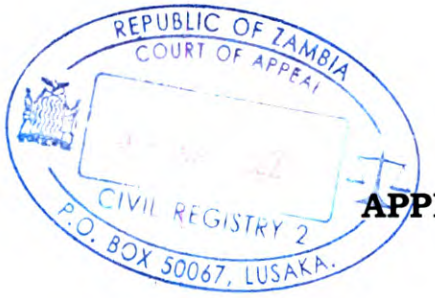
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 247/2020**

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

ETS RWASA SALVATOR **APPELLANT**

AND

DIDIER LEON KAOMA	**1ST RESPONDENT**
CLEVER MPOHA	**2ND RESPONDENT**
D. L. KAOMA IMPORT AND EXPORT LTD	**3RD RESPONDENT**
SAVENNDA MANAGEMENT SERVICES LTD	**4TH RESPONDENT**

CORAM: ***MCHENGA, DJP, MAKUNGU AND NGULUBE, JJA.***
On 19th January, 2021 and 31st May, 2021.

For the Appellant:	*Mr. K. Simbao, of Messrs. Mulungushi Chambers.*
For the Respondents:	*Mr. K. Nchito, of Messrs. Kapungwe Nchito Legal Practitioners.*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *J Evans and Son (Portsmouth) Limited vs Andrea Merzaria Limited (1976) 2 All ER 930.*
2. *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) Z. R. 172.*
3. *Esso Petroleum Co. Limited vs Southport Corporation (1956) 218.*

4. *Undi Phiri vs Bank of Zambia (2007) ZR 186.*
5. *Mhango vs Ngulube (1983) ZR 61.*
6. *Kasote Singogo vs Lafarge Zambia Plc, Appeal No. 33/2012.*
7. *Harbutt's Plasticine Limited vs Wayne Tank and Pump Co. Limited (1970) 1 ALL ER 225.*
8. *General Nursing Council of Zambia vs Mbangweta (2008) 2 ZR 105.*

Legislation referred to:

1. *The Sale of Goods Act, 1893.*
2. *The Constitution of Zambia as Amended by Act 2 of 2016.*

Other work referred to:

1. *Wordsense.eu Dictionary.*
2. *Black's Law Dictionary*
3. *Halsbury's Laws of England, 5th Edition, Volume 91.*
4. *Dr. Patrick Matibini SC, Zambian Civil Procedure: Commentary and Cases, Volume 2.*

INTRODUCTION

1. This appeal is against the Judgment of the Honourable Mr. Justice S. Nkonde of the Commercial Division of the High Court, delivered on 30th April, 2020, dismissing the appellant's action against the respondents with costs.

BACKGROUND

2. The appellant is a company incorporated in the Republic of Burundi, which was awarded a tender to supply 900 metric

tonnes of grade one rice to the Burundian Ministry of National Defence and Veterans. Its manager was introduced by telephone to the first respondent, who is a director and shareholder in the third respondent. According to the appellant, the first respondent made representations that they could supply the appellant with 1000 metric tonnes of grade one rice and deliver it to Mpulungu port within a maximum of twenty-one days after receipt of payment. The appellant's manager travelled to Zambia for purposes of finalizing its negotiations with the first and third respondents.

3. When the appellant's manager arrived, the respondent took him to the fourth respondent's offices at Plot No. 153436, Milima Road in Woodlands, Lusaka, where the meeting was held. The first respondent introduced the appellant to the second respondent, who is a director and shareholder in the fourth respondent. The respondents even provided the appellant's manager with a sample of the rice.

4. The appellant's claim was that the second respondent assured the appellant's manager that he had just purchased 1562 tonnes of paddy rice from the Food Reserve Agency, which could be polished to supply grade one rice to the appellant to the same

standard of the sample that had been provided. It was alleged that the second respondent further represented that he had been working with the first respondent in the grain trading business and their companies were at the time fulfilling contracts for the supply of grain to Burundian businesses and could fulfil the requirement of the appellant.

5. The appellant claims to have relied on the said representations and entered into agreements with the third and fourth respondents for the purchase of 1000 metric tonnes of grade one rice, to be delivered free on board (FOB) at Mpulungu Harbour. On 6th March, 2012, the appellant ordered a bank transfer for the sum of US$221,000 to the first respondent's account at Finance Bank Zambia Limited, for the purchase of 500 metric tonnes of grade one rice.

