IN THE COURT OF APPEAL FOR ZAMBIA APPEAL No.21/2017

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

CAMCO EQUIPMENT ZAMBIA LIMITED **APPELLANT**

AND

PERCY CHANDA **RESPONDENT**

Coram: Mchenga DJP, Chashi, Mulongoti JJA

On 4th May 2017, 6th June 2017 and 11th October 2017

For the Appellant: Mr. P Songolo of Messrs Philsong and Partners

For the Respondent: Mr. S. Sikota SC, of Messrs Central Chambers

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JUDGMENT

Mulongoti, JA *delivered the Judgment of the Court.*

Cases referred to:

1. ***L'Estrange v Graucob (1934) 2KB 394***
2. ***British Westinghouse Co v Underground Ry (1912) AC 673***
3. ***Eastern Co-operative Union Ltd v Yamene Transport Limited (1988 – 89) ZR 126***
4. ***Allan Muyambango Muyambango v Clement Banda SCZ Selected Judgment No. 30 of 2016***

5. *Victoria Laundry (Windsor) Ltd v Newman Industries Ltd (1949) 2 KB 528*
6. *Payzu Limited v Saunders (1919) 2 KB 581*
7. *Examination Council of Zambia v Reliance Technology Limited (2014) 3 ZR 171 (SC)*
8. *Crowther v Shannon Motors Co. (1975) 1 ALL ER 139*
9. *B.S Brown & Sons Limited v Craiks Limited (1970) 1 ALL ER 823*
10. *Suisse Atlantique Societed'Armement Maritime SA v NV Rotterdamsche Kolen Centrale (1967)1 AC 361*
11. *Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd (1983) 1 ALL ER 101*
12. *A.M.I Zambia Ltd v Chibuye (1999) ZR 50 (SC)*
13. *Photo Production Ltd v Securicor Transport Ltd (1980) 1 ALL ER 556*
14. *Air Transworld Limited v Bombardier (2012) EWHC 243 (COMM)*
15. *The Mercini Lady (2011) 1 Lloyd's Rep.442*
16. *George Mitchell (Chesterhall) Ltd v Finney Lock Seedy Ltd (1983) 2 ALL ER 737 (HL)*
17. *Nevers Sekwila Mumba v Muhabi Lungu (Suing in his capacity as National Secretary of the MMD) SCZ Selected Judgment No. 55 of 2014*
18. *Mohamed v Attorney General (1982) ZR 49*

Legislation and other works referred to:

1. *Sale of Goods Act, 1893*
2. *Commercial Law in Zambia: Cases and Materials by Mumba Malila*

3. ***Halsbury's Laws of England vol.22, 5th edition paragraph 390 page 352***
4. ***Benjamin's Sale of Goods: The Common Law Library No. 11, 1974 1st Edition, London: Sweet and Maxwell***

The appellant, Camco Equipment Zambia Limited, appealed against the judgment of the High Court sitting at Lusaka, given on 28th October, 2016. The court found in favor of the respondent, Percy Chanda, and ordered for replacement of the planter. The respondent was also awarded damages for breach of contract, to be assessed by the Deputy Registrar. At this stage it is necessary to say a little about the background. By an oral contract made on or about the 7th of November, 2009, the respondent a farmer, purchased various farm equipments from the appellant. Of relevance to this case is the planter which was valued at K11,079.50 (rebased). The respondent purchased the planter to assist him with the planting of maize. It was delivered to his farm in Kitwe on 11th November, 2009.

When he tried to use it, the planter failed to perform to expectation. It dropped a large quantity of seeds and skipped distances. He complained to the appellant about this. The appellant sent its technicians from Lusaka to fix it but the problem persisted. In May, 2011 he took the planter for repairs to the appellant's branch office at Kitwe after it failed

him for a third time. He left it there and received no response. He commenced an action claiming damages for breach of the oral contract and breach of warranty that the planter would be of good and serviceable quality. To prove damages, the respondent called as a witness an Agriculturalist who estimated the respondent's gross profit for the year 2009/2010 to be at K195,000.00 with expenses being K107,655.00 giving a net profit of K87,345.00. This was found to be the estimated loss the plaintiff suffered for five years (2009 to 2014).

