IN THE COURT OF APPEAL OF ZAMBIA HOLDEN AT LUSAKA
(Civil Jurisdiction)

CAZ Appeal No. 216/2019

BETWEEN:

RAPID GLOBAL FREIGHT LIMITED **APPELLANT**

AND

ZAMBIA RAILWAYS LIMITED **RESPONDENT**

CORAM : Mchenga, DJP, Chishimba and Sichinga JJA
On the 24th March, 2021 and 18th April, 2021

For the Appellant : Mr. Musumaile of Messrs SLM legal Practitioners.

For the Respondent : No Appearance.

J U D G M E N T

CHISHIMBA, JA, delivered the Judgment of the Court.

CASE REFERRED TO:

1. Surrey County Council and Another v Bredero Homes Limited (1993) 3 All ER 705
2. Mundia v Sentor Motors Limited (1982) ZR 66
3. Anderson Mazoka and Others v Levy Mwanawasa and Others (2005) ZR 138
4. Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172
5. Spancrete Zambia Limited v ZESCO Appeal no. 53/2018

LEGISLATION CITED

1. Public Procurement Regulations Statutory instrument No. 63 of 2011.

OTHER WORKS REFERRED TO:

1. Cheshire, Fifoot and Furmstones Law of Contract, 11th edition
2. Halsburys laws of England 4th Edition

1.0 INTRODUCTION

1.1 This appeal arises from the Judgment of the High Court delivered by Justice K. E. Mwenda-Zimba in which she held that the appellant had failed to prove its claim for damages for breach of contract and that the respondent was entitled to terminate the agreement upon failure to perform the contract. The court upheld the counter claim by the respondent for damages for breach of contract.

2.0 BACKGROUND

2.1 The facts giving rise to the appeal are that the parties entered into an agreement in which the appellant was to transport thirty (30) rail wagons from Chipata to the respondent's main workshop in Kabwe within a 15 day period. The agreement of the parties was embodied in various documents that included order issues, purchase orders and an award letter.

2.2 On 12th February, 2019, the respondent issued an award letter to the appellant stating that the wagons were to be transported within 15 days from the date of the purchase order. Two purchase orders were issued: the first in the sum of K1, 033, 560.00 was issued on 25th January, 2019, and the second for the additional loading charge of K180, 960.00 was issued on 7th February, 2019, the total contract sum being K1, 214, 520.00. Fifty percent (50%) of this sum was paid before delivery.

2.3 Subsequently, the respondent issued two invoices to the appellant in the sums of K1, 033, 560.00 and K180, 960.00 dated 31st January, 2019 and 1st February, 2019 respectively.

2.4 A disagreement arose between the parties as to when the 15 days began to run. The appellant in its statement of claim averred that the 15 days commencement date was understood to be upon payment of 50% of the order value to facilitate mobilization of the trucks and a hired crane from Lusaka to Chipata. The appellant stated that trucks hired to transport the wagons were marooned at the site in Chipata for 3 weeks prior to the payment of the 50% down payment. It was averred that the paid 50% down payment in the sum of K607,260.00 only reflected in the appellant's account on 28th February 2018.

Loading of Wagons onto the trucks was commenced on the 4th of March 2019. On 11th March, 2019, the respondent, in breach of contract, wrote to the appellant adjusting the contract agreement to transportation/delivery of 15 wagons at the cost of 50% already paid. As at the above date 12 wagons had been delivered, whilst the other trucks were prevented from loading. At the date of the alleged termination, the appellant had enroute to Lusaka three wagons that it has kept at its premises as lien for the 50% balance of the contract sum.