6. The appellant further claims to have on 14th March, 2012, paid the second respondent a sum of US$135,000 cash, for the purchase of an extra 500 metric tonnes of grade one rice, for which the fourth respondent is said to have issued a receipt reflecting the Kwacha equivalent of K700, 000.00.

7. The appellant sued the respondents claiming that they failed to deliver the agreed quality of rice and consideration paid by the

appellant had wholly failed. By amended writ of summons accompanied by an amended statement of claim, the appellant sought the following reliefs-

(a) A refund of all monies paid and received, that is USD221,000 plus K700,000;

(b) Damages in the sum of USD71,200 following the loss suffered in the contract to supply rice to the Ministry of National Defence and Veterans in Burundi;

(c) Damages in the sum of USD100,000 for loss of business credibility with the Ministry of National Defence and Veterans in Burundi;

(d) Special damages in the sum of USD 19,380 plus travel, visa and accommodation costs continuing to accrue;

(e) Any other relief the court deemed fit and just;

(f) Interest at the Bank of Zambia lending rate; and

(g) Costs.

8. The respondents filed a defence and counterclaim, in which they denied the appellant's allegations. Their position was that the rice contracted to be sold to the appellant was delivered in accordance with the agreement. They argued that the fourth respondent merely supplied rice to the third respondent who had contracted with the appellant.

9. In their counterclaim, the respondents said the third respondent issued an export proforma to the appellant for 1000 metric

tonnes of grade one rice, whereby it was agreed that the appellant was to pay for the rice in two batches each containing 500 metric tonnes. The respondents confirmed that the appellant paid the third respondent a deposit of US$221,000.00 which represented US$442.00 per metric tonne FOB ex-warehouse. It was averred that the third respondent placed an order for 1000 metric tonnes of unpolished rice from the fourth respondent, to whom a deposit of K700,000.00 was paid. They further claimed that it was agreed that the appellant would reimburse all the polishing and inland transportation related costs.

10. The respondents claimed that the fourth respondent was hired to transport the rice from Mansa to Mpulungu at the cost of US$61.00 per metric tonne and from Mongu to Mpulungu at the cost of US$ 145.00 per metric tonne. According to them, the rice reached Burundi in accordance with the agreement but the appellant failed to pay for transportation, port and shipping costs. They claimed that the third respondent incurred a bill of US$107,760.00 for transport costs which the appellant was supposed to reimburse. The respondents counterclaimed the sum of US$161,960.00, being the outstanding amount to be paid by the appellant.

DECISION OF THE HIGH COURT

11. After evaluating the evidence, the court raised four questions for determination; the first was whether there were two contracts: one for the sum of US$221,000.00 and the other for US$135,000.00. It however found that there was only one contract for the sum of US$221,000.00, out of which ZMW700,000.00 was paid by the third respondent to the fourth respondent. The court found that there was no evidence to prove that the appellant brought a sum of US$135, 000.00 cash into Zambia. It referred to a letter which the appellant wrote in July, 2012, which talked about the supply of 500 metric tonnes of high-quality rice at the price of US$221,000.00, which amount the appellant transferred to the third respondent. The court opined that proforma invoice number 044-2012 and other documents which named the fourth respondent as the exporter were issued to meet import and export requirements.

12. The second question raised by the court below was; who were the parties to the contract? It found that there was no controversy that the third respondent was a party to the contract as it had issued a proforma invoice No. 012 to the appellant. The lower

court dismissed the appellant's argument that the third respondent surrendered its contract with the appellant to the fourth respondent for performance, because the third respondent did not have any rice to sell. It reasoned that evidence of surrendering of the contract by the third respondent to the fourth respondent was outside pleaded matters and inadmissible in evidence for irrelevance and being outside its jurisdiction. The court expressed the view that the seller-buyer relationship was between the third respondent and the appellant, but the third respondent did not have adequate rice and it placed an order for the rice from the fourth respondent. It ultimately found that the first, second and fourth respondents were not parties to the contract.

13. The third question which was raised by the court below was whether the contract was performed. The court referred to ***section 15 of the Sale of Goods Act, 1893*** and found that this was a contract of sale by sample. It expressed the view that the appellant's manager who had been provided with the sample did not personally inspect the rice which was delivered to Mpulungu port.

14. The lower court found that there was no evidence to show that the agent who was engaged by the appellant was not given the sample to compare with the delivered rice in order for him to competently conclude that the delivered rice was not in accordance with the sample. It held that the appellant wrongfully refused to accept the rice on the advice of a person who was not called as a witness. There was also no evidence on what was bad about the quality of the rice. However, the court found that the fourth respondent delivered the rice to the third respondent at Mpulungu port and the responsibility of the third respondent ended at putting the goods in the warehouse.