The appellant denied the respondent's claims and averred that it had a warranty which expressly excluded consequential loss and or loss of revenue arising from equipment failure. The said warranty was in a receipt which was given to the respondent's driver.

After evaluating the evidence before her, the learned trial judge found that the planter was not merchantable and that the respondent was entitled to reject it in accordance with section 11(2) of The Sale of Goods Act of 1893. The appellant was ordered to replace the planter or pay the respondent its market value for a comparable planter. Damages were also awarded to the respondent.

Discontented, the appellant appealed and raised five grounds as follows:

(i) The learned trial judge misdirected herself when she awarded damages covering the period 2009 to 2014 without taking into account the fact that loss of revenue arising from equipment failure, which loss is to be used as the measure of such damages was specifically excluded by the parties themselves in the Warranty Agreement that was presented before the Court below.

(ii) The learned trial judge misdirected herself in law and in fact when she awarded damages arising from the alleged breach of contract to be assessed by the Deputy Registrar and the same to be computed as claimed namely from 2009 to date of judgment without taking into consideration the long settled principle relating to a plaintiff's duty to mitigate their loss or damages.

(iii) The learned trial judge misdirected herself in law and in fact when she found that the planter in issue was not of merchantable quality and ordered the appellant to replace it or pay the respondent its market value; when there was extensive evidence led at trial that the planter was destroyed as a result of the respondent's negligence and that as such, the appellant is not liable to replace it.

(iv) The learned trial judge misdirected herself in law and fact when she held that the evidence that was led on allegations that were not pleaded was not objected to.

(v) The findings of fact that led to the judgment handed down by the Court were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts and or they were findings which on a proper view of the evidence no trial court acting correctly can reasonably make.

Both parties filed heads of argument. The appellant contended, in ground one that it was entitled to rely on the warranty agreement as it was signed by both parties. The warranty excluded the appellant from liability of ***"expenses resulting from equipment failure consequences such as accommodation, costs, loss of revenue, transportation costs etc."*** Thus the court below erred in awarding the respondent damages to cover the farming period of 2009 to 2014 as these were loss of revenue which were excluded by the warranty.

The respondent was bound by the warranty as it was signed by his driver who was his middleman. The authority for this argument was cited as the book **Commercial Law in Zambia: Cases and Materials by Mumba Malila.** It was the further submission of counsel that the respondent was bound by the warranty whether he had read it or not. The case of **L'Estrange v Graucob**[1] was cited as authority where Scrutton LJ held that:

> ***"When a document containing a contractual term is signed, then in the absence of fraud, or I will add misrepresentation, the party signing it is bound, and it is wholly immaterial whether he has read the document or not."***

The appellant did not allege fraud and none was perpetrated by the respondent. There was also no claim of misrepresentation. As such the respondent was bound by the warranty.

It was argued, in ground two, that the respondent failed to mitigate his loss. The case of **British Westinghouse Co v Underground Ry**[2] was cited as authority that:

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

According to counsel, the respondent did not take any reasonable steps to mitigate his loss after the equipment failure. Thus the trial court erred in awarding him damages from 2009 to date of judgment in 2016, contrary to well settled principles of law on mitigation of damages. The Supreme Court decision in **Eastern Co-operative Union Ltd v Yamene Transport Limited**[3] was relied upon that:

"We find that in keeping with the principles which require the plaintiff to mitigate his loss, a plaintiff who has a profit making chattel damaged beyond repair is under obligation to replace that chattel and in this regard the poverty or otherwise of the plaintiff is quite irrelevant. The damages must be assessed therefore, on the basis that a prudent plaintiff would have taken steps to replace the chattel which has been damaged."

Counsel contends that it was unreasonable for the respondent as a prudent business man to wait for six years for a planter to be fixed before he could commence or continue farming maize. Additionally, that the appellant offered the respondent a higher version of the planter but he refused to collect it. Accordingly, the trial judge misdirected herself when she awarded damages for the alleged breach to be computed as claimed from 2009 to date of Judgment without taking into account the respondent's deliberate neglect to take reasonable steps to mitigate his loss.

