

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



2022/HP/0724

BETWEEN:

**SEMMANUEL TRADELINE LIMITED
MAYEYA SIMANGOLWA**

**1st PLAINTIFF
2nd PLAINTIFF**

AND

NATIONAL HOUSING EMPOWERMENT FUND

DEFENDANT

BEFORE HON MRS JUSTICE S. KAUNDA NEWA THE 22nd DAY OF MAY, 2024

For the Plaintiffs : Mr K.M Sikazwe, Messrs Jacques and Partners

For the Defendant : Mrs M.K Chileshe, Messrs Sukwana Mweemba and Partners

J U D G M E N T

CASES REFERRED TO:

1. *Addis v Gramophone Co Ltd 1909 AC 488*
2. *Pazyu v Saunders 1919 2 KB 581*
3. *Robinson v Harman 1957 2 WLR 528*
4. *Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited 1980 ZR 135*
5. *Zambia National Building Society v Ernest Mukwamataba Nayunda 1993 SJ 33*
6. *Jigry Auto Works Limited v M.H Patel 1993 SJ 65*
7. *Mwenya & Randee v Kapinga 1998 SJ 12*
8. *Wesley Mulungushi v Catherine Bwale Mizi Chomba 2004 ZR 96*
9. *Stanbic Bank v Trade Kings Limited 2011 ZNHC 18*
10. *Trans-Continental Limited and Andrew Robb v Donald McIntosh and Eric Routledge SCZ Appeal No 126/2012*
11. *Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa Selected Judgment No 21 of 2017*
12. *Sechem Enterprises v Phonetech Twenty-Four Wholesale 2017 ZMHC 38 (12 June 2017)*
13. *Transactions Payment Solutions Zambia Limited v Brunelli Construction Company Zambia Limited 2018 ZMHC 279*

14. *Muluchi Investments v Zesco Limited Appeal No 85 of 2021 [2023] ZMCA 135*

LEGISLATION REFERRED TO:

1. ***The Sale of Goods Act 1893***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary by Bryan A. Garner, 9th Edition, Thomas Reuters 2009***
2. ***Contract Law in Zambia 2nd Edition, by S.P. Ngambi and C. Chungu, Juta and Company, 2021***
3. ***Commercial Law in Zambia: Cases and Materials, by M. Malila, UNZA Press, Lusaka***
4. ***Halsbury's Laws of England Volume 9 (1)***
5. ***Halsbury's Laws of England, 4th Edition Re-Issue, Vol 9***
6. ***Law of Contract by Edwin Peel***
7. ***Mvunga, Malila and Ngambi on Contracts by Mvunga S.C, M. Malila S.C and S.P. Ngambi UNZA Press, 2010, Lusaka***

1. INTRODUCTION

1.1 An agreement for the sale of a motor vehicle, and the consequences of its alleged breach, is what is in dispute in this matter. Therefore, Semmanuel Tradeline Limited, a company that is incorporated under the ***Companies Act No 10 of 2017*** and Mayeya Simangolwa on 13th May, 2022, commenced this action by Writ of Summons.

1.2 The Writ of Summons was accompanied by a statement of claim, and the other documents, and is against National Housing Empowerment Fund, a company that is also incorporated. The reliefs sought are:

- i. *Specific performance of the said Purchase Order;*
- ii. *Damages for breach of contract in addition to specific performance;*

- iii. Further or in the alternative, damages for loss of business;*
- iv. Damages for loss of opportunity;*
- v. Interest on the damages from the date of breach of contract;*
- vi. Any other relief that the Court may deem fit; and*
- vii. Costs.*

2. STATEMENT OF CLAIM

- 2.1 The basis of the claims, as set out in the statement of claim, are that National Housing Empowerment Fund issued a Purchase Order, for the purchase of a Range Rover Sport motor vehicle on 19th January, 2021, from Mayeya Simangolwa, which vehicle was unregistered at the time. The price for the vehicle was stated as USD 57, 500.00 at a rate of K22.50 per United States Dollars, which came to K1, 293, 750.00.
- 2.2 The averment was that in pursuance of the agreement, Semmanuel Tradeline Limited and Mayeya Simangolwa registered the motor vehicle, and it bore the registration number BAR 4932, which was in Semmanuel Tradeline Limited's name. It was stated that subsequently, the vehicle was registered in Mayeya Simangolwa's, name who was supposed to transfer ownership of the said motor vehicle into National Housing Empowerment Fund's name.
- 2.3 The contention was that the vehicle had become unsellable, as it was registered in Mayeya Simangolwa's name, as opposed to it being unregistered. Thus, Semmanuel

Tradeline Limited and Mayeya Simangolwa had suffered damage and loss.

3. DEFENCE

- 3.1 In a defence which was filed on 7th July, 2022, National Housing Empowerment Fund, admitted that it placed a Purchase Order for the purchase of a Range Rover Sport motor vehicle with Mayeya Simangolwa on 19th January, 2021, at the price alleged.
- 3.2 However, its' defence was that it was unsuccessful in obtaining financing from FNB Bank Zambia Limited. Thus, it informed Mayeya Simangolwa through its' Investments Manager, on 26th January, 2021, via telephone call, and it cancelled the Purchase Order.
- 3.3 The assertion that the vehicle had become unsellable was denied, the contention being that individuals in Zambia sell vehicles which are registered, and upon sale, it would just be a matter of changing ownership with the Road Transport and Safety Agency (RTSA) into the names of the buyer. The further defence was that National Housing Empowerment Fund intended to purchase the vehicle through the Purchase Order, but when the funds to do the same were not raised, the Purchase Order was cancelled.
- 3.4 It was also stated that when the cancellation was done, Mayeya Simangolwa had complained about the same, through a text message on 27th January, 2021. Thus, the contention was that there was no agreement or letter of sale

relating to the Range Rover Sport motor vehicle, as it was not possible to conclude the same.

