

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

**APPEAL No. 152/2020**

**BETWEEN:**

**MOHAMMED HANIF PATEL**

**AYSHA HANIF PATEL**

**AND**

**ZESCO LIMITED**

**CAPITAL FISHERIES LIMITED**



**1<sup>ST</sup> APPELLANT**

**2<sup>ND</sup> APPELLANT**

**1<sup>ST</sup> RESPONDENT**

**2<sup>ND</sup> RESPONDENT**

**CORAM:** *Sichinga, Ngulube, and Banda-Bobo, JJA*  
*On 21<sup>st</sup> April, 2022 and 19<sup>th</sup> July, 2022*

*For the Appellants:* Mr. C. Maggubbwi of Messrs Tembo Ngulube and Associates

*For the 1<sup>st</sup> Respondent:* Mrs. J. Kunda – Principal Legal Officer

*For the 2<sup>nd</sup> respondent:* Mr. G.S. Cornhill of Messrs Wilson and Cornhill

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**JUDGMENT**

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Sichinga JA, delivered the Judgment of the Court.

***Cases referred to:***

1. *Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises SCZ Judgment No. 4 of 1999*
2. *Marius Blom and Another v Tshwane Metropolitan Municipality Council No. 8/2011*
3. *Amon v Bobbet 2 Q.B.D 543*
4. *Christopher Lubasi Mundia v Sentor Motors Limited (1982) Z.R. 66*
5. *Dunlop v Selfridge (1915) AC 847*

6. *General Nursing Council of Zambia v Mbangweta (2008) Vol. 2 ZR 105.*
7. *Emmanuel Mutale v Zambia Consolidated Copper Mines Limited (1994) SCJ 67*
8. *Michael Chilufya Sata v Zambia Bottlers Limited (2003) ZR 1*
9. *Evereal Garage Limited and Autoforce Limited v Kalumbwa Kaputo and 23 others SCZ Appeal No. 112 of 2011*
10. *Costa Tembo v Hybrid Farms Limited (2003) ZR 98*

**Legislation referred to:**

1. *The Electricity Act No. 11 of 2019*
2. *The High court Rules, Chapter 27 of the Laws of Zambia.*
3. *The Rules of the Supreme Court, 1999 edition*
4. *Court of Appeal Act No. 7 of 2016.*
5. *Landlord and Tenant's (Business Premises) Act, Chapter 106 of the Laws of Zambia*

**Other works referred to:**

1. *Chitty on Contracts-General Principles, Volume 1, Sweet and Maxwell, 2004*
2. *The ZESCO conditions of Supply No. 543 of 2012*

## **1.0 Introduction**

- 1.1 The issue in this appeal is whether the 1<sup>st</sup> respondent, ZESCO Limited, a power utility company, was wrong to disconnect electricity power supply to the appellants' premises (the plaintiffs in the court below) on the ground that they were connected to a dedicated transformer. Majula J, as she then was, held that the transformer was dedicated to the 2<sup>nd</sup> respondent. In her judgment delivered on 18<sup>th</sup> March, 2020 she found that the plaintiffs had failed to prove that they were entitled to the declarations sought as well as damages for breach of contract. She dismissed their claims, and the 2<sup>nd</sup> respondent's (2<sup>nd</sup> defendant in the court below) counterclaim in the sum of

K122, 584.30 being 50% of the cost of the transformer and accessories it installed on its premises.

**2.0 Background**

2.1 The plaintiffs, Mohammed Hanif Patel and his wife, Aysha Hanif Patel were the owners of a property, Stand No. 9066, Chinika area, Lusaka, which comprised six warehouses rented out to tenants. In 2012, one of the tenants, Omars Investments Limited, applied for electricity power supply to ZESCO Limited for its premises. It could not afford to have a dedicated transformer installed at its premises. Therefore, it entered into an agreement with the 2<sup>nd</sup> defendant company, Capital Fisheries Limited, which was on an adjacent stand, to share electricity from its dedicated transformer. It was supplied with power by ZESCO Limited. Later, Capital Fisheries Limited sought to upgrade the electricity supply from its 500kva transformer to an 800kva transformer. Capital Fisheries Limited met the full cost of the upgraded transformer, and gave notice to Omars Investment Limited that it would disconnect supply to it. Omars Investment Limited was subsequently disconnected, allegedly by the 2<sup>nd</sup> respondent's contractor.