15. The last question which the court below raised was whether the appellant was liable in transportation costs and related expenses in the shipping and supply of the rice to the appellant. It opined that the contract was FOB, transport costs inclusive in the amount which the appellant paid to the third respondent. The court below however held that the appellant failed to prove its case against all the respondents on a balance of probabilities and dismissed it with costs.

16. The court below ordered that the sum of USD221,000.00 which was paid by the appellant to the third respondent, be refunded to

the appellant by the third respondent, less all the costs and expenses naturally and ordinarily flowing from the failed contract; including but not limited to the cost of purchasing the rice from the fourth respondent and transportation costs since the contract was FOB. The court referred the matter to the registrar for assessment of the actual amount and further ordered that no interest shall be applied to the assessed amount, in view of its finding that it was the appellant who was wrong in relation to the contract.

17. The counterclaim was dismissed because there was no evidence that the first and second respondents transported rice to Mpulungu.

THE APPEAL TO THIS COURT

18. The appellant was not satisfied with the pronouncements and orders of the court below as contained in the judgment. It has now appealed to this Court on five grounds of appeal as follows–

1. The court below erred in fact and law when it found that the third and fourth defendants through their respective directors and agents were not co-adventures in the rice transactions a finding which run against the weight of evidence on record;

2. ***The court below erred in fact and law when it found "that the evidence of surrendering of the contract by the third defendant to the fourth defendant was outside the pleaded matters and inadmissible in evidence for irrelevance and being outside my jurisdiction", when in fact the piece of evidence was most relevant fortuitously introduced in evidence during cross-examination, and because of the manner in which the defence was conducted, could not have been objected against the fourth respondent;***
3. ***The court below erred in fact and law when it concluded that "all in all, and for the avoidance of any doubt, the plaintiff has failed to prove its case against all the defendants on a balance of probabilities and the same is dismissed with costs to all the defendants." And in the same breath adjudged that "on the sum of USSD221,000.00 paid by the plaintiff to the third defendant for the rice, I order that the amount to be refunded to the plaintiff by the third defendant;"***
4. ***The court below erred in fact and law when it adjudged that the amount to be refunded would be "less all costs and expenses naturally and ordinarily flowing from the failed rice contract; including but not limited to the cost of purchasing the rice from the fourth defendant and transportation costs as the contract was FOB" an adjudgment which was less than intelligible as the contract provided that the price was inclusive of transport; and***
5. ***The court below erred in fact and law in not awarding the plaintiff interest and costs, the plaintiff being a substantially successful litigant.***

19. Counsel filed heads of argument in support of their respective clients' positions, on which they relied at the hearing of the appeal.

THE APPELLANT'S CONTENTIONS

20. Under ground one, Mr. Simbao submitted that when the parties met at the fourth respondent's office to discuss the transportation of the rice, the appellant was the intending buyer and on the other side were the respondents who collectively, were the sellers. The second respondent represented to the appellant that the third and fourth respondents worked together in the grain trading business and their respective companies were currently fulfilling contracts of supply of grain to Burundian businesses. He argued that the representations were a well-orchestrated plan to collectively convince the appellant to proceed with the transaction and thereby obtain pecuniary advantage from the contract. Therefore, the court should have found that the respondents were co-adventurers from their synergy and linkages throughout the course of the transactions.

21. To buttress his submissions, Mr. Simbao referred to **Wordsense.eu Dictionary** which defines 'co-adventure', as *'a joint*

venture or partnership'. He also cited **Black's Law Dictionary** which defines "*Co-adventurer*" as *"a person who undertakes a joint venture with one or more persons'*. He argued that the facts completely satisfy these definitions.

22. On ground two, Mr. Simbao argued that the revelation by the appellant that the third respondent did not have any rice, surrendered the contract to the fourth respondent, was material and relevant in helping the court to fully appreciate what transpired prior to the transaction. He submitted that the contract in this case was made partly oral, partly written and partly by conduct of the parties. Therefore, all the available evidence should be interrogated to have a complete understanding of its intricacies and the intentions of the parties.