- 3.5 It was denied that Semmanuel Tradeline Limited and Mayeya Simangolwa suffered damage and loss, on the basis that they had been in possession of the motor vehicle for over a year since the Purchase Order was cancelled, and they could have advertised and sold the vehicle in that time. The defence was further that there was no agreement or letter of sale between the parties, pursuant to which Semmanuel Tradeline Limited and Mayeya Simangolwa could claim specific performance, and the action was therefore misconceived.

4. EVIDENCE LED AT TRIAL

- 4.1 At trial, Mayeya Simangolwa testified on behalf of Semmanuel Tradeline Limited and himself, while National Housing Empowerment Fund called One (1) witness.

PW1-MAYEYA SIMANGOLWA

- 4.2 In his testimony, Mayeya Simangolwa reiterated the averments in the statement of claim, that he is a director in Semmanuel Tradeline Limited. He produced his witness statement as his evidence. The evidence contained in that witness statement, was basically that on 19th January, 2021, National Housing Empowerment Fund placed a Purchase Order for a Range Rover Sport from him.
- 4.3 It was his evidence, that at the time, the vehicle was unregistered, and the purchase price for the said vehicle was USD 57, 500.00 at K22.50 per United States Dollar, bringing the total amount payable to K1, 293, 750.00. Mayeya

Simangolwa further testified that at the instance of National Housing Empowerment Fund, and with sufficient reliance being placed on the Purchase Order, the vehicle was registered, and now bears the registration number BAR 4392. He added that the vehicle was in the names of Semmanuel Tradeline Limited, and it was subsequently registered in his name, as he was supposed to transfer ownership of the vehicle into National Housing Empowerment Fund's name.

- 4.4 The assertion was that the vehicle had become unsellable, as it was already registered in Mayeya Simangolwa's name, as opposed to it remaining unregistered.

CROSS EXAMINATION OF MAYEYA SIMANGOLWA

- 4.5 In cross examination, Mayeya Simangolwa testified that Semmanuel Tradeline Limited was in the business of selling motor vehicles. He stated that they purchased and received Orders for the purchase of motor vehicles from Government, other institutions and individuals. It was also his evidence, that where Orders were obtained from the Government, Purchase Orders were raised, and as for individuals, they would deposit funds for the purchase.
- 4.6 He added that sometimes, vehicles were readily available for purchase. Still in cross examination, Mayeya Simangolwa testified that on Purchase Orders being issued, payment would be made after a vehicle was registered. Thereafter, a white book would be issued to the client. He added that the

only other document that would be issued, would be a receipt for the payment.

- 4.7 Further in cross examination, it was Mayeya Simangolwa's evidence that in this case, the agreed mode of payment was either cash payment or bank transfer into the account. He denied that he was informed that National Housing Empowerment Fund was supposed to obtain a loan from FNB Bank to purchase the vehicle. It was his testimony that Paul Siwela, who informed them that he was a Procurement Director, was the point of contact for National Housing Empowerment Fund.
- 4.8 The evidence that Mayeya Simangolwa also gave, was that Paul Siwela informed them that National Housing Empowerment Fund could not buy the vehicle, and not that they were to get a loan from FNB. He agreed that Paul Siwela informed them that the Purchase Order had been cancelled. Mayeya Simangolwa further agreed that people sell vehicles which are already registered, and therefore, it was possible to sell the vehicle.

RE-EXAMINATION OF MAYEYA SIMANGOLWA

- 4.9 It was Mayeya Simangolwa's testimony in re-examination, that when National Housing Empowerment Fund approached them, expressing interest in buying the vehicle, it was unregistered, and they had asked that it be driven to their offices, so that the lady manager who wanted it, could look at it. He stated that after this was done, the lady manager had requested Paul Siwela, in Mayeya

Simangolwa's presence, on 20th January, 2021, to buy it, and they were asked to register the vehicle.

- 4.10 However, Mayeya Simangolwa had explained to Paul Siwela that they first needed to provide a Purchase Order or pay a deposit, and that was how Paul Siwela had produced a Purchase Order, and had instructed that the vehicle be registered as soon as possible. Thus, the registration process was commenced, and the white book was obtained on 22nd January, 2021.
- 4.11 The clarification that was also given, was that Paul Siwela would follow up on registration of the vehicle, and that on 25th January, 2021, National Housing Empowerment Fund stopped picking up the phone calls, and Mayeya Simangolwa sent Paul Siwela a message on Wednesday, informing him that National Housing Empowerment Fund had put them in a predicament, as it had instructed them to register the vehicle.
- 4.12 Then after Two (2) weeks, Paul Siwela had called, stating that National Housing Empowerment Fund did not want the vehicle. His evidence was that the vehicle had become unsellable, as it would be sold at a loss, as in Zambia, buyers of vehicles, want to be the first to register them. Therefore, where a vehicle is registered, it is assumed that it is used.
- 4.13 Mayeya Simangolwa testified that they had received offers for the vehicle at USD30, 000.00, and that selling it would be at a loss, as at the time, the United States Dollars was at

K22.50 to the Zambian Kwacha. However, over time, it had reduced to K16.00.