2.2 Omars Investments Limited and the plaintiffs took out an action by way of writ of summons and statement of claim against ZESCO Limited seeking the following reliefs:

- (i) A declaration that the defendant's action to disconnect electricity power supply to the plaintiffs without notice or reason/cause is in breach of the express/implied conditions of the electricity supply Agreement;



- (ii) General damages for breach of the said express/implied conditions of the electricity power supply Agreement;
- (iii) Special damages for loss of rent for November and December, 2016 in the aggregate sum of USD 35,700.00 and loss of future earnings in rentals
- (iv) Aggravated damages;
- (v) Damages for mental distress and humiliation; and
- (vi) Interest and costs.

2.3 By Consent Order executed on 26<sup>th</sup> April, 2017, Capital Fisheries Limited was joined to the action. By a Ruling dated 5<sup>th</sup> October, 2017, Omars Investments Limited was misjoined from the suit.

2.4 Capital Fisheries Limited also had a counterclaim against the plaintiffs contending that it had suffered loss as a result of the plaintiffs' failure to pay half the cost of the transformer, as well as failure to execute the draft agreement on the supply of power.

### **3.0 Decision of the lower court**

3.1 Upon analysing the evidence, Majula J, declined to grant any of the plaintiffs' claims as they had failed to prove them.

### **4.0 The appeal**

4.1 Dissatisfied with the decision of the lower court, the plaintiffs appealed raising the following grounds of appeal:

1. That the learned trial Judge in the court below misdirected herself in law and fact, when she failed to understand and appreciate that at the material time when the 2<sup>nd</sup> respondent disconnected electricity power supply to the appellants' property, the transformer had ceased to belong to the 2<sup>nd</sup> respondent;



2. The learned trial Judge in the court below erred in law and fact, by holding that the 2<sup>nd</sup> respondent was entitled to unilaterally disconnect electricity power supply to the appellants' property on account of failure by the previous tenant, namely Omars Investment Limited, to pay the consideration price to the 2<sup>nd</sup> respondent for the use and joint ownership of the then dedicated transformer;
3. The learned trial Judge in the court below misdirected herself in law and fact, when she glossed over and disregarded the evidence adduced at trial by the 1<sup>st</sup> respondent which clearly showed that the 2<sup>nd</sup> respondent was not clothed with power and authority to unilaterally disconnect electricity power supply from the appellants' property;
4. The learned trial Judge in the court below erred in law and fact, when she held that the 1<sup>st</sup> respondent did not breach any express or implied conditions in the power supply Agreement when it refused, neglected and/or failed to reconnect electricity power supply to the appellants' property, despite the appellants having laid several complaints against the 2<sup>nd</sup> respondent's unlawful action;
5. The learned trial judge in the court below consequently misdirected herself in law and fact, by failing to award both general and special damages against both the 1<sup>st</sup> and 2<sup>nd</sup> respondents, despite the appellants having proved their case on a balance of probability;
6. The learned trial Judge in the court below erred in law, when she awarded costs of the entire proceedings to the respondents, when in fact, the 2<sup>nd</sup> respondent's counterclaim against the appellants had equally failed and dismissed.

## **5.0 Appellants' submissions**

- 5.1 Mr. Maggubbwi, learned counsel for the appellants, relied on the appellants' heads of argument filed on 17<sup>th</sup> August, 2020.
- 5.2 Prior to arguing the first ground of appeal, counsel begun by pointing out that at page 68 of the record of appeal, the amended statement of claim states that the appellants were directors in the then 1<sup>st</sup> plaintiff, Omars Investment Limited. That at trial, the 1<sup>st</sup> appellant clarified the position that

the appellants were not directors in the said company. (Per page 337 of the record of appeal).

5.3 It was submitted that since there was no objection to the evidence tendered, the pleadings should be construed that the appellants were not directors in Omars Investment Limited, but that instead the relationship that existed between the two parties was that of landlord and tenant.

