IN THE COURT OF APPEAL OF ZAMBIA Appeal No. 289/2024

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NEWGROWCO ZAMBIA LIMITED **APPELLANT**

AND

TUG ARGAN FARMS LIMITED **RESPONDENT**

CORAM : Siavwapa JP, Chishimba, and Patel JJA

On 19th January and 4th March 2026

For the Appellants: Mr. B. Stephen of Messrs Mwamba & Milan Advocates

For the Respondents: Mr. M. Bulundo of Messrs Lungu Simwanza

JUDGMENT

CHISHIMBA JA, delivered the judgment of the Court.

CASES REFERRED TO:

1. **Friday Mwamba v Sylvester Ntenga and Others SCZ Appeal 174 of 2010**
2. **Investors Compensation Scheme v West Bromwich Building Society(1998) IALLER 98**
3. **Indo Zambia Bank Limited v Mushaukwa Muhanga (2009) ZR 266**
4. **Zambia Revenue Authority v The Post Newspapers Limited SCZ Appeal 18/2016**
5. **National Drug Company Limited and Zambia Privatisation Agency v Mary Katongo Appeal No. 79 of 2001**
6. **Attorney General v Maureen Nawakwi (SCZ) EP01/02/03**

REPUBLIC OF ZAMBIA
COURT OF APPEAL
04 MAR 2026
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7. **Zambia National Building Society v Ernest Mukwamataba Nayunda SCZ Judgment No 11 of 1993**
8. **Finance Bank Zambia Limited & Another v Simataa Simataa SCZ Judgment No. 21 of 2017**
9. **Livingstone v Rawyards Coal Company (1880) 5 APP Case 25**
10. **Robinson vs Harman (1848) 1 Exch 850**

LEGISLATION REFERRED TO:

1. **The Halsbury's Law of England, 4th edition, Butterworts 1973**

1.0 INTRODUCTION

1.1 This appeal is against the Ruling of Hon. Mr. Justice K. Chenda delivered on 7th May, 2024, on the hearing of the issue of damages for breach of contract following a Consent Order to that effect for the Court to determine, whether the Respondent is liable to the Appellant in damages for the failure to deliver 2,568.82 metric tons of maize pursuant to the Grain Commodity Supply contract.

2.0 BACKGROUND

2.1 The factual background of the appeal is that the Appellant and the Respondent engaged in a commercial transaction for the supply and trading of agricultural commodities. On or about 29th June 2023, the parties entered into a Grain Commodity Supply Contract (the contract) pursuant to which the Respondent agreed to supply, and the Appellant agreed

to purchase, a total of 3,000 metric tonnes of white maize from the 2023 season at the price of ZMW 5,550 per metric tonne.

2.2 Under the terms of the contract, delivery of the maize was to take place in Serenje District during the period 30th June 2023 to 15th August 2023, in batches of 500 metric tonnes per delivery. Payment for each batch was stipulated to be made upfront upon presentation of an invoice by the Respondent.

2.3 Clause 14.E of the contract expressly provided for the effect of default by the Respondent (seller), that in the event of default, the Respondent would compensate the Appellant (buyer) for the difference in value of the loss on the contract at the market-related price of the product, together with the costs involved in procuring the product from another supplier.

2.4 Following execution of the contract, the Appellant made payments to the Respondent between 29th June 2023 and 28th July 2023, amounting in aggregate to ZMW 5,550,000. Part of the monies paid included an advance payment of ZMW 250,000.00. A further payment of ZMW 1,275,000 was

subsequently reversed through the banking system and returned to the Appellant.

2.5 The Respondent delivered only 431.18 metric tonnes of maize out of the contracted 3,000 metric tonnes, leaving an undelivered balance of 2,568.82 metric tonnes.

2.6 The Appellant was compelled to source substitute maize from other suppliers at prevailing market prices. According to the Appellant, it had entered into back-to-back supply arrangements with third parties on the strength of the contract with the Respondent and that the Respondent's non-performance exposed it to additional costs.

2.7 In November 2023, the Appellant commenced an action against the Respondent in which it sought the following reliefs:

(i) An Order for specific performance directing the Defendant to deliver to the Plaintiff the remaining 2,568.82 metric tons of white maize pursuant to the Grain Commodity Supply Contract entered into between the Plaintiff and the Defendant on or about 29th June,2023;

(ii) Damages arising out of the Defendant's breach of the said contract;

(iii) In the alternative, an Order for refund of the amounts of ZMW 381,951.00 being the price of the shortfall of 68.82 metric tons of white maize that were not and remain undelivered on the first batch of 500 metric tons fully paid for by the Plaintiff and ZMW 1,500,000.00 being one of two

payments made by the Plaintiff to the Defendant towards the 2nd undelivered batch of 500metric tons of white maize;

(iv) Reimbursement of any excess amount over and above the contract price of ZMW 5,550.00 per metric ton paid by the Plaintiff to other grain commodity suppliers for the same white maize to enable the Plaintiff fulfill its obligations under the divers contracts it entered into with third parties;

(v) Interest on all amounts awarded;

(vi) Any other relief the Court may deem just and/or equitable; and

(vii) Costs of this action.

