Mr Khan became unreachable again.

- 3.29 The Defendant testified that the Plaintiff accused him of conniving with Mr Khan to steal her money. The Plaintiff reported him to Lusaka Central Police who advised in presence of both that all they could do is report the matter to INTERPOL. The Plaintiff stormed out and accused the Police and the Defendant of conniving to take that position.
- 3.30 The Defendant ended his testimony that he returned the remaining USD2000 of the Plaintiff's funds to her albeit in the Kwacha equivalent.
- 3.31 When cross examined by Mr Malama, the Defendant admitted that he concluded that from a telephone call with the Plaintiff, Mr Khan put pressure on the Plaintiff to insist that he (Defendant) releases all the money to Mr Khan.
- 3.32 He testified that after he transmitted USD10,000 to Mr Khan, Mr Khan became unreachable until he (the Defendant), made a report of fraud to FNBSA who restricted Khan's account. Khan then resumed communications, the Plaintiff also got involved and he as the Defendant was made to send the email at p.1 of the Defendant's bundle. It was copied to the Plaintiff and Khan and requested the fraud complaint to be closed.

- 3.33 His evidence of putting the email at p.1 of the Defendant bundle in proper context is at p.2-5 of the same bundle.
- 3.34 The Defendant admitted that he did not have evidence that he was defamed by the Plaintiff at the Police Station.
- 3.35 He testified that when his correspondence of 15th March 2022 with Khan is looked at in isolation it raises doubts about the legitimacy of his dealings with Khan. According to him the proper context is that the said email correspondence came before the relationship between the Defendant and Khan had soured. He (Defendant) in an effort to get Khan to release the Plaintiff's vehicle told Khan that he (Defendant) had been taken to the Police, when in fact not.
- 3.36 The Defendant was not re-examined.
- 3.37 The Defendant's second witness (DW2) was Officer Sydney Chisenga whose evidence in chief was embodied in a witness statement of 6th September 2023.
- 3.38 It was Officer Chisenga's testimony that in 2022 the Plaintiff made a complaint against the Defendant to the Lusaka Division Headquarters of the Zambia Police. He interviewed the Plaintiff and the Defendant and reviewed a paper trail of their transaction. He concluded that the criminal wrongdoer was not the Defendant but the supplier in South Africa.

- 3.39 It was his evidence that he decided to engage INTERPOL to pursue the supplier in South Africa but that before he (DW2) could conclude his investigations, he was transferred and handed over the matter to another Officer (Mr Njovu).
- 3.40 When cross examined by Mr Malama, DW2 (Mr Chisenga) testified that his witness statement was not correctly drafted to the extent that it states that the Defendant transmitted the whole USD16,000 to South Africa.
- 3.41 When re-examined DW2 clarified that according to the bank statements he reviewed, USD16,000 was credited to the Defendant's account out of which USD14,000 was transferred to Auto Traders account with FNBSA.
- 3.42 On that score, the Defendant closed his case.

4 SUBMISSIONS FROM THE BAR

- 4.1 After conclusion of trial, the Plaintiff tendered final submissions on 21st February 2024 whilst the Defendant tendered on 6th March 2024.
- 4.2 I found the submissions useful and I am grateful to Counsel for them. Owing to the peculiar circumstances of the case, I propose to dispense with a copious reproduction of their content.

5 ANALYSIS AND FINDINGS

The contention of what became of the monies remitted by the Plaintiff to the Defendant

- 5.1 The Plaintiff pleads under paragraph 5 of the statement of claim that she deposited a total of USD16,600 into the Defendant's bank account on two different dates.
- 5.2 In *Galaunia Farms Limited v National Milling Company Limited*⁽¹⁾, the Supreme Court re-affirmed that the burden to prove any allegation is on the one who alleges.
- 5.3 The evidence on the point includes:
- i) the Plaintiff stated in paragraph 9 of her witness statement that that the Defendant on 4th and 7th October 2022 paid back the Plaintiff the sums USD1,000 and USD1,600 respectively; and
 - ii) the bank statement at p.5-7 of the Plaintiff's bundle show the said stipulated amounts of USD1,000 and USD1,600 to the credit of the Plaintiff with the Defendant's narration.
- 5.4 In the absence of competing evidence to prove the contrary, I find that the Defendant paid back to the Plaintiff the sum of USD2,600.