5.4 On the substantive argument in ground one, counsel submitted that the fundamental question that remained to be determined is as regards the legal or proprietary ownership of the subject transformer. To answer this question, we were referred to the quotation for electricity supply at page 118 of the record of appeal where it states the following:

*"Please note that payments of the said amounts does not confer on you any ownership or other proprietary interest in any equipment, cable or apparatus so installed."*

5.5 In addition to the above, we were referred to the testimony of the 1<sup>st</sup> respondent's witness, DW1, who confirmed that the ownership of the transformer is retained by the 1<sup>st</sup> respondent. Page 354, line 8-15 of the record of appeal refers.

5.6 It was submitted that since the transformer belonged to the 1<sup>st</sup> respondent, it follows that the 2<sup>nd</sup> respondent could not exercise proprietary rights over it. Counsel argued that if the learned trial Judge had properly understood this point, she would not have found that the 2<sup>nd</sup> respondent was fortified in engaging its contractor to disconnect the cable as it did not want Omars

Investment Limited to continue to tap power from its dedicated transformer.

- 5.7 It was submitted that notwithstanding the fact that the 2<sup>nd</sup> respondent may have bought the transformer for its dedicated use, the fact that Omars Investment Limited was allowed to tap power from it, rendered it a shared transformer. Counsel repeatedly drove the point that the transformer belonged to the 1<sup>st</sup> respondent. That its use could be shared with a third party, provided there was consent to do so by the customer who procured it. It was submitted that the power and authority to disconnect power supply rest in the hands of the 1<sup>st</sup> respondent company. We were urged to allow the first ground of appeal.
- 5.8 The argument in respect of the second ground of appeal is that when the 2<sup>nd</sup> respondent agreed to share the use of the transformer with Omars Investment Limited, it ceased to be a dedicated transformer but a shared one. It was submitted that the argument is buttressed by the fact that the 2<sup>nd</sup> respondent went to the extent of charging Omars Investment Limited a refund of 50% of the cost of its capital contribution towards procuring the said transformer.
- 5.9 Counsel contended that whilst it is common cause that the parties did not sign the draft agreement for the common use and ownership of the transformer, the evidence none the less, shows that for the years that followed, the 2<sup>nd</sup> respondent allowed Omars Investment Limited and subsequently, the appellants to continue tapping power from the transformer at its premises. It was submitted that when the appellants'



property through Omars Investments Limited, begun to tap power from the transformer procured by the 2<sup>nd</sup> respondent, the former became legal and legitimate customers of the 1<sup>st</sup> respondent company and not the 2<sup>nd</sup> respondent company.

5.10 The second question posed by the appellants is – *Did the 2<sup>nd</sup> respondent have the power and authority to disconnect the appellant's property from the 1<sup>st</sup> respondent's grid through the transformer located at its premises?* It was submitted that the answer was in the negative because the transformer belonged to the 1<sup>st</sup> respondent. That since the 2<sup>nd</sup> respondent had granted the appellants or their tenants consent to tap power, it did not have the power and authority to decide on its own volition, to disconnect a third party without the authority of the 1<sup>st</sup> respondent.

5.11 It was further submitted that the 2<sup>nd</sup> respondent had its hands tied the moment it agreed to share the transformer with the appellant's property through Omars Investment Limited, notwithstanding, the fact the latter had not honoured its contractual obligations as provided in the draft agreement.

5.12 We were referred to the learned authors of ***Chitty on Contracts volume 1, General Principles, 2004*** where they state at page 1423, paragraph 26-001 that:

*"Subject to a few controls, the parties to a contract may themselves specify in their contracts the remedy available to the innocent party following the other's breach. In the absence of any such 'tailor made' clause on the remedy, the law on damages fills the gap with standard form provisions*

***on the assessment of the money compensation which apply to all types of contracts."***

5.13 It was submitted that even though the draft agreement was not executed by the parties, it was acted upon by them when the 2<sup>nd</sup> respondent allowed the appellants' property to tap power through its then dedicated transformer. That since there was no tailor made provision in the draft agreement on consequences of breach, it follows that common law principles of damages should be allowed to kick in on the facts of this case. Counsel contended that this amplifies the fact that the only remedy or recourse available at the material time was for the 2<sup>nd</sup> respondent to sue for recovery of damages and not resort to self-help.