2.8 On 26th February 2024, the parties entered into a Consent Order where it was agreed that the Respondent would refund the Appellant the sum of ZMW 1,500,000, together with compound interest at the agreed rate, and a further sum of ZMW 25,634.60. The parties further agreed that, with the exception of the issue of damages arising from the Respondent's failure to deliver 2,568.82 metric tonnes of maize, all other issues between them stood resolved.

3.0 PRELIMINARY ISSUE HEARING ON DAMAGES FOR FAILURE TO DELIVER MAIZE

3.1 Pursuant to the Consent Order, the issue of damages was heard as a preliminary hearing. The parties filed affidavits and written submissions confined to that issue.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge relied on Clause 14.E of the contract, and held that though the Respondent had breached the contract, the Appellant was only entitled to damages in respect of 339.09 metric tonnes, being the quantity it found had been paid for but not delivered, irrespective of the refund of the money paid by the Appellant.

4.2 The Court further held that it would be unjust enrichment for the Appellant to construe clause 14.E in a manner that extends to the entire undelivered 2,568.82 metric tonnes (MT) over and above that which was paid for but not delivered (339.09 MT).

5.0 GROUNDS OF APPEAL

5.1 Dissatisfied with the decision of the Court below, the Appellant appealed, advancing the following grounds:

1. **The lower Court erred in law and in fact when it held that it would be unjust enrichment for the Plaintiff to construe Clause14.E in a manner that extends to the entire undelivered 2,568.82 MT over and above that which was paid for but not delivered (339.09).**
2. **The Lower Court erred in law and in fact when it held the Plaintiff is only entitled to damages for the difference of**

339.09MT if at all it sourced the same from another supplier at a cost higher than the K5, 550MT under the grain contract with the Defendant.

6.0 APPELLANT'S HEADS OF ARGUMENT

6.1 The Appellant argued the grounds together. It was submitted that the learned Judge erred in law and fact in his interpretation of clause 14.E of the Contract by limiting the scope of recoverable damages to 339.09 metric tonnes, being the quantity found to have been paid for but not delivered, rather than the entire undelivered contractual quantity of 2,568.82 metric tonnes.

6.2 It was contended that it was not in dispute that the parties contracted for the supply of 3,000 metric tonnes of white maize at a price of ZMW 5,550 per metric tonne. The Respondent delivered only 431.18 metric tonnes and defaulted on the delivery of the rest of the maize contracted to be supplied. The Appellant submitted that the lower Court itself found the Respondent to have acted in breach of the contract.

6.3 It was argued that the correct approach to construing Clause 14.E lay in applying settled principles of contractual

interpretation. Reliance was placed on the case of **Friday Mwamba v Sylvester Ntenga and Others**[1], where the Supreme Court, citing Chitty on Contracts, affirmed that words used in a contract must be given their ordinary and natural meaning, and that the intention of the parties must be gleaned primarily from the language of the document itself. The Appellant further relied on **Investors Compensation Scheme v West Bromwich Building Society**[2], where it was held that while context is relevant, courts should not lightly assume that parties made linguistic mistakes in formal documents.

6.4 The Appellant also relied on the Supreme Court's decision in **Indo Zambia Bank Limited v Mushaukwa Muhanga**[3], wherein the Court reiterated that recourse to alternative principles of interpretation only arises where the natural meaning of words results in ambiguity or absurdity. It was submitted that clause 14.E was clear and unambiguous, and therefore did not allow qualification or limitation by the court.

6.5 It was further submitted that the learned Judge erroneously read into the contract the principle of unjust enrichment, thereby altering the agreement between the parties. In this regard, reliance was placed on the case of **National Drug**

Company Limited and Zambia Privatisation Agency v Mary Katongo[4], where the Supreme Court held that once parties freely and voluntarily enter into a contract, courts are bound to respect, uphold, and enforce its terms.

6.6 The Appellant's position is that the lower Court erred by allowing moral or sympathetic considerations to influence its interpretation of Clause 14.E. In support of this proposition, reliance was placed on the cases of **Zambia Revenue Authority v The Post Newspapers Limited**[5] and **Attorney General v Maureen Nawakwi**[6] in which the Supreme Court cautioned that courts should not be swayed by sympathy or moral judgment in a manner that departs from settled legal principles.