23. He submitted that where the terms of a contract are partly contained in a written document, the court is entitled to consider all the evidence relating to the parties' contractual relationship. He cited the case of ***J Evans and Son (Portsmouth) Limited vs Andrea Merzaria Limited***[1], where the court said-

> ***"... But with a contract which, as I think, was partly oral, partly in writing and partly by conduct. In such a case the court does not require to have recourse to***

lawyers' devices such as collateral oral warranty in order to seek to adduce evidence which would not otherwise be admissible. The court is entitled to look at and should look at all the evidence from start to finish in order to see what the bargain was that was struck between the parties"

24. He cited ***Article 118 (2) (e) of the Constitution of Zambia as Amended by Act No. 2 of 2016***, which provides-

"Justice shall be administered without undue regard to procedural technicalities."

25. It was his argument that the court below went against the spirit of this provision by refusing to consider the evidence of surrendering of the contract to the fourth respondent by the third respondent.

26. On the third ground of appeal, Mr. Simbao argued that the court below misdirected itself by rendering a judgment which was devoid of finality and left the appellant unsure of what to make of it. Counsel submitted that in one breath, the court held that the appellant did not succeed but an order for reimbursement of the sum of US$221,000.00 was granted and in another breath, the court held that the respondents failed to prove their counter claim and condemned them in costs. Mr. Simbao argued that the

lower court did not completely deal with the issues in dispute and rendered a judgment that leaves the parties with more questions than answers. Counsel referred us to the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited[2],*** where it was held that:

> ***"A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties, can and should be avoided."***

27. It was his contention that the appellant proved its case and the court below ought to have pronounced as such before ordering a refund of the sum of US$221.000.00.

28. Under ground four, Mr. Simbao submitted that it was established during trial that the contract was *Free On Board/Freight On Board* 'FOB'. This being a term in international commercial law which specifies at which point obligations, costs, and risks involved in the delivery of goods shift from the seller to the buyer. His contention was that the appellant's obligations and duties under the contract began at Mpulungu port and it was therefore unfair for the court below to order the appellant to

cover the costs which were incurred before the goods arrived at Mpulungu.

29. As regards ground five, Mr. Simbao faulted the lower court for not awarding interest and costs to the appellant. It was his contention that the lower court's finding that the appellant was wrong, defeated the order for a refund that it had granted.

THE RESPONDENTS' CONTENTIONS

30. In response to ground one, Mr. Nchito submitted that evidence was adduced that the contract was between the appellant and the third respondent. But the third respondent did not have sufficient stocks of rice and engaged the fourth respondent. He argued that evidence was led to show that a sum of US$221,000.00, for the purchase of rice, was paid to the third respondent who upon receipt, transferred a sum of K700,000 to the fourth respondent.

31. He supported the finding of the lower court that the seller and buyer were the third respondent and the appellant respectively; and that the fourth respondent was not party to the contract. It was his argument that even assuming that the third and fourth respondents were co-adventures, the appellant did not

demonstrate how such a finding would have influenced or varied the decision of the lower court. He argued that ground one is convoluted and redundant, and that it did not disclose a cause of action.

32. In opposing ground two, Mr. Nchito submitted that pleadings defined the appellant's case and they are an essential component of a procedurally fair hearing. He said the court below emphasized that the function of pleadings is to give notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by pleadings. Counsel submitted that this principle was expressed by Lord Normad in ***Esso Petroleum Co. Limited v Southport Corporation***[3].

33. It was his contention that the lower court found that there was nowhere in the statement of claim where the appellant pleaded that the contract was surrendered by the third respondent to the fourth respondent for performance. He pointed out that the court below found that what was surrendered was part of the rice and the fourth respondent started dealing with the appellant. It was counsel's further argument that in any event, there was no evidence on record to support the allegation that the contract was surrendered by the third respondent to the fourth

respondent. We were urged to dismiss the second ground of appeal.

34. Mr. Nchito also countered grounds three and four which he argued together. His argument was that the finding of the court below that the appellant failed to prove its case on a balance of probability and ordering that the sum of US$221,000 be refunded by the third respondent, was based on its review of the evidence. Counsel regurgitated the court below's evaluation of the evidence and its analysis. We will therefore not belabour the same.

35. On ground five, Mr. Nchito argued that it is trite law that costs follow the event but, in this case, there was no basis on which the appellant was alleging to be the successful litigant. He submitted that the court below held that the appellant failed to prove its case on a balance of probabilities and was condemned in costs. He submitted that even assuming the appellant was successful, there are general principles which courts follow. According to him, the traditional approach is explained by the Honourable Dr. Justice Patrick Matibini SC, in his book entitled, ***Zambian Civil Procedure: Commentary and Cases, Volume 2***, at page 1697, in which the learned author states as follows:

"The court, hearing a matter, has a wide discretion with regard to costs. However, the court must exercise this discretion in accordance with certain well-established principles. The most important of these principles is that a party who has been substantially successful in bringing or defending a claim, is generally entitled to have a costs order made in his favour against a party who was not successful. This seminal principle is often expressed as 'costs follow the event or the outcome of a case.