2.5 The appellant sought the following reliefs:

(1) Damages for breach of contract for the Plaintiff to transport the Defendant's wagons from Chipata to Kabwe within the month of March 2019;

(2) Further payment of K141, 960.00 being refund of hire charges advanced to the crane company whose charges were paid globally;

(3) Demurrage charges for loss of use of three trucks housing the Defendant's 3 wagons;

(4) Interest on the sums found due;

(5) Any other relief the court may deem fit; and

(6) *Legal costs of the action.*

3.0 DEFENCE AND COUNTER CLAIM IN THE COURT BELOW

3.1 The respondent filed a defence in which it averred that the contract sum was ZMW 1,214,500 inclusive of both loading and transporting. The order and award letters were issued on the 12th of February 2019 and that delivery ought to have been effected by the 27th February 2019. Only 12 wagons were delivered by the appellant. There was no agreement between the parties as to the hire of the crane specifically because the cost of loading and transportation was included in the quotation. Nor was there an agreement for the payment of 50% of the contract sum for mobilization as claimed. The respondent stated that it paid 50% of the contract sum on the 26th of February 2019. The contract period for delivery was 15 days from the date of issue of the order.

3.2 It was further averred that by 4th of March 2019, the appellant was in breach of contract by the failure to transport and deliver the 30 wagons within the period agreed.

3.3 As at 11th of March 2019, 26 days from the date of contract, only 8 wagons had been transported to Kabwe. The appellant in breach of contract used 12 meter trailers instead of 14 meter trailers to load the wagons resulting in breakdowns and marooning of trucks.

3.4 Three of the wagons loaded on 15th March 2019 have been retained by the appellant. The respondent denied liability for any expenses incurred such as demurrage charges and costs of loading.

3.5 The respondent counterclaimed against the appellant for the following;

(i) Damages for breach of contract to transport 30 wagons.

(ii) Damages for loss of business owing to the plaintiff's failure to deliver the wagons as agreed.

(iii) An Order for the appellant to release any wagons belonging to the respondent in its custody and that the cost of transportation be borne by the appellant and;

(iv) Interest on the amounts found due.

4.0 **REPLY AND DEFENCE TO COUNTER CLAIM**

4.1 The appellant reiterated that delivery of wagons could only commence upon receipt of 50% advance payment which was only received on 28th February 2019 and that the purchase orders were issued on the 25th January 2019 and 7th February 2019.

4.2 It was averred that the three wagons are being held as lien for payments of the sums claimed in the statement of claim

following breach by the respondent. The appellant denied each and every allegation of fact contained in the respondent's Defence and counter claim.

5.0 **EVIDENCE ADDUCED AT TRIAL**

5.1 At trial, a witness on behalf of the appellant testified that after the respondent requested for a revised quotation to exclude offloading, the appellant revised the quotation to K1, 033, 560.00 and that the respondent accordingly issued a purchase order on 25th January, 2019 in the said sum. In turn, the appellant issued an invoice on 29th January, 2019 in the sum of K1, 033, 560.00 in which it made it a condition precedent that 50% advance payment was to be paid on commencement of contract and the balance to be paid upon delivery.

5.2 Following agreement for an additional sum of K180, 960.00 to cover transportation costs for a crane from Lusaka to Chipata, the respondent issued a purchase order in the said sum on 7th February, 2019. This led to the issuance of the award of the contract as per the letter dated 12th February, 2019 for the delivery of 30 wagons at a consideration of K1, 214, 520.00 within 15 days ***"from the order issue date"***. PW1 stated that 50% advance payment was required for mobilization and hire of

the crane. The respondent requested the appellant to furnish it with an insurance backed advance payment guarantee which was accordingly done on 21st February, 2019.

5.3 According to the appellant, the 15 days agreed upon for delivery of the wagons was to commence after the payment of the 50% advance payment paid on 28th February, 2019. On 2nd March, 2019, the appellant paid for the hire and transportation of the crane from Lusaka to Chipata. The appellant commenced loading of the wagons on 4th March, 2019 and took the view that completion ought to have been on 19th March, 2019. In a letter dated 11th March, 2019, the respondent unilaterally adjusted the contract to limit the agreement to the transportation of 15 wagons only. As the respondent was not willing to revisit its decision, the appellant withheld three Wagons as a lien for the balance of the 50% of the contract sum.

5.4 On behalf of the respondent, DW1 testified that after the appellant increased the freight charge owing to the hire of a 50 ton crane, the respondent informed the appellant of the issued award by letter dated 12th February, 2019. The award letter, reflected the adjusted contract sum of K1, 214, 520.00 and stated that the delivery period was ***"15 days from the order***

issue date". By 6th March, 2019, only three wagons had been transported to Kabwe. As at 11th March, 2019, being the 26th day from the date the purchase order was issued to the appellant, only 8 wagons had been delivered out of the 30 contracted to be delivered.