4.14 That marked the close of the case for Semmanuel Tradeline Limited and Mayeya Simangolwa.

DW1-PAUL SIWELA

4.15 Paul Siwela, produced his witness statement as his testimony before the Court. He testified therein, that on or about 20th January, 2021, National Housing Empowerment Fund issued a Purchase Order for a specified Range Rover Sport, which was being sold by Mayeya Simangolwa. His testimony was that the vehicle was to be purchased against a Vehicle Asset Finance from FNB Zambia Limited.

4.16 Paul Siwela further stated that one of the requirements from the Bank, for an application for pre-owned vehicles, is that it must be registered. Thus, Semmanuel Tradeline Limited and Mayeya Simangolwa who were the vendors of the vehicle proceeded to register the vehicle.

4.17 His testimony was that as the process continued, the facility from FNB was not approved, and on 26th January, 2021, himself, as Investments Manager, on behalf of National Housing Empowerment Fund, informed Mayeya Simangolwa via telephone call, of the development, and that the said National Housing Empowerment Fund was no longer in a position to proceed.

4.18 It was further his testimony, that on 27th January, 2021, Mayeya Simangolwa sent him a WhatsApp message, which was at page 2 of National Housing Empowerment Fund's

bundle of documents, to the effect that National Housing Empowerment Fund had wasted Semmanuel Tradeline Limited and Mayeya Simangolwa's time, and that another client had been turned down.

4.19 In concluding his testimony, Paul Siwela testified that when the motor vehicle was offered to National Housing Empowerment Fund, the mileage for the vehicle, that was contained in the Engineer's Report, was 47, 181 kilometers. However, at the time of being served the Court's documents, the mileage for the vehicle had increased to 100, 000 kilometers.

4.20 It was stated that the Purchase Order was cancelled when the funding from FNB Zambia fell through, and Semmanuel Tradeline Limited and Mayeya Simangolwa were duly notified of that state of affairs.

CROSS EXAMINATION OF PAUL SIWELA

4.21 Paul Siwela, in cross examination, testified that one of the conditions for obtaining the financing, was that the vehicle had to be registered. He agreed that he had not provided any evidence to that effect. As proof of his assertion that the Purchase Order was cancelled, Paul Siwela's evidence was that there were screen shots of the conversation.

4.22 On being referred to the said screen shots at page 2 of National Housing Empowerment Fund's bundle of documents, Paul Siwela's testimony was that he cancelled the Purchase Order via telephone call, and that the response on the screen shots, was evidence of the cancellation. When

cross examined further, Paul Siwela stated that there was no evidence of him having cancelled the Purchase Order. He also testified that while paragraph 4 of his witness statement alleged that there was change in the mileage of the vehicle, there was no evidence to support this.

4.23 His continued testimony in cross examination, was that National Housing Empowerment Fund instructed Semmanuel Tradeline Limited and Mayeya Simangolwa to register the vehicle. He disagreed that the value of a vehicle that is registered, is not the same as that for one that is not registered.

4.24 Paul Siwela also testified that while paragraph 7 of the defence stated that there was no agreement or letter of sale for the vehicle, there was a Purchase Order. It was his position that the Purchase Order was cancelled as the financing with the Bank did not go through. He agreed that the Purchase Order did not state that it was conditional upon the Bank financing the purchase, after Semmanuel Tradeline Limited and Mayeya Simangolwa did their part.

RE-EXAMINATION OF PAUL SIWELA

4.25 The clarification that was given in re-examination, was that Paul Siwela cancelled the Purchase Order via telephone call to Mayeya Simangolwa.

4.26 That marked the close of the case for National Housing Empowerment Fund.

5. DECISION OF THIS COURT

5.1 I have considered the evidence and the submissions.

FACTS NOT IN DISPUTE

- 5.2 It is common cause that National Housing Empowerment Funds raised a Purchase Order in the names of Mayeya Simangolwa on 19th January, 2021, for it to purchase a Range Rover Sport motor vehicle, which was unregistered at the time. The facts that are also not in dispute, are that the said motor vehicle was shortly thereafter registered, and now bears the registration number BAR 4932, after National Housing Empowerment Fund requested Mayeya Simangolwa to register the vehicle.
- 5.3 It is not in contention, that National Housing Empowerment Fund did not proceed to pay for the vehicle after it was registered.

ISSUES IN DISPUTE

- 5.4 It is in dispute whether National Housing Empowerment Fund cancelled the Purchase Order, and informed Semmanuel Tradeline Limited and Mayeya Simangolwa of the said cancellation. The facts that are also in contention, are whether the purchase of the motor vehicle by National Housing Empowerment Fund, was conditional upon it obtaining financing from FNB Zambia.
- 5.5 It is further in dispute whether National Housing Empowerment Fund should be ordered to specifically perform the contract, and whether it was in breach of the agreement, and is therefore liable to pay damages for breach of contract and for loss of opportunity.