In addition, courts also apply the following principles:

(a) A successful party may be deprived of costs if there is a good reason for this;

(b) A party who unnecessarily causes costs must bear those costs; thus a successful party may be ordered to pay costs in respect of proceedings that the party himself caused.

It is important from the preceding principles that equity is an important consideration, and one which underpins the principles that have been developed by the court."

36. Mr. Nchito maintained that the appellant in this case failed to prove its case against the respondents and was condemned in costs. On that basis, ground five must be dismissed.

CONSIDERATIONS BY THIS COURT AND VERDICT

37. We have considered the record of appeal, the heads of argument filed by counsel for the parties and the authorities to which we

were referred. There is no dispute that the appellant had a contract with the third respondent for the supply of grade one rice and that the appellant paid the third respondent a sum of US$221,000.00 by way of a bank transfer on 06th March, 2012. For the sake of clarity, we shall begin by addressing the third ground of appeal.

38. Ground three relates the holding of the court below that the appellant failed to prove its case against all the respondents on a balance of probabilities. It also challenges the decision of the lower court to order that the sum of US$221,000.00 which was paid by the appellant to the third respondent, be refunded to the appellant, less all the costs and expenses naturally and ordinarily flowing from the failed contract. Counsel for the appellant submits that the court did not completely deal with the issues in dispute and rendered a judgment that leaves the parties with more questions than answers.

39. In our view, the court below was blowing hot and cold when it held, in the same breath, that the appellant failed to prove its case on a balance of probabilities but, ordered that the sum of USD221,000.00 be refunded to the appellant by the third respondent. We must emphasize that it is the duty of the courts

to conclusively determine disputes without leaving any doors open for further litigation over the same issues between the same parties. This is what the Supreme Court held in ***Wilson Masauso Zulu v Avondale Housing Project Limited***[2] in which Ngulube DCJ, as he then was, said-

> ***"I would express the hope that trial courts will always bear in mind that it is their duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality. A decision which, because of uncertainty or want of finality, leaves the doors open for further litigation over the same issues between the same parties can and should be avoided."***

40. We agree with Mr. Simbao that the decision is contradictory and leaves the parties with more questions than answers. Therefore, the most important question which begs an answer in this appeal is whether the appellant indeed failed to prove its case on a balance of probabilities. As we have already stated, there is no dispute that the appellant had a contract with the third respondent for the supply of grade one rice and that the appellant paid the third respondent a sum of US$221,000.00, for the purchase of 500 metric tonnes of rice. The dispute arises from the appellant's claim that it paid the fourth respondent an

additional sum of US$135,000.00 cash, on 14th March, 2012, for the purchase of an extra 500 metric tonnes of grade one rice.

41. The appellant's claim before the court below was that there were two contracts: one for the sum of US$221,000.00 and the other for US$135,000.00. The lower court took the view that there was only one contract for the sum of US$221,000.00, out of which ZMW700,000.00 was paid by the third respondent to the fourth respondent. According to the court below, there was no evidence to prove that the appellant brought a sum of US$135, 000.00 cash into Zambia.

42. The court found that the appellant's letter of July, 2012 only referred to the supply of 500 metric tonnes of high-quality rice at the price of US$221,000.00, which amount the appellant transferred to the third respondent. It further ruled out the possibility of the appellant having paid the US$135,000.00 because the appellant's demand was for a refund of US$221,000.00 and did not mention the US$135,000.00 or its equivalent.

43. The court took the view that the fourth respondent was not a party to the contract between the appellant and the third respondent. It opined that the contract was only surrendered to

the fourth respondent by the third respondent for performance as the third respondent did not have any rice. The court reasoned that proforma invoice number SMS044-2012 and other documents which named the fourth respondent as the exporter were issued to meet the import and export requirements.