5.5 Consequently, in line with the conditions of the purchase order, the respondent issued an adjustment letter on purchase order numbers 05007 and 05073 and that the appellant would be paid for any milestone achieved. Only 12 wagons had been delivered by 15th March, 2019, therefore, the respondent engaged another transporter to move the remaining 30 wagons. Subsequently the respondent terminated the contract for failure to deliver within the stipulated timeframe of 15 days.

6.0 DECISION OF THE LOWER COURT

6.1 Judge Mwenda-Zimba considered the evidence on record and took the view that the documents forming the basis of the contract were the enquiry, quotation, purchase orders and award letter. She noted that the two purchase orders dated 25th January, 2019 and 7th February, 2019 stated as follows:

"In accepting this order, it is understood that you agree to all the terms and conditions shown on the face and back hereof ..."

The second purchase order stated: **"Delivery being 15 days."**

6.2 The court below considered the letter of 12th February, 2019 and found that the parties agreed that the 30 wagons were to be delivered within a period of 15 days. With respect to the first purchase order of 25th January, 2019, the court found that the wagons ought to have been delivered by 9th February, 2019 while for the second of 7th February, 2019, it ought to have been by 22nd February, 2019. With respect to the award letter of 12th February, 2019, delivery should have been done by 28th February, 2019.

6.3 On the issue of the 50% advance payment, the court below held that there was no agreement between the parties and that it was an afterthought made after mobilization on the part of the appellant. She further observed that the whole agreement between the parties was finalised through the award letter, and that neither the award letter nor the purchase orders referred to the contentious 50% advance payment. Consequently, the claim for damages for breach of contract failed and the

appellant was ordered to release the three wagons it had retained.

6.4 As regards the respondent's counterclaim, the learned trial Judge found that the respondent was entitled to terminate the contract due to the failure by the appellant to deliver the wagons as agreed. Therefore, the learned trial Judge awarded damages for breach of contract and loss of business to be assessed by the Deputy Registrar.

7.0 GROUNDS OF APPEAL

7.1 Being dissatisfied with the decision of the court below, the appellant has raised six grounds of appeal as follows:

1) ***That the court below erred in law and in fact when it refused to agree that the 50% advance payment was a condition precedent before the plaintiff could deliver the 30 wagons from Chipata to Kabwe and thus held that the issue of the 50% was an afterthought, despite the evidence on record;***
2) ***That the court below misdirected itself in law and in fact when it found that the presence of the plaintiff's truck at the loading site prior to payment indicated that the plaintiff had mobilized was ready to load and transport the 30 wagons before advance payment of 50% of the contract value;***

3) ***The court below erred in law and in fact when it found that the hiring of the 50-ton crane was not agreed between the parties despite evidence of the second purchase order and the defendant's witness confirming that the second purchase order was meant to mobilize the 50-ton crane from Lusaka to Chipata;***
4) ***The court below erred in law and in fact when it held that the plaintiff acknowledged in its pleadings that delivery was to be 15 days from "issue order date" without regard to the agreement for an advance payment before commencement of delivery;***
5) ***The court below erred in law and in fact when it held that the defendant was entitled to terminate the agreement, and that consequently, the Plaintiff was not entitled to a lien on the 3 Wagons held in Lusaka; and***
6) ***The court below erred in law when it upheld the defendant's claim for damages of breach of contract.***

8.0 **APPELLANT'S ARGUMENTS**

8.1 The appellant filed heads of argument dated 9th December, 2019 and further placed reliance on the submissions in the court below. Grounds one and two were argued together as they relate to the issue whether or not the parties had agreed or contemplated that 50% advance payment had to be made before the appellant could execute the contract. It was contended that

the finding of the lower court that the purchase order of 25th January, 2019 was the basis of the contract and that it did not provide for the payment of 50% in advance ignored the evidence on record that the payment was to enable the appellant to mobilise and get started with the contract. The appellant proceeded to refer to all the documents from the quotation issued, the purchase orders, award letter, tax invoice issued and email correspondences.