ANALYSIS

- 5.6 The evidence as given by Mayeya Simangolwa, was that after National Housing Empowerment Fund raised a Purchase Order to purchase the Range Rover Sport, Semmanuel Tradeline Limited and Mayeya Simangolwa fulfilled their obligations under the Purchase Order, by registering the vehicle, firstly in Semmanuel Tradeline Limited's name, and thereafter into Mayeya Simangolwa's name, at the request of National Housing Empowerment Fund.
- 5.7 He stated that however, National Housing Empowerment Fund did not honour its' obligations under the Purchase Order, by paying for the vehicle after it was registered. Mayeya Simangolwa further testified that the vehicle had become unsellable, as in Zambia, people prefer to buy unregistered vehicles, as they consider vehicles that are registered as used.
- 5.8 In defence, Paul Siwela testified that indeed National Housing Empowerment Fund approached Semmanuel Tradeline Limited and Mayeya Simangolwa, to purchase the motor vehicle, Range Rover Sport, and that it raised a Purchase Order to that effect. Its' defence was that it cancelled the Purchase Order, as FNB Zambia did not avail it the funding, that it needed to purchase the vehicle.
- 5.9 The testimony that Paul Siwela further gave, was that it was a condition for obtaining the financing with the Bank, that the vehicle to be procured had to be registered. Thus, he approached Mayeya Simangolwa to register the vehicle and

he had accordingly informed him that the vehicle would be purchased from funding from the Bank. However, they were unsuccessful in obtaining the funding, and he had informed Mayeya Simangolwa of the development via telephone call, and he had cancelled the Purchase Order.

- 5.10 In submission, Semmanuel Tradeline Limited and Mayeya Simangolwa referred to the learned authors, **Ngambi and Chungu** who at page 9, define a contract, as an agreement which is legally binding on the parties, and gives rise to obligations for the parties involved. The submission was further that the learned authors state that under a contract, the parties voluntarily assume their obligations or undertakings.
- 5.11 It was also submitted that *Malila S.C* at page 32, defines what a contract is, according to **Section 1 (1) of the Sales of Goods Act, 1893**, which is that a seller transfers or agrees to transfer property in the goods to the buyer, for a money consideration, called the price.
- 5.12 The submission was also that the learned author, states that there is a distinction between a sale, where ownership of property is transferred immediately from the seller to the buyer, which is called a sale, and an agreement to sell, where ownership of the goods is to be transferred at a future time, or is subject to some condition to be fulfilled, which is called an agreement to sell.
- 5.13 Based on this, the submission was that upon the Purchase Order being issued, a contract which was an agreement to

sell was created, as property in the vehicle did not pass immediately, but was dependent upon certain conditions being met. The conditions to be met were named as being, acceptance of the Purchase Order by Semmanuel Tradeline Limited and Mayeya Simangolwa, and National Housing Empowerment Fund obtaining a loan from FNB Zambia, in order to pay for the vehicle.

5.14 It was also submitted that when one of the conditions, being the obtaining of a facility from FNB Zambia, to pay for the vehicle was not granted, Mayeya Simangolwa was informed via telephone call of the same, and he was advised that the vehicle could not be purchased. The contention was that Paul Siwela confirmed that he cancelled the Purchase Order, both in examination in chief and in cross examination. The submission was further that Mayeya Simangolwa in his testimony, told the Court that the Purchase Order was cancelled Two (2) weeks after it was issued.

5.15 Therefore, there was no question that the agreement to sell was properly cancelled. It was noted that Mayeya Simangolwa had testified that the Purchase Order was cancelled after the vehicle had been registered in his name. However, the assertion was that in cross examination, Mayeya Simangolwa had testified that it is possible to sell a vehicle that is already registered.

DECISION

WHETHER NATIONAL HOUSING EMPOWERMENT FUND BREACHED THE CONTRACT

5.16 Semmanuel Tradeline Limited and Mayeya Simangolwa in respect of this claim, submitted that the Court of Appeal in the case of ***Muluchi Investments v Zesco Limited*** ⁽¹⁴⁾ held as follows, as regards a Purchase Order:

“a Purchase Order is indeed a contractual agreement between the purchaser and the supplier and becomes legally binding once it has been accepted by the supplier. The Purchase Order, in our view, details the goods or services that the buyer has agreed to buy and the terms of the purchase.”

5.17 Therefore, it was submitted that as National Housing Empowerment Fund raised a Purchase Order on 19th January, 2021, for a Range Rover Sport at a consideration of USD 57, 700.00, at K22.50 per United States Dollar, bringing the amount payable to K1, 293, 750.00, and it was signed by both parties, as seen at page 6 of Semmanuel Tradeline Limited and Mayeya Simangolwa’s bundle of documents, it was a legally binding agreement.

5.18 The further submission was that Semmanuel Tradeline Limited and Mayeya Simangolwa proceeded to honour the Purchase Order.

5.19 Reference was made to ***paragraph 966 of Halsbury’s Laws of England Volume 9 (1)*** as stating that:

“It has been said that a fundamental term is no more than a condition that is a term which the parties have agreed either expressly or impliedly

goes to the root of the contract, so that any breach of that term, without reference to the circumstances, will allow an innocent party to treat himself as discharged. Similarly, there will be a fundamental breach in this sense, entitling the innocent party to be discharged, if the breach had produced a situation fundamentally different from anything which the parties as reasonable persons have contemplated when the contract was made.”

- 5.20 Further reliance was placed on the case of **Stanbic Bank v Trade Kings Limited** ⁽⁹⁾, the submission being that the Court in that matter, noted that some contractual obligations go to the root of the matter, and their non-performance may fairly be considered as substantial failure by the other party to perform the contract. It was stated that Semmanuel Tradeline Limited and Mayeya Simangolwa honoured their obligations under the contract by supplying the Range Rover Sport.
- 5.21 However National Housing Empowerment Fund failed to pay for the said vehicle, which amounted to breach of the agreement. Page 2 of National Housing Empowerment Fund’s bundle of documents, was submitted as being evidence of the failure to pay.
- 5.22 National Housing Empowerment Fund in response, submitted that the contract was cancelled, so there could be no breach of contract.