44. We take the view that the lower court's review of the evidence and analysis did not consider the evidence on the total metric tonnes of rice which the respondents had delivered to the appellant. The evidence shows that the respondents supplied 1,147 metric tonnes of rice. For instance, the fourth respondent's letter dated 14th March, 2012 to the third respondent acknowledges receipt of a K700,000.00, as a deposit for 1,147 metric tonnes of rice. There is also another letter from Manna Freight Logistics Ltd dated 27th October, 2012 which clearly refers to the shipping of 1.147.20 metric tonnes of rice to the appellant. Most importantly, the second respondent's testimony before the court below was that the respondents supplied 1,147 metric tonnes of rice.

45. We take the view that if at all there was only one contract for the supply of 500 metric tonnes at the price for US$221,000.00, the

respondents would not have supplied 1,147 metric tonnes of rice.

46. Therefore, it is our considered view that the appellant's claim that it paid the fourth respondent an additional USD135,000.00, is more probable than not. It accordingly follows that there were actually two contracts, one for 500 metric tonnes and the other one for the difference, the total of which was 1,147 metric tonnes of rice. The inevitable conclusion is that the fourth respondent was a party to the contract, having received the additional US$135,000.00 from the appellant.

47. The next issue we have to determine is whether the appellant proved that the respondents failed to deliver the agreed quality of rice in accordance with the sample. There is no dispute that the rice transaction between the appellant and the respondents was a contract of sale by sample as provided by ***Section 15 of the Sale of Goods Act, 1893***. The appellant's manager came to Zambia where the respondents provided a sample of the rice to him. The legal implications of having a contract of sale by sample, is that there is an implied term that the bulk will correspond with the sample in quality and that the goods will be free from any defect

making their quality unsatisfactory. ***Paragraph 95*** of ***Halsbury's Laws of England, 5th Edition, Volume 91, at page 88,*** provides that-

> ***"95. Implied terms in sales by sample. In the case of a contract for sale by sample there is an implied term:***
>
> ***(1) that the bulk will correspond with the sample in quality;***
>
> ***(2) that the goods will be free from any defect, making their quality unsatisfactory, which would not be apparent on reasonable examination of the sample."***

48. It is trite law that a buyer is entitled to reject the goods if he inspects and finds the goods not up to the contract. In this case, the court below found that the appellant wrongfully refused to accept the rice on the advice of a person who was not called as a witness. This was because the appellant's manager who had been provided with the sample did not personally inspect the rice at Mpulungu port. According to the court below, there was no evidence to show that the agent who was engaged by the appellant was given the sample to compare with the delivered rice in order for him to competently conclude that the delivered rice was not in accordance with the sample.

49. Again, we are of the considered view that the court below's review and analysis of the evidence did not take into account the

evidence on record which shows that before rejecting the rice, the appellant's manager requested the appellant's agent who was at Mpulungu port to send a sample of the delivered rice, after the agent informed the appellant that the rice was not of good quality. This is evident from the following email of 23rd May, 2012:

> ***"I apologize because I've been busy since yesterday and I was not able to answer on your calls, but a new problem has occurred is that <u>the boy I sent to Mpulungu, told that rice you sent is not good quality so I asked him send to me a SAMPLE so that I can decide if I take my money or rice</u>."***
>
> ***thank you I call you tomorrow."***

50. In our view, the appellant satisfied itself that the rice delivered was not of the agreed quality in accordance with the sample. Therefore, the appellant was entitled to reject the rice. The appellant's manager did not necessarily need to personally travel to Mpulungu port to inspect the rice. What is important is that the appellant requested for a sample of the delivered rice from its agent and under the circumstances, we can safely assume that he inspected the rice against the sample that he was given by the

respondents before rejecting the delivery. The appropriate place for inspection by the buyer is usually a question of fact which depends on the circumstances of the case. This is explained by the learned authors of ***Halsbury's Laws of England, 5th Edition, Volume 91, at paragraph 370,*** who state as follows-

> ***"370. Right of rejection. In the absence of a special term or usage, the buyer is not under any duty to inspect the goods before shipment, and there is no general law that the place of shipment is the place of inspection, although the buyer is entitled to reject even before shipment if he inspects the goods then and finds them not up to contract. The appropriate place for inspection by the buyer is a question of fact depending on the circumstances of the case."***

51. In the circumstances, it was wrong for the court below to find that the appellant failed to prove that the rice delivered was not in accordance with the sample. The fact that the rice delivered was not of the agreed quality in accordance with the sample, the appellant was entitled to a refund of all the monies it had paid to the respondents for the rice.