8.2 DW1, in his testimony had confirmed that in a letter dated 13th February, 2019, the appellant had requested for the 50% advance payment to mobilise. That after the request was made, the respondent then requested an advance payment guarantee that was subsequently issued by African Grey Insurance leading to the payment of the 50% on 26th February, 2019.

8.3 The appellant further contended that the Zambia Procurement Regulations Statutory Instrument No. 6 of 2011, supports the need for advance payment though it only provides for 25% as opposed to 50%. The contention by the appellant in a nutshell is that the issue of 50% advance payment was a condition precedent for the appellant to proceed in its obligations under the contract.

8.4 As regards the hiring of the 50-ton crane, the appellant submits in ground three, that there was evidence on record supporting this. The site visit by the appellant revealed that a 30-ton crane could not load the wagons and hence the request to adjust the contract value to include the hiring of a 50-ton crane. This led to the respondent issuing a second purchase order in the additional sum of K180, 960.00. This, it was contended, shows that the parties had agreed and/or contemplated to hire a 50 ton crane from Lusaka which had to be paid up front. Hence the reason the 50% advance payment was needed to facilitate mobilization and hire charges of the crane. The appellant went on to refer to the evidence by its witness at pages 149-148, 152-153 of the record of appeal and the issued purchase order on record. Therefore, it was contended that the lower court misdirected itself when it held that the crane hire issue was not agreed between the parties.

8.5 As regards ground four, the appellant submitted that a critical look at the sequence of events would reveal the real intentions of the parties. According to the appellant, the reference to the 15 days delivery from order issue date springs from the award letter of 12th February, 2019 while the purchase order of 25th

January, 2019 makes no reference of the delivery period. Therefore, if the commencement of the delivery period was based on the purchase order of 25th January, 2019, then the 15 days lapsed on 9th February, 2019 before the award letter was issued. It was submitted that the 15 day period could not have been contemplated by the parties as running from the actual purchase order date of 25th January, 2019.

8.6 It was also contended that if the period started running from 25th January, 2019 then the respondent would not have issued the award letter of 12th February 2019 as the 15 days had already lapsed by the date of the letter. Conversely, if time started running from 12th February, 2019, then the 15 days would have lapsed on 27th February, 2019, while the 50% advance payment was made on 28th February, 2019. It was argued that in any case, the advance payment could not have been made until the payment guarantee had been obtained which was furnished to the respondent on 21st February, 2019.

8.7 The appellant submits that all these factors, including the hire of a 50 ton crane from Lusaka, clearly point to the fact that it was in the contemplation of the parties that works would only commence after advance payment was made by the respondent.

Therefore, the *'issue order date'* was not the date of issue of the first purchase order, but the date when the respondent effected the 50% down payment. The court below erred by not taking into account what was pleaded in paragraph five of the pleading and the evidence before it.

8.8 In arguing grounds five and six, the appellant relied on its submissions filed in the court below appearing at pages 131 to 136 of the record of appeal. As regards the termination of the agreement, the lien on the three wagons and the claims for damages for breach of agreement, it was submitted that the respondent breached the contract by effectively terminating the same before the expiry of the 15 day period. The works in issue could not be commenced without an advance payment until a crane had been hired and transported to Chipata within a reasonable period of time, which request had been repeated in the tax invoices issued by the appellant. Therefore, it was inconceivable for the respondent to suggest that the 15 days commenced prior to issue of payment and mobilization.

8.9 As regards the termination clause under the terms and conditions of the contract, it was submitted in the first instance that the same relates to the supply of goods while the agreement

between the parties was for provision of transportation services and not supply of goods. Secondly, that the clause allows the respondent to cancel the contract and not to adjust purchase orders to limit the service provider to what it has done up to the point of adjustment. In the third instance, that the adjustment of the contract is contrary to the provisions of the **Public Procurement Regulations No. 63 of 2011.** Therefore, as the respondent did not adhere to these provisions, it was in breach of contract by repudiating the same.