6.7 On the measure of damages, the Appellant referred to the case of **Zambia National Building Society v Ernest Mukwamataba Nayunda**[7], where the Supreme Court affirmed that damages are intended to place the injured party, so far as money can do so, in the position it would have occupied had the breach not occurred. This position was echoed in the case of **Finance Bank Zambia Limited & Another v Simataa Simataa**[8]. Reference was also made to English decision of **Livingstone v Rawyards Coal**

Company[9], which espoused the fundamental principle that compensation should restore the injured party to the position it would have been in had the wrong not been committed.

6.8 The Appellant submitted that clause 14.E expressly stipulated these principles by providing compensation for **"the difference in value of the loss on the contract at the market related price of the product plus the cost involved to buy the product from another supplier."** It was argued that the phrase "loss on the contract" necessarily referred to the entire contractual obligation, and not merely to quantities already paid for.

6.9 Accordingly, the Appellant contended that the learned Judge misdirected himself by restricting damages to 339.09 metric tonnes and by characterising recovery beyond that quantity as unjust enrichment. It was submitted that such an approach was inconsistent with the language of the contract and amounted to a rewriting of the parties' agreement.

6.10 In conclusion, the Appellant submitted that the appeal had merit and prayed that the ruling of the lower Court be set aside. Further, that damages be assessed on the basis of the entire undelivered quantity of 2,568.82 metric tonnes, together with costs.

7.0 RESPONDENT'S ARGUMENTS

7.1 The Respondent did not file heads of arguments on record. Further, its' Notice of Cross Appeal was dismissed for being incompetently before the court.

8.0 ANALYSIS AND DECISION OF THE COURT

8.1 We have considered the appeal, the authorities cited and the arguments advanced by learned counsel. The facts not in dispute are that the parties entered into a contract for the supply of 3,000 metric tonnes of white maize at the price of ZMW 5,550 per metric tonne. Consent Order dated 26th February, 2024 was entered into. It is also not in dispute that, the Respondent delivered only 431.18 metric tonnes of maize. It is common cause that the contract was not fully performed.

8.2 The Court below found that the Appellant had paid a total of ZMW 4,275,000, which, at the agreed contract price of ZMW 5,550 per metric tonne, corresponded to 770.27 metric tonnes of maize. The Court below concluded that, of the quantity paid for, 339.09 metric tonnes had not been delivered. The learned Judge found that the though Respondent was in breach of the contract, the Appellant's

entitlement to damages was confined to the 339.09 metric tonnes paid for but not delivered. It is this decision that prompted the appeal before us.

8.3 We note that grounds one and two are related and will therefore, be dealt with together. The primary issue for determination before us is whether the lower Court was justified in finding as it did on the proper measure and scope of damages recoverable under Clause 14.E of the Grain Commodity Supply Contract. Whether the Appellant was entitled to damages for breach of contract in respect of the entire undelivered maize quantity of 2,568.82 MT or the undelivered paid for quantity of 339.09 MT sourced from another supplier.

8.4 The Appellant contends that the failure by the Respondent to deliver 2,568.82 metric tonnes of white maize entails that it should be liable for damages for all of the undelivered maize, not just the portion that the court below said had been paid for.

8.5 In essence, that the lower Court erred by limiting damages to maize already paid for, and should instead have allowed damages for the full quantity of maize the Defendant failed to deliver under the contract.

8.6 In determining the appeal, it is imperative to set out the key clauses of the contract. Clause 10 provides for the terms of payment for the contract as follows:

> **10. 500mt upfront on Invoice for first 500mt. Thereafter in 500mt batches upfront on Invoice. Final 500mt will be harvested, Invoiced, and paid as per final mass.**

8.7 Clause 14.E provides for the effect of default on the terms of the contract as follows:

> **14.E On default, the seller to compensate NewGrowCo within 14 days the difference in value of the loss on the contract at the market related price of the product plus cost involved to buy the product from another supplier.**

8.8 What can be deduced from clause 10 is that payment under the contract was required to be made in batches of 500 metric tonnes upfront of Invoice. Payment was to be made upfront on issuance of an invoice by the Respondent

8.9 Simply put, the Respondent was required to issue an invoice for the first batch, and upon such issuance, the Appellant's obligation to pay arose immediately. Delivery of the first 500 metric tonnes was contingent upon that upfront payment being made.