In ground three it was counsel's argument that the planter was only taken to the appellant's Kitwe office for repair after it hit into something hard like a rock which could explain the state in which the appellant's technicians who went to repair it the very first time found it in. As testified by DW1 they found that the planter had a number of problems like broken parts and bent parts. The respondent even neglected to call

the person who was using it the first time it had a knock out to testify as to what led the planter to be in the state the technicians found it in.

It is counsel's contention in ground four that the trial court misdirected itself in fact and law when it held that the evidence that was led on allegations that were not pleaded was not objected to. According to counsel the record will reveal that the appellant raised serious objections during trial and in cross examination of the respondent on why he was claiming for consequential loss and loss of revenue when these were not specifically pleaded and expressly excluded by the parties.

Counsel argued in relation to ground five that the findings of fact by the trial court were either perverse or made in the absence of any relevant evidence or misapprehension of the facts or they were findings which on a proper view of the evidence no trial court acting correctly can reasonably make. It is argued that the court failed to notice that loss of revenue was expressly excluded by the parties by warranty which the court chose to completely ignore without any explanation. The case of **Allan Muyambango Muyambango v Clement Banda**[4] was cited as authority on how a court should assess the evidence. It was the further submission of counsel that the court failed to realize that in the unlikely event that the appellant was liable the respondent still had a duty at law to mitigate his damages.

The respondent's counsel argued in relation to ground one that the issue here centered on the warranty agreement under clause 7 which excluded liability for loss occasioned by equipment failure such as loss of revenue that the respondent claimed. According to counsel the trial court was on firm ground when she excluded clause 7 of the warranty and held that the respondent was entitled to damages of revenue as a direct loss as a result of the equipment failure. The court rightly applied its mind to the fact by firstly identifying the governing law as seen at page 18 lines 12-16 of the Record of Appeal, when she observed that:

> ***"Express terms are those agreed upon by parties while on the other hand terms maybe implied into a contract either by the court, custom or by statute. For purposes of the present case the governing law as regards contract of sale of goods is the Sale of Goods Act 1893."***

According to counsel this is in consonant with section 53 of the Competition and Consumer Protection Act No.24 of 2010 which provides that:

> ***"53. (1) In a contract between an enterprise and a consumer, the contract or a term of the contract shall be regarded as unfair if it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.***
>
> ***(2) An unfair contract or an unfair term of a contract between a consumer and an enterprise shall not be binding..."***

It is argued that clause 7 of the warranty is unfair as it seeks to limit liability for reasonable losses which were in the contemplation of the appellant. The planter was unmerchantable as correctly held by the court. It was never tested at the appellant's office to ascertain if it was merchantable. The court rightly found it defective and held the appellant liable in accordance with the case of **Victoria Laundry (Windsor) Ltd v Newman Industries Ltd[5].** And that in accordance with section 53 above clause 7 of the warranty is not binding for being unfair and aimed at denying the respondent from recovering his losses as a result of the appellant's actions. Consequently, that the issue of the signature would automatically fall away in light of the illegality of the exclusion clause.

It is argued in the alternative that the trial court rightfully excluded clause 7 of the warranty because the equipment failed to perform the basic purpose of the contract. The learned authors of Anson's Law of Contract were quoted thus:

> ***"The doctrine of fundamental breach was developed to prevent anyone relying on an exemption clause if he had failed to perform or carry out the basic purpose of the contract...the fundamental term was conceived to be something more basic than a warranty or even a condition...it formed the core of the contract and therefore could not be affected by any exemption clause."***

Learned counsel concluded that the failure of the planter to perform was fundamental and the warranty agreement was rightly excluded as espoused by Anson's Law of Contract.