8.10 The appellant placed reliance on **Cheshire, Fifoot and Furmstones Law of Contract, 11th edition at page 521** where the learned authors note that a breach of contract, no matter what form it takes, entitles the innocent party to maintain an action for damages. Therefore, following the termination of the contract, the appellant was entitled to treat itself as discharged from further obligations and was not bound to deliver the three wagons in its custody.

8.11 The appellant stated that it was in the contemplation of the respondent that the appellant would suffer loss as can be seen from the letter of 11th March, 2019 adjusting the purchase order. To buttress its plea for damages, the appellant relied on

the cases of **Surrey County Council and Another v Bredero Homes Limited** [1] that espouse the principle that an aggrieved party is to be put in the financial position it would have been had the contract been performed.

9.0 **RESPONDENT'S ARGUMENTS**

9.1 The respondent filed heads of arguments on 13th March, 2020 in which it was submitted that, as rightly found by the court below at page J27 of the judgment, the purchase order, being the document which informed the appellant that it had been awarded the contract, did not provide for any payment of 50% advance payment. Therefore, as the purchase order contained no agreement regarding an advance payment, it followed that this was an afterthought as the appellant had in fact already mobilised its trucks in Chipata before payment. There was in fact no agreement between the parties to the effect that there would be an advance payment.

9.2 With reference to Regulation 140 of the Public Procurement Regulations, 2011, the respondent submits that advance payments for a government entity are not mandatory per se, but ought to be agreed upon by the parties. Therefore, the claim by the appellant that they were entitled to 50% advance payment

flies in the teeth of Regulation 140(3) which only provides for a maximum of 25% advance payment. Hence the court below's conclusion that a private contract cannot override a statute.

9.3 With respect to ground three, the respondent contends that neither the enquiry nor the purchase orders mention the hiring of a crane when the parties agreed because the respondent intended to get a transporter with capacity to transport all the 30 wagons without getting involved in the hiring or engagement of third party resources. By the time the issue of the 50 ton crane arose, the agreement between the parties had already been finalised.

9.4 We were referred to the observations made by the lower court at pages 38 and 39 of the record that though there was an advance payment made on 28th February, 2019, this does not take away the fact that there was no agreement regarding the advance payment. In any case, the advance payment was attributed to the hiring of the crane from Lusaka to Chipata, which was never agreed upon by the parties. Thus, the appellant's emails could neither vary the purchase order nor the award letter.

9.5 In ground four, the respondent submits that the delivery period was categorically stated as being 15 days from the issue order

date which the appellant never objected to at any given time. Further, that in paragraph 4 of its Statement of Claim, the appellant did acknowledge this fact and hence the lower court's conclusion that the appellant was bound by its pleadings as per the case of **Mundia v Sentor Motors Limited** [2] and **Anderson Mazoka and Others v Levy Mwanawasa and Others** [3].

9.6 The respondent submitted that by failing to deliver the wagons within the stipulated time, the appellant breached the contract with the respondent. Though the respondent had graciously tried to extend the period of delivery the appellant failed to deliver the wagons.

9.7 With respect to grounds five and six, the respondent reiterated that the appellant breached the contract between the parties by failing to deliver all the wagons within the stipulated period of time, which inevitably entitled the respondent to terminate the contract and claim damages for breach. We were urged to dismiss the appeal.

10.0 **CONSIDERATION OF THE APPEAL AND THE DECISION OF THE COURT**

10.1 We have considered the appeal, the heads of argument filed by the respective parties and the authorities cited. The facts not

in dispute are that the parties entered into a contract for the appellant to transport 30 wagons of the respondent from Chipata to Kabwe. The value of the contract being the sum of K1,214,500. The delivery period stipulated was fifteen days from the Order Issue date. It is further not in dispute that the appellant did not deliver all the wagons, having only delivered twelve (12) wagons. The respondent, as a result of the delays by the appellant to deliver the subject matter of the contract, readjusted the contract to the delivery of half of the wagons. There is further no dispute that fifty percent (50%) of the contract sum was paid on the 26th of February 2019 and that the appellant has retained possession of three wagons on the basis of an alleged lien for the balance of the contract sum.