5.23 In reply, the decisions in the cases of *Muluchi Investments v Zesco Limited* ⁽¹⁴⁾ and *Stanbic Bank v Trade Kings Limited* ⁽⁹⁾ were reiterated. Further reliance was placed on the case of *Sam Amos Mumba v Zambia Fisheries and Fish Marketing Corporation Limited* ⁽⁴⁾ stating that the decision in that case was:

“Where the parties have embodied the terms of contract into a written document, extrinsic evidence is not admissible to add to, vary, subtract from or contradict the terms of the written document except on certain exceptions.”

5.24 Thus, the contention was that the Purchase Order that the parties executed on 19th January, 2021, which was at page 6 of Semmanuel Tradeline Limited and Mayeya Simangolwa’s bundle of documents, was the agreement that the parties entered into. It was submitted that the said Purchase Order contained a fundamental term, which was the supply of the Range Rover Sport to National Housing Empowerment Fund, and which went to the root of the contract.

5.25 Therefore, failure to perform such an obligation would be substantial failure to perform the contract. However, Semmanuel Tradeline Limited and Mayeya Simangolwa honoured that obligation, by Ordering the vehicle to supply it to National Housing Empowerment Fund. It was stated that National Housing Empowerment Fund failed to

complete the transaction, which was fundamental breach of the agreement.

5.26 The addition was that there was only one term of the Purchase Order, and the obtaining of financing for the payment of the vehicle from FNB Zambia, was not a term of the Purchase Order. Thus, it could not be argued, as having been a prerequisite for the buying of the motor vehicle.

5.27 The Purchase Order is at page 6 of Semmanuel Tradeline Limited and Mayeya Simangolwa's bundle of documents. It was for a Range Rover Sport SDV6 at United States Dollars 57, 500.00.

5.28 ***Black's Law Dictionary by Bryan A. Garner, 9th Edition, Thomas Reuters 2009, at page 1354*** defines a *purchase order* as:

"A document authorising a seller to deliver goods with payment to be made later."

5.29 In Order for a contract to be valid, ***Halsbury's Laws of England, 4th Edition Re-Issue, Vol 9 in paragraph 244*** states that:

"A valid contract requires (i) agreement (2) intention to create legal relations and (3) consideration."

5.30 The contention by Semmanuel Tradeline Limited and Mayeya Simangolwa was that there was only One (1) term of the contract, being the supply of the motor vehicle. When one looks at the requirements for a contract to be valid, in terms of agreement between the parties, the evidence on

record shows that Semmanuel Tradeline Limited and Mayeya Simangolwa entered into an agreement for the sale of the motor vehicle Range Rover Sport to National Housing Empowerment Fund, at USD57, 500.00.

- 5.31 It can further be said that there was an intention to create legal relations, as a Purchase Order is a document that authorises a seller to deliver goods, with payment to be made later. There was consideration in the form of the price for the motor vehicle, which was supposed to be paid.
- 5.32 The Purchase Order however, did not state what the other terms of the contract were, in terms of how the money was to be paid, whether lump sum or otherwise, and by when. Further, there is nothing on the Purchase Order to show when delivery of the vehicle was to be made to National Housing Empowerment Fund on the payment being made.
- 5.33 ***Halsbury's Laws of England, 4th Edition Re-Issue Vol 9 in paragraph 261*** states that:

“The general rule. To constitute a binding contract, there must be a concluded bargain, and a contract is one that settles everything that is necessary to be settled and leaves nothing to be settled by agreement between the parties. This requirement may be expressed by way of a general rule that for the parties to be bound, they must have finished reaching an agreement, so that it is possible to infer an intention on the part of both of them to be bound immediately.”

- 5.34 Thus, in this case, it would be reasonable to infer that the express terms of the agreement were that Semmanuel Tradeline Limited and Mayeya Simangolwa would supply National Housing Empowerment Fund the Range Rover Sport and National Housing Empowerment Fund was to pay the purchase price for the vehicle. That was the agreement that was concluded.
- 5.35 As earlier pointed out however, the time when the payment was supposed to be made, was not stated on the Purchase Order. It has not been disputed that National Housing Empowerment Fund requested Semmanuel Tradeline Limited and Mayeya Simangolwa to register the vehicle so that it could purchase it. As such, it can be concluded that the Purchase Order is not the only document that contained the terms of the agreement, but that extrinsic evidence is admissible as evidence of the other terms of the agreement.
- 5.36 **Section 1 (2) of the Sales of Goods Act, 1893** states that:
“Where under a contract, the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of property in the goods is to take place at a future date, or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.”
- 5.37 Then under **Section (1) (4) of the said Act**, it provides that:
“An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject

to which the property in the goods is to be transferred.”

- 5.38 From the definition of a purchase order, it is clear, that it is an agreement to sell, as it authorises a seller to supply goods with payment to be made later. The evidence as adduced by the parties in this matter, shows that when the payment for the vehicle was to be honoured, was not limited by a time period or when the vehicle would be delivered.
- 5.39 What is clear, is that Paul Siwela on behalf of National Housing Empowerment Fund instructed Mayeya Simangolwa to register the vehicle as soon as possible, so that National Housing Empowerment Fund could purchase it.
- 5.40 Again, there was no evidence that was led as to the time period within which the vehicle was to be registered, and for National Housing Empowerment Fund to pay for the vehicle thereafter. It has been seen that after the Purchase Order was issued on 19th January, 2021, the vehicle was registered by 22nd January, 2021, about Three (3) days later.
- 5.41 Mayeya Simangolwa's testimony was that after they registered the vehicle, National Housing Empowerment Fund stopped picking up the phone calls, and he sent the message which was at page 2 of National Housing Empowerment Fund's bundle of documents to Paul Siwela, indicating that they had been placed in a predicament, as they had registered the vehicle, but National Housing Empowerment Fund had not come through to complete the purchase.