52. On the appellant's claim for damages, we are fortified by the case of ***Mhango vs Ngulube***[4], where it was held that:

> ***"It is, of course, for any party claiming a special loss to prove that loss and to do so with evidence which makes it possible for the court to determine the value of the loss with a fair amount of certainty."***

53. The appellant proved that as a result of the respondents' failure to supply the agreed quality in accordance with the sample, it is entitled to damages following the loss it suffered with regard to its contract to supply the Burundian Ministry of National Defence and Veterans with 900 metric tonnes of rice. There is also cogent evidence to show that the appellant suffered special damages in respect of expenses travel, visa and accommodation, for which it is entitled to.

54. The only relief which was not proved by the appellant was for damages for loss of business credibility and we hereby dismiss it.

55. Overall, the appellant was successful in this matter and the court below fell into grave when it held that the appellant failed to prove its case against the respondents on a balance of probabilities. There is merit in ground three and it accordingly succeeds.

56. Coming to the first ground of appeal, the question to be decided is whether the third and fourth respondents were co-adventures in the contract for the supply of rice. Counsel for the appellant

has referred us to **Black's Law Dictionary** which defines the term 'co-adventurer' as *"a person who undertakes a joint venture with one or more persons'*. He also referred to **Wordsense.eu Dictionary** where "joint adventure" is defined as *'a joint venture or partnership'*. The respondents contend that the third and fourth respondents were not co-adventurers, but that the fourth respondent was engaged by the third respondent to supply the rice as the third respondent did not have sufficient rice.

57. On the evidence, we are of the view that the third respondent which was originally engaged by the appellant was inextricably working with the fourth respondent in the rice transaction. From the start, the fourth respondent hosted the meeting at which the parties finalized the contractual negotiations and the appellant was provided with a sample of the rice. During the meeting, the third and fourth respondents jointly made commitments to the appellant regarding the supply of rice and the fourth respondent even issued proforma invoice No. SMSS044-2012 directly to the appellant. The record has correspondence which makes it clear that the third and fourth respondents were co-adventurers. This is epitomized by a letter of 17th March, 2012, which is in the following terms:

"March 17, 2012,
E.T.S RWASA SALVATOR
BP 1681 Bujumbura
Avenue De L'amitie No. 65
Bujumbura Burundi

Dear Sir,
Re: SUPPLY OF 500MT. OF RICE
Following your purchase of rice for 500mt. through DL Kaoma Import and Export and our ourselves which is partially paid to up to K700 million, we will make all the 500mt. available to you.
...
...
We look forward to a long term business relationship.
Your sincerely,
For/on behalf of
SAVENDA MANAGEMENT SERVICES LTD.

Signed
CLEVER MPOHA
MANAGER BUSINESS DEVELOPMENT – AFRICA"

58. In the circumstances, we take the view that the finding of the court below was made on a misapprehension of the facts. In the case of ***Wilson Masauso Zulu vs Avondale Housing Project Ltd***[2], the Supreme Court held that:

> ***"Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make."***

59. We have no doubt in our minds that the lower court erred to have held that the third and fourth respondents were not co-adventurers. We accordingly reverse that finding and allow the first ground of appeal.

60. With respect to ground two, the issue to be determined is whether evidence of the surrendering of the contract by the third respondent to the fourth respondent was outside the pleaded matters and inadmissible for irrelevance and being outside the jurisdiction of the court below. The court correctly held that the function of pleadings is to give notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed.

61. In this case, the appellant did not specifically plead the issue of the third respondent surrendering the contract to the fourth respondent, but evidence was led to that effect. In ***Undi Phiri v Bank of Zambia***[5], the Supreme Court held that:

> ***"It is trite law that matters that a party wishes to rely upon in proving or resisting a claim must be pleaded. However, where a party does not object to evidence on an unpleaded matter, the Court is not precluded from considering the evidence."***

62. The fact that evidence of surrendering the contract by the third respondent to the fourth respondent was let in evidence without any objection from the respondents, the court below was not precluded from considering it. It was therefore a misdirection for the lower court to hold that it was outside the pleaded matters and inadmissible for irrelevance and being outside his jurisdiction. We find merit in ground two and it accordingly succeeds.