5.5 As regards the greater portion, namely USD14,000, the evidence led by the Defendant in paragraph 8 and 11 of his witness statement was that he forwarded a total of USD14,000 on diverse dates to Mr Khan's bank account for purchase of the vehicle. The proof of bank transfers is at p.8-10 of the Defendant's bundle. The said evidence was not shaken in cross examination

5.6 I accordingly find that out of the USD16,600, USD14,000 was transferred into a third party account (at FNBSA) operated by Mr Khan.

The contention of who is blameworthy for non-fulfillment of the contract referred to in paragraph 4 of the statement of claim

5.7 In determining this contention, it is pertinent to classify the nature of legal relationship between the Plaintiff and Defendant.

5.8 In the case before Court the evidence shows that the Defendant acted for the Plaintiff for purposes of procurement of a vehicle from a third party (Mr Khan or Auto Traders Export Ltd. hereinafter referred to as the "**purported seller**"). It also shows that there was no agreement that the Defendant would be remunerated by the Plaintiff.

- 5.9 The learned authors of **Chitty on Contracts**⁽¹⁾ state that a person who agrees to procure goods for another may be an agent.
- 5.10 According to **Black's Law Dictionary**⁽²⁾, a gratuitous agent is one who acts without a right to compensation.
- 5.11 In the case before Court, the Defendant was clearly a gratuitous agent of the Plaintiff given the absence of any agreed right to remuneration.
- 5.12 In **Halsbury's Laws of England**⁽³⁾, the duties of a gratuitous agent are explained as follows, including citing the celebrated case of **Chaudhry v Prabhakar**⁽²⁾:

"Where an agent acts without reward, he is only bound to use such skill as he has, except where he has represented himself as possessing skill, in which case the amount of skill requisite is such as may reasonably be expected under the circumstances. The care and diligence required are such as persons ordinarily use in their own affairs." (Emphasis added)

- 5.13 The Plaintiff conceded in cross examination that she did not have any evidence that the Defendant was in the business of buying and selling cars. She also admitted that she did not know of any persons that the Defendant had assisted with getting cars.

5.14 Therefore, this Court will take it that the Defendant did not profess to have any special skills as an importer of used cars and should be held to a standard of care and diligence as if he had been transacting with the purported seller on his own behalf (not for the Plaintiff).

5.15 The record also shows that the Plaintiff's transaction with the purported seller was brought about by the Defendant.

5.16 Further, the record shows that out of the USD14,000 transmitted to the purported seller, USD4,000 was transmitted freely by the Defendant whilst USD10,000 was transmitted after the Plaintiff got involved to override the Defendant's apprehension that there may be a fraud at play.

5.17 There is no evidence on record to show that the Defendant used his best endeavours to ascertain whether the purported seller was a legitimate trader before transmitting the initial USD4,000. That is not to say that it has been proven that he was negligent.

5.18 It is thus equitable for the Defendant to restore to the Plaintiff the USD4,000 lost at his hands. **Chitty on Contracts⁽⁴⁾ (2018) 33rd Edition. Vol. 2 (Specific Contracts) para.31-129, p.86** is authoritative in this regard:

*“Equity provides much of the reasoning in this area, substantive as well as remedial, and must be invoked when a claim is in respect of one of the equitable duties and is not simply a common law claim for breach of contract or negligence. The remedy to which general reference is usually made is that of a duty to account, though some of the technical terminology within this is more relevant to the procedure accompanying the taking of an account against a trustee, and the modern approach is to look more to substantive general principles. **To the extent that an agent is in possession or control of the principal’s money or funds as trustee and misapplies them, equity will both require the agent personally to restore the trust fund** and will also give proprietary remedies to the extent that the moneys or their traceable substitutes are identifiable in the agent’s or a third party’s hands, subject to applicable defences that the third party may have. Where such remedies are applicable, there would be consequences as regards limitation, for by virtue of s.21(1)(b) of the Limitation Act 1980 its provisions do not apply to actions by a beneficiary to recover trust property. Such reasoning when deployed in a commercial context may be used to facilitate attempts to avoid the consequences of, for example, a fall in property values. Although it seems that the normal rules for accounting by trustees do not in all circumstances call for the restitution of the entire trust fund, recent English decisions concerning fact situations of this sort have invoked rules of equitable compensation to facilitate making an award for no more than the amount perceived as having been lost by reason of the trustee’s actions, using some general notion of “but for” causation to assist in the process. It is not clear that the somewhat ill-defined category of equitable compensation needed to be enlarged in this way to provide a way of dealing with inadmissible claims. There must also certainly be situations where an agent who holds as trustee, for example a solicitor in conveyancing matters whose power to pay out a fund is specifically limited, could be rightly made liable for wrongful disposal of the trust estate.”*
(Emphasis added)

5.19 However, the evidence shows that the Defendant took steps to prevent the purported seller having the benefit of the USD10,000 that followed. In particular, the evidence shows:

- (i) there was an email from the Defendant to FNBSA reporting a suspected fraud and requesting for funds recall from the purported seller's account;
- (ii) FNBSA restricted the purported seller's account;
- (iii) the Plaintiff instructed the Defendant to request FNBSA to lift the restriction on the purported seller's account after which the Defendant did as instructed, FNBSA suspended the restriction and the purported seller withdrew the funds deposited (from the Plaintiff); and
- (iv) the purported seller has been unreachable since.

5.20 The said evidence was not shaken in cross examination nor contradicted by any other on record.

5.21 Accordingly, it is the Plaintiff's own fault that the purported seller got the benefit of an additional USD10,000 and the Defendant cannot be liable for it in the given circumstances.

5.22 I thus find that the non-fulfillment of the contract was due to the fraudulent acts of the purported seller and worsened by the remittance of USD4,000 by the Defendant (without evidence before Court that it was safe to do so) and worsened too by the Plaintiff who caused the larger release of the restricted funds (USD10,000) to the purported seller.

Whether the Plaintiff uttered any statement/s that are defamatory of the Defendant

5.23 In the case of ***Frederick Kunongona Mwanza v Zambia Publishing Company Limited***⁽³⁾, defamation was defined as:

“Any imputation which may tend to injure a man's reputation in a business, employment, trade, profession, calling or office carried on or held by him.”

5.24 In the case before Court, the Defendant pleaded as follows in paragraphs 4-8 of his counterclaim:

“4. The statements made by the Plaintiff at Lusaka Central Station sometime in December 2022 when she stormed out of the Police Station were highly contemptuous, disparaging, and unfounded statements which cast aspersions on the Defendant's character and integrity as a businessman and employee of the organization where both the Plaintiff and the Defendant work, and his general reputation. In particular, the following are the

words that were uttered to the Defendant at the Police Station: "You have connived with the Police Officers to deny me justice."

5. The Defendant will aver that the words uttered by the Plaintiff impute traits of dishonesty, deceitfulness, being a fraudster and a person who cannot be trusted.
6. On the basis of the foregoing the defendant will aver that the words complained of have lowered him in the estimation of right thinking members of society, especially at his work place and have generally brought him into scandal, ridicule, odium, hatred and contempt.
7. The Defendant will further aver that the slanderous statement complained of caused him to be looked upon suspiciously by his workmates as the Plaintiff has been telling every person who cares to listen that the Defendant has defrauded her of thousands of United States Dollars through a motor vehicle selling scam.
8. All efforts to have a retraction of the defamatory statements, and an apology rendered have proved futile."