10.2 The issues in dispute for determination arising from the grounds raised, in our view, are as follows;

(1) Whether the parties had agreed that 50% advance payment was a condition precedent before the appellant could deliver the 30 wagons from Chipata to Kabwe;

(2) Whether the hiring of the 50-ton crane was agreed upon between the parties;

(3) What the effective date of contract is in respect of the delivery date i.e whether it was from the issue order date or from the date of payment of the 50% advance payment; and

(4) Which party between the appellant and the respondent breached the contract in issue and is entitled to damages for breach.

10.3 In order to determine the issue of whether it was agreed between the parties that 50% percent advance payment of the value of the contract was a condition precedent before the appellant could deliver the 30 wagons, recourse is had to the chronology of events leading to the contract. The respondent issued a request for a quotation on 21st January 2019 for transportation of 30 wagons from Chipata Railway Station to Kabwe Zambia Railways main workshops. The appellant responded by issuing a quotation for the cost of transportation of the said wagons which was inclusive of loading and offloading fees per wagon totaling sum of K1,207,506=00. Under the column "other comments" appearing on the quote, there was indicated 50% advance payment to be made and the other 50% upon delivery.

10.4 Thereafter, the respondent issued a purchase order dated 25th January 2019 in the sum of K1,033,560.00 and a second purchase order dated 7th February 2019 for additional loading charge in the sum of K180,960.00 This was followed by a letter dated 12th February 2019, informing the appellant that the contract for the transportation of the 30 wagons had been awarded to the appellant. The appellant contends that it was a condition precedent that 50% advance payment was to be paid up front.

10.5 In contract, a condition precedent details an event which must take place before a contract or a party's obligations under a contract. According to ***Halsbury's Law of England, 4th edition paragraph 962***, condition precedent is defined as follows;

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

10.6 In the dispute before us, we are dealing with a condition precedent to the performance of a contract as opposed to the formation of a contract. In a condition precedent to performance, there is a contract but the obligations of one or both of the parties are suspended. Liability to perform only arises on the performance of the condition.

10.7 Reverting back to the issue of whether payment of 50% advance payment was a condition precedent to the performance of the contract, we are of the view that the contract on record, that is the purchase order, did not include or stipulate the advance payment of 50% of the contract value as a condition or term of the contract. The said payment was not a condition precedent to the performance of the contract. Even the letter awarding the contract does not allude to 50% payment of the advance payment. In as much as the quotation issued by the appellant provided for 50% advance payment, the contract issued to the appellant between the parties did not provide for the advance payment of 50% of the contract value. Both purchase orders stipulated that **"in accepting this order, it is understood that you agree to all the terms and conditions shown on the face and back thereof."**

10.8 In respect of the terms and conditions appearing at page 96 of the record, there is no provision stipulating payment of 50% upfront.

10.9 It appears to us that it is the appellant that was advancing the issue of 50% advance payment as reflected in its quotation and the tax invoice dated 29th January 2019 issued by it.

10.10 In further contending that payment of 50% advance payment was a condition precedent, the appellant argued that it was for this reason that an advance payment guarantee was obtained from African Grey Insurance Limited in the sum of K607,260.00 in favour of the respondent as beneficiary.

10.11 In our view the obtaining of advance payment guarantee in favour of the respondent cannot be said to imply that there was therefore a condition precedent that 50% was to be paid upfront. Advance payment guarantee is a form of security for performance in the event of breach.

10.12 It is also pertinent to state that the request for quotation dated 21st January 2019 stated that **"any order resulting from this enquiry will be subjected to ZPPA Public Procurement Regulations of July (S I No. 63 of 2011)** which are available on request.

10.13 The said ZPPA regulations provide for 25% of the contract value which "may" be provided for in a contract. The paid sum of K607,260.00 being the 50% of the contract sum was paid by the respondent after several correspondences. It is evident to us that the issue of the advance payment was neither agreed upon by the parties nor was it a condition precedent, not having been provided for on the purchase order and award letter. We find no merit in the ground relating to the above.