8.10 Further, all subsequent deliveries were to be effected in further batches of 500 metric tonnes, each likewise payable upfront upon invoice. Therefore, for purposes of payment and

delivery, each batch of 500 metric tonnes was contractually independent such that no obligation arose on the buyer to prepay for future batches until an invoice was issued in respect of the relevant batch. Upon payment, the batch paid for must be delivered.

8.11 Flowing from clause 10, the import of clause 14.E is that if the Respondent did not deliver the maize paid for as agreed, it would be in default of the terms of the contract. This default triggers a requirement to compensate the Appellant within 14 days for the loss suffered under the contract.

8.12 It is trite that a contract is binding on the parties to it, as espoused in **National Drug Company Limited and Zambia Privatisation,** referred to by the Appellant.

8.13 Coming to the issue of the extent of damages due to the Appellant, it can be gleaned from Clause 10 that the contract was to be performed in stages, as payment and delivery obligations were shared and sequential.

8.14 It is trite that in contract law, a default on the terms of the contract entitles the other party to damages for loss. In the case of **Robinson vs Harman** [10], it was held that -

> **"...the rule of the common law is that where a party sustains a loss by reason of breach of contract, he**

is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

8.15 The lower Court, in its decision, affirmed that the Appellant was indeed entitled to damages for breach of contract. However, the learned Judge went on to state that the extent of the damages was limited to the undelivered maize that had already been paid for.

8.16 In the present case, it appears to us that the contract had a condition precedent to its performance under Clause 10. According to **Halsbury's Law of England, 4th edition, paragraph 962**, a condition precedent is defined as follows:

> **"A contractual promise by one party may be either unconditional or conditional. A conditional promise is one where liability to perform depends upon something or event, that is to say, it is one of the terms of the contract that the liability of the party shall only arise, or shall cease, on the happening of same future event which may or may not happen."**

8.17 In other words, performance or delivery of maize depended on upfront presentation of the invoice and payment. In consideration of the Appellant's position, we have perused the Consent Order dated 26th February, 2024 at page 25 of the Record of Appeal. It is clear that the Respondent agreed to

refund the Appellant the sum paid for the undelivered maize. The Order did not end there. It imposed a 2% compound interest per month on the sum due from 7th July, 2023 to 30th June 2024, which is about a year.

8.18 Following the hearing on the issue of damages, the learned Judge awarded damages to the Appellant only in respect of the undelivered maize and not the whole 2,568.82 metric tonnes. He was of the view that awarding further damages would amount to unjust enrichment. Was the learned Judge on firm ground in refusing to award damages on the whole contract?

8.19 The answer to the above lies in the interpretation of Clause 14E. Clause 14E stipulates that

"On default the seller to compensate NewGrowCo within 14 days the difference in value of the loss on the contract at the market related price of the product costs plus cost involved to buy the product from another supplier"

8.20 We shall not belabour on the principles of contractual interpretation as Counsel for the Appellant has aptly summed up and cited the relevant court decisions therein. The contract was for the supply of 3,000 MT of maize. The payment terms under Clause 10 was upon invoice in batches

of 500MT. The default is not in issue. Upon the seller defaulting the Respondent was entitled to terminate the contract and seek damages for the entire contract for the quantity of 3,000MT. Under Clause 14E as stated earlier, the Appellant was to be compensated the difference in value of the loss on the contract at the market related price of the product plus cost involved to buy the product from another supplier.

8.21 We hold the view that the Appellant as buyer had the right to purchase replacement maize from the (open) market at the related (prevailing market price) and to charge the Respondent the difference between the contract price and the market price or as stated the difference in value of the loss on the contract etc., plus incidental expenses referred to in the contract as "plus costs" involved to buy the product from another supplier.

8.22 We are of the view that the lower Court erred by holding that the Appellant was only entitled to damages for the difference of 339.09 MT and not on the whole contract.

8.23 In our view, damages are calculated as the difference between the contract price and the market price at the time the maize was to be delivered. The lower Court ought to have awarded

damages on the undelivered quantity of 2,568.82 of maize and referred the matter to the Registrar to assess the compensation due to the Appellant in line with Clause 14 E. The Registrar would then assess the compensation taking into account evidence adduced as to whether the Appellant incurred costs by sourcing from another supplier or suppliers.

9.0 CONCLUSION

9.1 We find merit in the appeal and accordingly set aside the ruling of the Court below. We substitute it with the holding that the Appellant is entitled to compensation on the basis of the undelivered quantity of 2,568.82 metric tonnes of maize pursuant to the Grain Commodity Supply Contract. The said damages shall be assessed by the Registrar. Costs to the Appellant.

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M. J. Siavwapa

JUDGE PRESIDENT

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F. M. Chishimba

COURT OF APPEAL JUDGE

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A.N. Patel

COURT OF APPEAL JUDGE