In ground two, learned counsel conceded that the case of **BritishWestinghouse Co. v Underground Ry**[2] cited by the appellant's counsel is good law. He submitted that it was further held in that case that 'the quantum of damages is a question of fact'. In addition that in **Payzu Limited v Saunders**[6] Bankers LJ stated that:

> ***"The question of what is reasonable for a person to do in mitigation of his damages cannot be a question of law but must be one of fact in the circumstances of each particular case."***

Counsel argued that the duty of the respondent to take reasonable steps to mitigate the loss suffered following the equipment failure is a matter of fact and not law. The act of sending the planter back to the appellant was the necessary mitigation in the circumstances of the case. The respondent had also resorted to hiring some labour lads that planted half the hectare he had prepared. He therefore did not sit idle but attempted to continue farming. Therefore, the trial court was on firm ground when she awarded damages arising from the alleged breach of contract to be computed from 2009 to date as she took into account that the aspect of mitigation was on the basis of facts of a particular case.

Ground three was argued on the basis that the planter was received on 11th November 2009 and immediately the respondent tried to use it, the results were catastrophic. The appellant never tested the planter in the presence of the respondent to ensure that it was working which was against its own policy. DW1 testified that the planter had a number of problems including broken parts and bent parts but it also had a problem of not being able to plant as expected from inception. Counsel argued also that it was strange that the appellant's policy which was to provide job cards failed to produce the job card showing the repairs it carried out.

It was further argued that the respondent also purchased a disc harrow/ripper from the appellant which is used to break down and soften the soil and allow the planter to easily plant the seeds. This entailed that the disc harrow/ripper would have been equally damaged if the appellant's assertions are correct that the planter hit into something hard at the respondent's farm, but it was not. However, the planter was not merchantable as it failed to plant seed and apply fertilizer as expected the first time it was used.

As to ground four learned counsel argued that the unpleaded evidence though objected to, the court has discretion to either sustain or overrule it. The trial judge rightly allowed the issue of merchantability of the

planter on account that such an issue was a condition that was implied and applicable by operation of the law under the Sale of Goods Act.

Counsel submitted in ground five that the trial court did not misapprehend the evidence that was led by the appellant. The rest of the arguments are a repeat of the ones in the other grounds on the warranty, job cards and mitigation of loss.

At the hearing of the appeal, Mr. Songolo who appeared for the appellant relied entirely on the appellant's heads of argument. Mr. Sikota SC who appeared for the respondent also relied on the respondent's heads of argument. In response to the respondent arguments Mr. Songolo submitted that the respondent's counsel repeatedly relied on the Competition and Consumer Protection Act which was never canvassed in the court below and should therefore not be considered on appeal.

We have considered the submissions and arguments by counsel. The issues the appeal raises relate to the question of merchantability of the planter, whether the appellant can rely on clause 7 of the warranty which excluded consequential loss and whether the respondent is entitled to damages from 2009 to 2014 as held by the trial judge.

We shall deal with grounds one, three, four and five simultaneously as they are interrelated.

We wish to state from the onset that it is trite law that an appellate court can only interfere with the findings of fact made by a trial court if they are either perverse, or made in the absence of any relevant evidence or on a misapprehension of the facts or that the findings are such that on a proper view of the evidence no trial court acting reasonably can make. To put things in perspective we will first address the issue of merchantability upon which the findings of fact were made.

The learned trial judge evaluated the evidence before her and reviewed the case law and legislation on sale of goods. She concluded that the oral contract between the appellant and the respondent is governed by the Sale of Goods Act, 1893 (the Act). After considering section 14 (2) of the Act she found that there is an implied condition that the planter sold should be of merchantable quality. This is regardless of whether the issue of merchantability has been pleaded or not as the implied conditions are applicable by law as held by the supreme court in **Examination Council of Zambia v Reliance Technology Limited**[7]that "the implied condition as to merchantability as well as the right of rejection are legal rather than contractual matters." The trial court further found that the planter was unmerchantable and the respondent was

entitled to reject it in accordance with section 11(2) of the Sale of Goods Act.

The judge made the finding that the planter was unmerchantable based on the evidence before her. The evidence was that the planter failed to plant the maize seeds as expected. The respondent informed the appellant about it and the latter sent technicians to repair it. The problem persisted until it was taken to the appellant's office in Kitwe and was kept there to date because according to the respondent there was no feedback from the appellant. The judge noted the appellant's insistence that the planter malfunctioned because of the respondent's incorrect use of it. She however, found that the planter was not merchantable for breaching the Sale of Goods Act.