- 5.42 Then after Two (2) weeks, Paul Siwela informed Mayeya Simangolwa, that National Housing Empowerment Fund was not able to buy the vehicle, as the funding that it was expecting from FNB Zambia, had not been approved. Semmanuel Tradeline Limited and Mayeya Simangolwa argued that the obtaining of funding from FNB Zambia was not a pre-condition to National Housing Empowerment Fund paying for the vehicle.
- 5.43 The evidence on record shows that only the particulars of the vehicle to be bought, and its' price were the terms that were expressly stated on the Purchase Order. The other terms, such as registering the vehicle before payment, was extrinsic evidence, not having been included on the Purchase Order.
- 5.44 It has been noted that Semmanuel Tradeline Limited and Mayeya Simangolwa disputed that the obtaining of financing from FNB Zambia was a condition of the agreement. National Housing Empowerment Fund in its' defence, failed to show that the obtaining of financing from FNB Zambia was a condition of the contract, as it did not rebut the denial or indeed adduce any evidence to show that Semmanuel Tradeline Limited and Mayeya Simangolwa had agreed that the vehicle would be sold on condition that financing for it would be obtained from FNB Zambia.
- 5.45 That being the position, and seeing that Semmanuel Tradeline Limited and Mayeya Simangolwa in response to the Purchase Order, had the vehicle registered within Three

(3) days, entailed that upon registration, National Housing Empowerment Fund had to pay for the vehicle.

5.46 That is the agreement that the parties had, which was an agreement to sell, and one that would become one for sale, after Semmanuel Tradeline Limited and Mayeya Simangolwa registered the vehicle and National Housing Empowerment Fund would pay for it. Therefore, there was a valid contract between the parties. However, National Housing Empowerment Fund did not pay for the vehicle after it was registered.

WHETHER SEMMANUEL TRADELINE LIMITED AND MAYEYA SIMANGOLWA CAN CLAIM THE REMEDY OF SPECIFIC PERFORMANCE?

5.47 As regards whether Semmanuel Tradeline Limited and Mayeya Simangolwa can claim for an Order for specific performance, the submission was that specific performance is an equitable remedy, which is given by the Court, and it compels a defendant to do what they are supposed to do.

5.48 The case of ***Wesley Mulungushi v Catherine Bwale Mizi Chomba*** ⁽⁸⁾ was cited as having held that:

“The court will decree specific performance only if it will do more perfect and complete justice than the award of damages.”

5.49 Further reliance was placed on the case of ***Jigry Auto Works Limited v M.H Patel*** ⁽⁶⁾ where the High Court held as follows:

“A court will not grant a decree for specific performance of a contract if the party seeking the decree can obtain a sufficient remedy by a judgment for damages and such a decree will not be made when it would be impracticable to secure compliance to it.”

- 5.50 It was submitted that in view of the above, an Order for specific performance of the contract should be made, as damages would not suffice, Semmanuel Tradeline Limited and Mayeya Simangolwa having already performed their obligations under the contract, in Order for the contract to be completed, by registering the vehicle into Mayeya Simangolwa's names, so that it could be transferred into National Housing Empowerment Fund's name.
- 5.51 Therefore, granting the Order would compel National Housing Empowerment Fund to complete the agreement.
- 5.52 In denying that claim, National Housing Empowerment Fund stated that the contract was cancelled. The submission was that in consequence, it was inconceivable to imagine why Semmanuel Tradeline Limited and Mayeya Simangolwa would bring an action for specific performance of an agreement, that they themselves accepted was cancelled, Two (2) weeks after it was entered into.
- 5.53 In reply, it was reiterated that as the vehicle was registered in Mayeya Simangolwa's name, it was prudent that National Housing Empowerment Fund completed the transaction, as

the vehicle could not be sold at the value that it was purchased, as it was perceived as a third hand motor vehicle.

5.54 It was also stated that the submission that, as the sale was cancelled, an Order for specific performance could not be made, that was not tenable, as the said cancellation was only made after Semmanuel Tradeline Limited and Mayeya Simangolwa had already performed their obligations under the Purchase Order. The further submission was that the reason advanced for cancellation of the Purchase Order, was not a term of the said Purchase Order.

5.55 In relation to the assertion that Semmanuel Tradeline Limited and Mayeya Simangolwa should have mitigated their loss, the submission was that the same was flawed, as the vehicle was registered twice at National Housing Empowerment Fund's instance, thus devaluing the vehicle's value. It was stated that for this reason, the vehicle had not been able to be sold.

5.56 Specific performance was stated in the case of ***Trans-Continental Limited and Andrew Robb v Donald McIntosh and Eric Routledge*** ⁽¹⁰⁾ as:

“Equitable relief that is given by the Court to enforce against a defendant, the duty to do what he agreed by contract to do.”

5.57 It is trite that specific performance, is generally ordered if in the circumstances of the case, it is just and equitable to do so, and where damages would not adequately compensate a

party for breach of contract. The case of *Mwenya & Randee v Kapinga* ⁽⁷⁾ refers.