10.14 Equally we find no merit in the 2nd ground assailing the holding by the court below to the effect that the presence of the appellant's truck at the loading site prior to payment indicated that the appellant had mobilized, was ready to load and transport the wagons before the advance payment of 50% of the contract sum. The above finding of fact was not perverse or made upon a misapprehension of facts. We decline to reverse the said finding on the basis of the holding in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited** [4]

10.15 There was evidence adduced by Martin Siwale (PW1) that prior to the payment of 50% of the value of the contract sum the appellant had mobilized upon issuance of the purchase order. This was on their understanding that the wagons would be

loaded using a 30 ton crane available in Chipata, and had already mobilized eight trucks to Chipata. Therefore the lower court was on firm ground in holding that the above evidence shows that the plaintiff mobilized its trucks and was ready to load the wagons before the payment of the 50%.

10.16 The third issue in dispute for determination is the effective date of the contract viz a viz the delivery date. The parties advance competing dates for completion or performance of contract. According to the appellant, the 15 days delivery period agreed upon was with effect from the date of payment of the 50% advance payment paid on 28th February 2019, with completion being by the 19th of March 2019, while the respondent contends it was 15 days from date of purchase order.

10.17 As regards the terms of the contract in respect of the delivery period, recourse is had to the documents issued to the appellant by the respondent namely the purchase orders. According to the purchase order dated 7th February 2019, providing for additional loading charge for transportation of the 30 wagons, the stated delivery period is 15 days. On the 12th of February 2019, the respondent wrote to the appellant advising of the

award of the contract. The said letter stated the **"delivery period of 15 days from the order issue date."**

10.18 From the evidence adduced in the lower court, we are of the firm view that the effective date of the contract was from the 7th February 2019, the date the 2nd purchase order was issued by the respondent. Commencement date of the contract was not premised on the alleged date of payment of the 50% advance payment of the contract sum or on the date when the performance guarantee was obtained in favour of the respondent.

10.19 We accordingly hold that the 15 days period began to run from the date of issue of the second purchase order of 7th February 2019 as per awarding letter of 12th February 2019.

10.20 Ground three, assails the holding by the court below that hiring of the 50 ton crane was not agreed between the parties despite the evidence of the 2nd purchase order and the defendant's witness confirming that the 2nd purchase order was meant to mobilize the 50 ton crane from Lusaka to Chipata.

10.21 The learned trial judge in the court below stated that **"a consideration of the enquiry and purchase order shows**

there was no mention of hiring of a crane when the parties agreed."

10.22 There is evidence on record that the first purchase order dated 25th January 2019 provided only for the loading of wagons at K6,200.00 each. There was nothing stipulated specifically or agreed regarding the hiring of the 50 ton crane from Lusaka needed to load the wagons. However, the 2nd purchase order reflects an additional loading charge of transportation of the 30 wagons in the sum of K180,960=00. This is reflected in the tax invoice at page 70 of the record headed **"transportation of crane Lusaka to Chipata: description transportation of 50 ton crane from Lusaka to Chipata and back (Additional loading charge)."**

10.23 From the evidence on record, we find merit in ground three to the extent that the respondent issued a supplementary purchase order in respect of the transportation of a 50 ton crane from Lusaka to Chipata. Accordingly, we reverse the holding ofthe court below to the effect that there was no agreement for the transportation/hiring of a 50 ton crane between the parties. This is on the basis that it was made from a misapprehension of facts by the court below.

10.24 Though ground three has been upheld, it does not impact on the substantive issue of the effective date of contract in respect of delivery period and the issue of 50% advance payment.

10.25 The last issue to be determined is which of the parties breached the contract. This covers the issues raised in grounds 5 and 6, which assails the holding by the court below that the respondent was entitled to terminate the agreement and that the appellant was not entitled to the lien on the 3 wagons retained. Further the upholding of the counter claim by the respondent for damages for breach by the court below.

10.26 It is not in issue that the delivery period of the contract was 15 days from date of issue of the 2nd purchase order. We held earlier on that the effective date of contract was 7th February 2019 when the 2nd purchase order was issued. We are of the view that the issue for determination therefore: is whether the appellant performed the contract by delivering the wagons in issue.