In the **Examinations Council of Zambia** case the Supreme Court cited the English case of **Crowther v Shannon Motors Co.**[8] where it was held that goods should be merchantable at the time of the sale, but the fact that goods deteriorate soon after the purchase may be evidence that they were not of merchantable quality at the time of sale. **B.S Brown & Sons Limited v Craiks Limited**[9] was also referred to where it was held that "goods are said to be of merchantable quality if they are fit for the purpose for which goods of the kind are commonly bought".

In the case in hand, the respondent's testimony was that the planter failed to perform the first time he used it at his farm. The appellant admitted this and sent its technicians to repair it. Clearly, the planter was not of merchantable quality going by this evidence and the cases cited above. The trial judge cannot be faulted for finding that it was not merchantable and that the respondent was entitled to reject it.

We are alive to the appellant's arguments that the trial judge allowed claims that were not pleaded and excluded by warranty. The issue of unpleaded claims was aptly dealt with by the trial judge. She reasoned, first that merchantability is an implied term of the contract of sale of goods. It is not contractual but rather legal. Secondly, that since the unpleaded claims were not objected to, the court was not precluded from considering them. Additionally, we opine that even where unpleaded claims are objected to, it is in the court's discretion to consider such or not as canvassed by Mr. Sikota, SC. The appellant admit to cross examining the respondent at length over the unpleaded claims and so have suffered no prejudice and as correctly reasoned by the judge the same were let in evidence and could be considered.

Coming to the issue of the warranty, the said clause 7 states thus:

"The warranty does not cover expenses resulting from equipment failure consequences such as accommodation costs, loss of revenue, transportation costs etc"

The appellant argued that by this clause it was excluded from liability form expenses resulting from equipment failure such as revenue loss. According to Halsbury's Laws of England paragraph 390 at page 352, a clause excluding liability is commonly called an exclusion clause while the one limiting liability is a limitation clause. In this case clause 7 is clearly an exclusion clause. Authorities abound such as **Suisse Atlantique Societe d'Armement Maritime SA v NV Rotterdamsche Kolen Centrale[10] and Ailsa Craig Fishing Co. Ltd v Malvern Fishing Co. Ltd[11],** that the words of the clause are to be given their plain, natural meaning and the court was not entitled to place on an exclusion clause a strained construction for the purpose of rejecting it. Furthermore, that clauses which purport to exclude all liability were to be construed more narrowly than those which sought to limit liability.

In the case of **A.M.I Zambia Ltd v Chibuye[12]**, the appellant carried on the business of, among other things, storage of goods for customers. The respondent's goods were stored with the appellant. Subsequently, it was discovered that there had been pilferage and goods worth K5,562.63 had been stolen. The appellant sought to rely on an exemption clause which said that goods would be stored "at owner's risk". The Supreme Court

followed the **Ailsa Craig Fishing case**[11] and **Photo Production Ltd v Securicor Transport Ltd**[13] on exclusion and limitation of liability. It held further that:

"In the case at hand, there was no suggestion that the clause *"at owner's risk"* had been given a definition in the contract so that it would have been necessary to ascertain its meaning, like any other clause in a contract, having regard to the nature and purpose of the contract, and the context within which the words were used. On the facts we do not see how the appellants could have exemption from their own wrong doing by the misconduct of their staff. "*At owner's risk*" in the circumstances would have to exclude wrongdoing and misconduct of the party seeking exemption and that of its staff."

In the present case, the appellant seeks to exclude all liability of expenses arising from equipment failure such as revenue loss (which is relevant here). Going by the cases cited the clause is subject to narrow interpretation. The appellant have not defined in the warranty the scope of the equipment failure neither was the said warranty exhibited in full in the record of appeal other than clause 7. In the circumstances of this case we do not think equipment failure would cover what transpired in this case where the planter was unmerchantable and not fit for the purpose. . We are of the considered view also that clause 7 also violates the provisions of section 14(4) of the Sale of Goods Act.