- 5.58 The basis for seeking an Order for specific performance in this matter, is that Semmanuel Tradeline Limited and Mayeya Simangolwa had the vehicle registered in readiness for National Housing Empowerment Fund to pay for it. However, the payment was not made, and the contention was that the vehicle having been registered, it had become unsellable, as buyers in Zambia, prefer to buy unregistered vehicles, as opposed to registered ones, the assumption being that when a vehicle is registered, it is used.
- 5.59 Semmanuel Tradeline Limited and Mayeya Simangolwa further argued that at the time the vehicle was to be sold to National Housing Empowerment Fund in January, 2021, the rate of One (1) United States Dollars to the Zambian Kwacha was 22.50. Therefore, if the vehicle had been sold, it would have been sold at a loss, as at one point, the rate was K17.00 to One United States Dollar.
- 5.60 It is a matter of common knowledge that as at now, One (1) United States Dollars is trading between K25.00 and K27.50. As a consequence, if the vehicle were to be sold at USD 57,500.00 at say K26.00 per United States Dollars, that would amount to K1,495,000.00, which is more than it would have been sold for in 2021, at K1,293,750.00.
- 5.61 Semmanuel Tradeline Limited and Mayeya Simangolwa submitted that they had received an offer for the vehicle at USD30,000.00. Assuming that that was the position, if they

were to sell it now at that price at K26.00 per United States Dollars, that would come to K780, 000.00.

5.62 However, it is trite, that damages are assessed as at the time of loss. The evidence of record shows that National Housing Empowerment Fund contended that it was expecting to purchase the vehicle from funding from FNB Zambia, although that was not a term of the contract. What this does however show, is that National Housing Empowerment Fund did not have the immediate resources to pay for the vehicle.

5.63 Therefore, in the circumstances of the case, it would not be just and equitable to make an Order for specific performance. Further, as I will later show, damages would be adequate compensation, and the claim fails.

WHETHER SEMMANUEL TRADELINE LIMITED AND MAYEYA SIMANGOLWA CAN CLAIM DAMAGES FOR BREACH OF CONTRACT?

5.64 On this claim, Semmanuel Tradeline Limited and Mayeya Simangolwa drew the Court's attention, to the learned author *Edwin Peel* in the *Law of Contract in paragraph 17-409 at page 828* as stating that:

“A breach is committed when a party without lawful excuse fails or refuses to perform what is due from him under the contract, performs defectively, or incapacitates himself from performing. A breach of contract may entitle the injured party to claim damages...”

5.65 It was also submitted that the Court in the case of ***Transactions Payment Solutions Zambia Limited v Brunelli Construction Company Zambia Limited*** ⁽¹³⁾ held that:

“It is sufficient that when a breach of contract occurs, a party affected is entitled to damages and in the case of a serious breach, a party can terminate a contract.”

5.66 Therefore, the submission was that National Housing Empowerment Fund was in breach of the contract, by not paying for the motor vehicle, that it had contracted to buy. In view of that, Semmanuel Tradeline Limited and Mayeya Simangolwa were entitled to damages, as an alternative or in addition to an Order of specific performance being granted.

5.67 National Housing Empowerment Fund in response, submitted that Semmanuel Tradeline Limited and Mayeya Simangolwa had not proved that they are entitled to damages for loss of business, as they had the vehicle in their possession, and they could have sold it. Further, they had not exhibited any statements or proof of their contention that the value of a vehicle diminishes after registration.

5.68 National Housing Empowerment Fund, on the claim for damages for breach of contract, submitted that as it had been established that the contract was cancelled, there was no basis upon which a claim for damages for breach of contract could be sustained.

5.69 The case of **Addis v Gramophone Co Ltd** ⁽¹⁾ was relied on, stating that *Lord Atkins* in that matter, held that he had always understood that damages for breach of contract were in the nature of compensation, not punishment.

5.70 Also relied on, was the case of **Zambia National Building Society v Ernest Mukwamataba Nayunda** ⁽⁵⁾ where the Supreme Court held that:

“The essence of damages has always been that the injured party should be put, as far as monetary compensation can go, in about the same position he would have been had he not been injured. He should not be in a prejudiced position nor be unjustly enriched.”

5.71 The submission was also that in the case of **Sechem Enterprises v Phonetech Twenty-Four Wholesale** ⁽¹²⁾, the Court held that:

“As a general rule, general damages must be strictly proved. The case of Esso Petroleum Co Ltd v Mardoni is instructive where it held that:

“The damages available for breach of contract are measured in a similar way as loss due to personal injury. You should look into the future as to forecast what should have been likely to happen if he never entered into the contract.”

5.72 Other authorities relied on, was **Mvunga, Malila and Ngambi on Contracts at page 292**, stating that they refer

therein, to reliance loss, and state that Courts can award damages if the claimant has incurred expenses in reliance of a contract, which then becomes aborted.

5.73 It was submitted that at no time in this matter, did National Housing Empowerment Fund take possession of the vehicle, and that Semmanuel Tradeline Limited and Mayeya Simangolwa had not shown what expenses they incurred in reliance on the contract of sale, aside from registering the vehicle into Mayeya Simangolwa's name, which registration cost was minimal.

5.74 Thus, to be put in the position that they would have been, had the contract not been entered into, entailed that they would have retained possession of the vehicle, which was in fact the status quo. The submission as a result, was that Semmanuel Tradeline Limited and Mayeya Simangolwa had not incurred any loss by the contract of sale being cancelled.