5.25 However, (when cross-examined by Mr Malama) the Defendant conceded that he did not have any evidence that he was defamed by the Plaintiff at the Police Station as pleaded.

5.26 DW1 who was one of the dealing officers also did not give any evidence supporting the allegation of defamation.

5.27 The Defendant did not otherwise lead evidence of being defamed by the Plaintiff anywhere else.

5.28 Thus, in the absence of evidence to prove the Defendant's allegation(s), it becomes unsafe and unsound to make any finding that the Defendant defamed the Plaintiff as pleaded or at all (***Galaunia Farms Limited v National Milling Company Limited*** principle on burden of proof followed).

Whether the Plaintiff is entitled any relief against the Defendant or the Defendant entitled to relief against the Plaintiff.

5.29 Save for the USD4000 lost at his hands for which he has to account, there has been no proven wrongdoing on the part of the Defendant with respect to his agency for the Plaintiff.

5.30 Secondly, in ***Konkola Copper Mines PLC v Mitchell Drilling International Limited and Anr.***⁽⁴⁾, the Supreme Court endorsed the principle that a party should not be allowed to benefit from circumstances brought about by its own wrongs.

5.31 In ***Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Limited***⁽⁵⁾, Lord Wright aptly put it that:

"It is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep." (Emphasis added)

5.32 Back to the case before Court, it would have been prudent for the Plaintiff to have allowed the Defendant to conclusively resolve the fraud case with FNBSA without her interference that led to lifting of the restriction on the purported seller's account and loss of a further USD10,000.

5.33 That the Plaintiff did not do so was a lapse on her part for which it cannot derive a benefit in form of holding the Defendant liable for the additional money lost (USD10,000) when she strong-armed the Defendant to pay the purported seller even after being aware of the suspected fraud.

5.34 Turning to the Defendant, following failure to prove that the Plaintiff defamed him, there is no basis for any relief against the Plaintiff, let alone any finding that the Defendant has suffered any injury at the hands of the Plaintiff.

6 CONCLUSION AND ORDERS

Plaintiff's (unnumbered) claims in writ and statement of claim

6.1 The Plaintiff has failed to prove that she is entitled to a refund of the USD14,000 from the Defendant nor to any damages for negligence or otherwise.

6.2 The claim for USD14,000, interest thereon and damages is accordingly dismissed.

6.3 However, under the head of any other relief and pursuant to s.13 of the **High Court Act**⁽¹⁾, I order that the Plaintiff is entitled to restitution in the sum of the USD4,000 lost to the purported seller at the hands of the Defendant. The Defendant shall pay the said sum to the Plaintiff within 270 days from date hereof together with interest at the secured overnight financing rate (SOFR) from date of writ to payment.

Defendant's claims 1. to 5. in the counterclaim

6.4 The Defendant has failed to prove that he was defamed by the Plaintiff and that he is entitled to damages.

6.5 There is also no basis in fact and law to grant the listed remedies in favour of the Defendant as against the Plaintiff, which I accordingly dismiss.

Plaintiff's claim and Defendant's counterclaim for costs

6.6 This head relates to costs of this action, which is a matter of discretion in terms of Order 40 Rule 6 of the **High Court Rules**.⁽¹⁾

6.7 As for the guidance in the exercise of that discretion, I heed the Supreme Court's judgment in ***Afrope Zambia Limited v Anthony Chate & Ors***⁽⁶⁾ where Wood, JS aptly stated:

"It is a settled principle of law that a successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted costs." (Emphasis added)

6.8 In the case before Court, the record shows that the Plaintiff and Defendant had been close friends and are still colleagues in the same institution.

6.9 I thus deem it appropriate to order that each party should bear their own costs of this action in the hope that it will allow room for rehabilitation of their relations.

Dated at Lusaka this 7th day of June 2024



K. CHENDA
Judge of the High Court