Section 14(4) provides that:

> "***An express warranty or condition does not negative a warranty or condition implied by this Act, unless inconsistent therewith.***"

Additionally, the appellant should have expressly excluded the implied terms under the Act as provided in section 55 which provides for exclusion of implied terms and conditions that:

> ***"Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract."***

Thus, in the recent English case of **Air Transworld Limited v Bombardier**[14] it was observed that:

> *"past case law has tended to the view that in order to exclude liability for statutory conditions imposed by the Sale of Goods Act as to the satisfactory quality and/ or fitness purpose of the goods in question, the exclusion clause must expressly state that it applies to 'conditions'".*

The court concluded that as conditions were not expressly excluded and as the implied terms of the Act were conditions, the exclusion clause did not operate as to exclude those implied terms. **The Mercini Lady**[15] case was cited which had an exclusion clause which expressly stated that the sale contract for gas oil contained:

"No guarantees, warranties or misrepresentations, express or implied of merchantability, fitness or suitability of the oil for any particular purpose or otherwise".

The clause expressly excluded implied terms as to merchantability and the seller was protected by it.

In the English case of **George Mitchell (Chesterhall) Ltd v Finney Lock Seedy Ltd**[16], where by an oral agreement the defendants who were seed merchants, agreed to supply the plaintiffs, who were farmers with Dutch winter cabbage seed. The seed was delivered together with an invoice in common form and of long standing in the seed trade, which contained a clause purporting to limit the liability of the defendants in the event of the seed proving to be defective; to replacing the defective seed or refunding the purchase price and further purporting to 'exclude all liability for any loss or damage arising out of such use...or for any other loss or damage whatsoever'. The plaintiffs planted some 63 acres using the seed supplied by the defendants. However, the seed supplied was not of the variety agreed and was in the event unmerchantable. The crop was a failure and had to be ploughed in, and consequently the plaintiff lost a year's production from the 63 acres. The plaintiffs brought an action claiming damages of 61,513 pounds for breach of contract. The defendants contended that they were entitled to rely on the clause in the invoice to limit their liability.

The plaintiffs were awarded damages sought, plus interest. On appeal the Court of Appeal upheld the judgment of the court below. Lord Denning MR stated:

> ***"Quite apart from the provisions of section 55 of the Sale of Goods Act 1979, (which is the same as under the 1893 Act) it is a general principle that the court will not permit a party to rely on a limitation clause in circumstances in which it would be unfair or unreasonable to allow reliance on it".***

He also noted that on its true construction the limitation clause did not exempt the defendants from liability because there was nothing in it which protected them from the consequences of their own negligence. The House of Lords affirmed the decision of the Court of Appeal.

In the case of **L'Estrange v Graucob**[1] which the appellant is relying on, the defendant was protected by the exclusion clause which stated that: ***"any express or implied condition, statement or warranty, statutory or otherwise, is hereby excluded".*** Thus, not only did the plaintiff sign the document at the time of purchasing the cigarette machine but most importantly, the express or implied terms were specifically excluded. So the implied terms as to merchantability and fitness for the purpose were excluded. The parties were bound by what they signed. In casu, not only does

clause 7 not exclude the implied terms expressly but it is also an unfair term which the court is bound to stop the appellant from relying on it.

Additionally, we find that the said clause violates section 53 of the Competition and Consumer Protection Act as submitted by Mr. Sikota SC. Mr. Songolo's arguments that the Competition and Consumer Protection Act cannot be referred to on appeal because it was not raised in the court below is flawed and lacks merit. The supreme court recently pronounced itself on this issue in the case of **Nevers SekwilaMumba v Muhabi Lungu (Suing in his capacity as National Secretary of the MMD)[17] thus:**

> ***"It would indeed be calamitous were we to accept the argument implied in the respondent's counsel's submission that any legal argument and authority not advanced before a lower court, cannot be made before this Court".***

In effect therefore even though the trial judge did not consider in detail the warranty in clause 7, the net result is the same as the exclusion clause breached the implied conditions and the appellant cannot be protected by it. Therefore, the appellant cannot rely on clause 7 to exclude liability for loss of revenue arising from equipment failure.