5.75 It was also argued that Semmanuel Tradeline Limited and Mayeya Simangolwa had a duty to mitigate their loss. In that regard, reliance was placed on the case of **Pazyu v Saunders** (2) in which *Mccaerdie J* stated that:

“What is the rule of law as regards the duty to mitigate damages? I will first refer to the Judgment of Cockburn C.J in Frost v Knight where he said ‘in assessing the damages for breach of performance, a jury will of course take into account whatever the plaintiff has done, or has had the means of doing, and, as a prudent man,

ought in reason to have done, whereby his loss has been, or would have been diminished....

*I think the substance of the rule which I have indicated was also laid down by the House of Lords in **British Westinghouse Electric and Manufacturing Co v Underground Electric Railways Co of London** where Lord Haldane said:*

“The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach: but this first principle is qualified by the second, which imposes on the plaintiff, the duty of taking all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage which is due to his neglect to take such steps.”

The question therefore, is what a prudent person ought reasonably to do in order to mitigate his loss arising from a breach of contract.”

5.76 Thus, it was submitted that Semmanuel Tradeline Limited and Mayeya Simangolwa ought to have mitigated their loss, which was caused by the cancellation of the Purchase Order, by finding another buyer for the vehicle. It was contended that consequently, they are not entitled to any damages for loss of opportunity to sell the vehicle, as the motor vehicle, always having been in their possession, they had opportunity to sell it.

- 5.77 As noted above, National Housing Empowerment Fund on raising the Purchase Order, instructed Mayeya Simangolwa to register the vehicle, as soon as possible. This was done so that the vehicle could be transferred into its' name. However, National Housing Empowerment Fund, did not pay for the vehicle after it was registered.
- 5.78 The evidence shows that the time for registration was agreed as being as soon as possible, with no definite time frame. The vehicle was registered within Three (3) days, implying that National Housing Empowerment Fund had to pay for it upon its' registration.
- 5.79 By not paying for it, there was breach. In the case of ***Finance Bank Zambia Limited and Rajan Mahtani v Simataa Simataa*** ⁽¹¹⁾, the Supreme Court held that damages for breach of contract seek to restore the innocent party to the same economic position that the party would been in, had the contract not been breached. It was stated in that case, that in such cases, the damages can be assessed by reference to the claimant's direct financial loss.
- 5.80 National Housing Empowerment Fund submitted that the only expenses that Semmanuel Tradeline Limited and Mayeya Simangolwa incurred, were in relation to the registration of the vehicle, which was a minimum expense, and they had the vehicle in their possession. Therefore, they had opportunity to sell it. It was further submitted that Semmanuel Tradeline Limited and Mayeya Simangolwa had a duty to mitigate their loss by selling the vehicle.

- 5.81 The evidence on record shows that very soon after the vehicle was registered, about Two (2) weeks later, National Housing Empowerment Fund indicated to Mayeya Simangolwa that they were unable to buy the vehicle.
- 5.82 When it comes to the principles that govern the award of damages for breach of contract, the rule is that the damages due, are those that would put, the injured party, in this case, Semmanuel Tradeline Limited and Mayeya Simangolwa, in the position that they would have been, had the other party, in this case, National Housing Empowerment Fund honoured its' obligations under the contract.
- 5.83 In my view, that would have meant that Semmanuel Tradeline Limited and Mayeya Simangolwa would have sold the Range Rover Sport at USD57, 500.00 at K22.50 per United States Dollars bringing the total amount due to K1, 293, 750.00. Their contention was that they had been unable to sell the vehicle with an offer having been made to buy the vehicle at USD30, 000.00, as it was registered, and therefore, it was considered as a used vehicle.
- 5.84 It is not in contention that costs were incurred in registering the vehicle. In the case of ***Robinson v Harman*** ⁽³⁾, Parke B stated that the rule of the common law, is that where a party sustains a loss by reason of breach of contract, he is as far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.
- 5.85 ***Section 50 of the Sale of Goods Act, 1893*** is as follows in provision:

“(1) Where a buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.

(3) Where there is an available market for the goods in question, the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when they ought to have been accepted, or if no time was fixed for acceptance, then at the time of the refusal to accept.”

5.86 There is no evidence on record, to show the availability of the Range Rover Sport on the market. There was just an assertion by Semmanuel Tradeline Limited and Mayeya Simangolwa that the value of the vehicle had diminished due to the fact that having been registered, it is considered as a third hand vehicle. No evidence was adduced to support that contention, or the assertion that an offer of USD 30, 000.00 had been made for the vehicle due to the fact that it had been registered.

6. CONCLUSION

- 6.1 As no evidence as to the market price of a registered Range Rover Sport at the time that National Housing Empowerment Fund informed Mayeya Simangolwa that it would not be able to buy the vehicle was adduced, I direct that an assessment shall be done to show the value of a registered Range Rover Sport as at that time.
- 6.2 The difference between that amount, and the contract price of USD57, 500.00 should it be lower than the contract price, is the amount that shall be due to Semmanuel Tradeline Limited and Mayeya Simangolwa as damages for breach of contract, and for loss of opportunity.
- 6.3 Semmanuel Tradeline Limited and Mayeya Simangolwa are also awarded costs of the registration of the motor vehicle, which if not agreed, shall be assessed. The amounts found due, shall carry interest at the average short-term deposit rate from the date of issue of the Writ of Summons, until Judgment, and thereafter, at the Bank of Zambia lending rate until payment.
- 6.4 Costs go to Semmanuel Tradeline Limited and Mayeya Simangolwa which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THE 22nd DAY OF MAY, 2024

S. Kaunda
S. KAUNDA NEWA
HIGH COURT JUDGE