10.27 It is not in dispute that as at 22nd of February 2019 i.e fifteen days from 7th February 2019, the appellant had not delivered the wagons. Even assuming for arguments sake that the delivery period ran from date of the award letter of 12th of

February 2019, up to 28th of February 2019, the appellant had not delivered the 30 wagons contracted to be transported to Lusaka.

10.28 There is further evidence as per letter dated 11th March 2019 by the respondent to the appellant adjusting the purchase orders down to the transportation of 15 wagons; that is only 8 wagons had been transported as at that date.

10.29 Under the terms and conditions pursuant to which the purchase order were issued, regarding time, it was stipulated that **"should the supplier fail to supply any goods within the period specified, the purchaser shall have the right to cancel the order without payment to the supplier of any compensation whatsoever. The purchaser however, may at his discretion grant an extension to the delivery period if so requested."**

10.30 Therefore, upon failure to perform the contract the respondent was entitled to cancel the contract. It is trite that a breach of contract occurs when a contracting party (the defaulting party) fails to perform, without lawful excuse a contractual obligation or term of contract, whether by late performance or defective performance etc. It is essentially the breaking of the obligation

which a contract imposes and confers a right of action in damages to the injured party entitling him to treat the contract as discharged.

10.31 The principle remedy for breach of contract is monetary compensation. Where the innocent party terminates the contract, the contracting parties are discharged from all contractual obligations as at the point of termination. The appellant having breached a term or condition of contract central to the contract i.e failure to deliver the wagons within 15 days from date of issue of 2nd purchase order, entitled the respondent to terminate the contract and gave rise to a secondary obligation to pay damages to the innocent party. We refer to our decision in the case of **Spancrete Zambia Limited v ZESCO Limited**[5]. Breach of contract entitled the respondent (the innocent party) to terminate the contract and sue for damages. The lower court was on firm ground.

10.32 As regards the claim to entitlement to a lien on the wagons retained, we are of the firm view that the appellant is not entitled to withhold the 3 wagons as lien on account of alleged breach of contract. It is trite that a lien is a right at common law to retain that which is rightfully and continuously in one's

possession belonging to another until the present or accrued claims of the person in possession are satisfied. See ***Halsbury's Laws of England 4th Edition paragraph 502***. A lien is a possessory right as opposed to a proprietary right. A lien cannot exist unless the lien holder is in possession. It is a right of defence and not a right of action. It is held until the other party satisfies the amount of the demand.

10.33 In *casu*, the appellant allegedly retained as lien the 3 wagons on the basis of payment of the balance of the contract sum for the delivery of 30 wagons. The appellant did not deliver the 30 wagons, only 12 were delivered. The respondent paid 50% of the contract price which translates to cost of delivery of 15 wagons. Upon failure to deliver the wagons the contract was adjusted to delivery of 15 wagons instead of thirty. Therefore the appellant has no legal right to exercise a possessory lien against the 3 wagons retained. There is no debt due to the lien holder by the respondent to warrant the holding of goods.

10.34 As regards the upholding of the counter-claim by the respondent for damages for breach of contract, we are of the view that the appellant having breached the contract, the respondent is entitled to damages for breach. Therefore, the

learned trial judge was on firm ground by upholding the counter-claim for damages for breach of contract. We reiterate our holding that the appellant is not entitled to exercise a possessory lien against the retained 3 wagons belonging to the respondent. There is no basis to hold the wagons as lien and the same must be returned to the respondent as ordered by the court below.

11.0 **CONCLUSION**

11.1 We find no merit in the grounds of appeal, save for ground three, which does not go to the substantive issues on appeal. We accordingly uphold the decision of the court below and dismiss the appeal. Costs are awarded to the respondent to be taxed in default of agreement.

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C. F. R. Mchenga

DEPUTY JUDGE PRESIDENT
COURT OF APPEAL JUDGE

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F. M. Chishimba

COURT OF APPEAL JUDGE

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D. L. Y. Sichinga

COURT OF APPEAL JUDGE