Furthermore, according to the **Air Transworld**[14] case supra, breach of a warranty entitles the innocent party to claim damages but not to terminate the contract. Breach of a condition entitles the innocent party to terminate the contract and claim damages. It was also held in that case that the implied terms of the Act are conditions. Therefore, we conclude that the appellant here having breached the implied terms of the Act which are conditions, the respondent was entitled to terminate the contract and to claim damages.

In light of all the foregoing we find that the trial court did not misdirect herself in law and fact when she found that the appellant had breached the implied terms of the Act as to merchantability and fitness for purpose. And that the respondent was entitled to damages sought. She rightly ordered the appellant to replace the planter at current market value. We equally perused the record and found that the appellant did not adduce any evidence at all to prove its allegation that the planter was destroyed as a result of the respondent's negligence. This allegation was based on assumptions. It is settled law that he who alleges must prove. See **Mohamed v Attorney General**[18]. If anything the appellant should have counter claimed in negligence, setting out the particulars as well.

We are also not satisfied that the trial judge failed to evaluate the evidence before her or that she made findings that were either perverse

or made in the absence of any relevant evidence or upon misapprehension of the facts and or they were findings which on a proper view of the evidence, no trial court acting correctly can reasonably make. The judge drew the correct conclusion on the evidence laid before her. She reviewed the relevant case law and legislation on sale of goods and correctly found that the goods in question (planter) was unmerchantable and not fit for the purpose as it failed to conform to the respondent's expectation. It broke down almost immediately and the appellant even sent technicians to fix it. Accordingly grounds one, three, four and five are devoid of merit and are dismissed.

We are alive to the fact that the appellant's contention as argued in ground two is to the quantum of damages and the respondent's failure to mitigate his loss. It is contended that the trial court awarded the respondent damages covering the period of 2009 to 2014 while also referring the damages to be assessed from 2009 to date of judgment; without considering the long settled principle relating to the plaintiff's (respondent) duty to mitigate their losses.

As argued by the appellant's counsel and the cases cited, it is trite law that it is the duty of the claimant to mitigate their loss. According to the author of **Benjamin's Sale of Goods: The Common law Library**, this entails that a claimant, respondent here, must ensure that it minimizes

the loss it has suffered by taking reasonable steps to ensure that where possible the loss does not increase; and not to take unreasonable steps which may increase the loss. See the case of **Eastern Co-operative Union v Yamene Transport Limited** supra.

In this case the respondent purchased the planter first for use in 2009-2010 farming season. At page 230 of the record of appeal lines10 to 15, the respondent testified that '***in 2010 we cultivated the area, cleared it until it was ready for planting. Unfortunately, the planter behaved in the same manner.***' He later took the planter to the appellant's Kitwe office on 21st May, 2011 after it failed him for the third time and never got it back.

Going by the case of **Eastern Co-operative Union v Yamene Transport Limited** supra, as a prudent farmer the respondent should have taken steps to mitigate the loss by replacing the planter or hiring one instead of sitting back and waiting for over five years for litigation to be over. We find this to be unreasonable. The damages must therefore be assessed on that basis. Thus, damages should be limited to the 2009 - 2010 farming season when the planter first failed to perform. From 2011 onwards he cannot be compensated because as aforestated he should have mitigated the loss.

Thus we set aside the order by the trial court that damages be assessed from 2009 to date of judgment as it was erroneous in law and fact. We order that the respondent be paid damages for one farming season which is from 2009-2010. Matter is referred to the Deputy Registrar to assess damages as indicated.

The sum total is that the success of this appeal is more apparent than real as only the issue of damages has been partially allowed. Accordingly, each party shall bear own costs in this court.

C.F.R MCHENGA
DEPUTY JUDGE PRESIDENT
COURT OF APPEAL

J. CHASHI
COURT OF APPEAL JUDGE

J. Z. MULONGOTI
COURT OF APPEAL JUDGE