63. As regards ground four, the bone of contention is whether it was competent for the court below to award the appellant a refund less the costs and expenses of the contract, including the cost of purchasing the rice from the fourth respondent as well as transportation costs. It is common cause that the contract between the parties was an FOB contract. Mr. Simbao contends that the appellant's obligations and duties under the contract began at Mpulungu port. Therefore, it was unfair for the court below to order the appellant to bear the costs incurred before the goods arrived at Mpulungu port. The learned authors of ***Halsbury's Laws of England, 5th Edition, Volume 91, at paragraph 362,*** describe FOB contracts as follows:

> ***"Fob Contracts***
> ***362. Commercial nature of fob contracts. Where goods are sold fob (free on board), the duty of the seller is to deliver the goods on board ship at the contractually appointed port at his own expense for carriage to the buyer."***

64. The learned authors of ***Halsbury's Laws of England***, further state at ***paragraph 369***:

> ***"369. Price. The price quoted in an fob contract covers all expenses up to and including delivery on board the named ship. Thereafter all further expenses fall on the buyer."***

65. We agree with counsel for the appellant that since the contract between the parties was FOB, the appellant was only liable for the costs and expenses after Mpulungu port. It was therefore a misdirection for the court below to order that the refund should be less the costs and expenses flowing from the contract which failed at Mpulungu port. Therefore, ground four has merit and it is accordingly allowed.

66. Under the fifth ground of appeal, the appellant's counsel is challenging the decision of the court below not to award interest and costs to his client, despite the court having ordered a refund of the money which the appellant paid to the third respondent. It

has been argued that the appellant was the substantially successful litigant who should have been awarded interest on the refund and costs.

67. Regarding interest on a judgment debt, ***Section 2 of the Judgments Act***[3] provides that-

> ***"Every judgment, order, decree of the High Court or of a Subordinate Court whereby any sum of money or any costs, charges or expenses are to be payable to any person shall carry interest as may be determined by the court which rate shall not exceed the current lending rate as determined by the Bank of Zambia from the time of entering up such judgment, order or decree until the same shall be satisfied..."***

68. Therefore, the court is empowered by this provision to award interest on a judgment debt from the date of judgment until full settlement. The court also has discretionary power to award simple interest on debts and damages from the date the cause of action arose up to the date of judgment. This was explained by the Supreme Court in the case of ***Kasote Singogo vs Lafarge Zambia Plc***[6], where it was held that-

> ***"Section 4 of the Law Reform (Miscellaneous Provisions) Act confers discretionary power on the court to award simple interest on debts and damages from the date that the cause of action arose up to the date of***

> ***judgment. The usual practice by the courts has been to peg this interest at the average short term deposit rate from the date when an action is commenced up to the date of judgment. After judgment, the rate of interest imposed is in accordance with the Judgments Act, that is to say 'at the current lending rate as determined by the Bank of Zambia'. We have enunciated this formula in many decisions."***

69. The rationale for an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself and should therefore, compensate the plaintiff for the period that he has kept the plaintiff out of the use of the money. In the case of ***Harbutt's Plasticine Limited vs Wayne Tank and Pump Co. Limited***[7], Lord Denning, M.R. held that-

> ***"An award of interest is discretionary. It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant has had the use of it himself. So he ought to compensate the plaintiff accordingly."***

70. It is therefore clear from the foregoing that the court below ought to have awarded interest to the appellant on the refund. The respondents kept the appellant out of its money and had use of it themselves and should therefore have compensated the appellant for the period that the respondents kept the appellant

out of its money. The lower court was wrong in principle not to award interest to the appellant.

71. Coming back to the issue of costs, Mr. Nchito has correctly submitted that an award of costs is in the discretion of the court and a party who has been substantially successful in bringing or defending a claim is generally entitled to have a costs order made in his favour against a party who was not successful. However, the discretion of the court to award costs should be exercised judiciously as held in ***General Nursing Council of Zambia vs Mbangweta***[8], where the court stated that-

> ***"It is trite law that costs are awarded in the discretion of the court. Such discretion is however to be exercised judiciously. Costs usually follow the event."***

72. The appellant in this case substantially succeeded and it should not have been deprived of costs since costs follow the event. Ground five has merit and it accordingly succeeds.

CONCLUSION

73. All in all, this appeal is allowed for the foregoing reasons. We set aside the judgment of the court below and enter judgment in favour of the appellant against the third and fourth respondents for the sum of US$221,000 plus K700,000.00, being a refund of

all monies paid and received. We hereby refer the matter to the learned registrar for assessment of the damages awarded. The amounts due shall carry interest at the short-term bank deposit rate from date of writ to date of judgment and, thereafter, at the current bank lending rate as determined by the Bank of Zambia until full payment.

74. We award costs to the appellant both here and the court below, to be taxed in default of agreement.

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

C.K MAKUNGU
COURT OF APPEAL JUDGE

P.C.M NGULUBE
COURT OF APPEAL JUDGE