5.14 We were referred to the case of ***Mususu Kalenga Building Limited and Another v Richmans Money Lenders Enterprises<sup>1</sup>*** in which the appellant locked the business premises of the tenant on account of rental default, the Supreme Court said in *obiter dicta* as follows:

***"The respondent was in occupation of more or close to 7 months before the office was locked. It was incumbent upon the appellants to comply with the provision of the Act by giving the respondent a proper notice terminating the lease and if the notice was not complied with, to commence proceedings for possession of the office and recovery of mesne profits. This they did not do. They therefore acted at their own peril by locking the office and detaining the respondent's goods."***

5.15 It was submitted that the above authority illustrates that a party to a contractual relationship has no authority to resort to self-help, a practice which is frowned upon by the courts to discourage lawlessness in society. It was argued that in the instant case the 2<sup>nd</sup> respondent should either have commenced proceedings against the appellants for recovery of 50% of their

capital contributions towards the purchase of the dedicated transformer, or wait upon the 1<sup>st</sup> respondent to take appropriate action, if any.

5.16 It was submitted, in sum, that the 2<sup>nd</sup> respondent had no legal authority and power to unilaterally disconnect the appellants' property from the transformer located at its premises and by extension from the 1<sup>st</sup> respondent's national grid. We were urged to uphold the second ground of appeal.

5.17 The third ground of appeal was abandoned for substantially raising the same issue as the second ground of appeal.

5.18 The argument raised in the fourth ground of appeal is whether, on the facts and circumstances of the case, the 1<sup>st</sup> respondent had the legal authority to reconnect power to the appellants' property upon discovering that an illegal disconnection occurred following complaints by the appellants and whether, failure or default in doing so, constitutes breach of the electricity supply agreement.

5.19 It was submitted that the 1<sup>st</sup> respondent had the legal authority and mandate to reconnect electricity supply to the appellants' property and that their failure to do so constitutes breach of contract between the electricity supplier and the consumer as contemplated by **section 39 (5) (a) of the Electricity Act<sup>1</sup>** which provides that:

*"A licensee shall, on approval of an application for the supply of electricity – (a) enter into a contract of supply with a retail consumer."*



- 5.20 It was submitted that in the instant case the facts show that the 1<sup>st</sup> respondent was legally obliged to reconnect the power supply because the 1<sup>st</sup> respondent did express displeasure at the 2<sup>nd</sup> respondent for disconnecting power supply to the appellant's property in the manner it did without its knowledge. We were referred to the letter at page 140 of the record of appeal, from the 1<sup>st</sup> respondent to the 2<sup>nd</sup> respondent. We were also referred to the 1<sup>st</sup> respondent's witness' (DW1) testimony at page 354 of the record of appeal to the effect that the 1<sup>st</sup> respondent only disconnects customers when they are in arrears.
- 5.21 It was submitted that in the instant case, the appellants' service status remained active and they continued to receive a fixed charge because the account was active since the disconnection was not normal.
- 5.22 It was argued that the 1<sup>st</sup> respondent company breached its implied duty to the appellants to maintain power supply on account that they neither failed to pay for the bills nor request the 1<sup>st</sup> respondent to disconnect power supply. In support of this submission reliance was placed on **section 39 (5) (a), (b) and (c) of the Electricity Act supra** which provides as follows:
- "(5) A licensee shall, on approval of an application for the supply of electricity -*
- (a) enter in to a contract of supply with a retail consumer;*
  - (b) provide electricity lines or an electrical plant or electrical equipment to the successful applicant for the purposes of supplying electricity;*
  - (c) ensure continuous supply of electricity; and..."*

5.23 It was submitted that the import of the above provision is that it mandates or obligates a supplier of electricity, such as the 1<sup>st</sup> respondent, to ensure a continuous supply of electricity, unless, there is a disconnection occasioned by non-payment of tariffs or the consumer requests for such disconnection or indeed there is power interruption as contemplated by **section 39 (8) and (9)** of the said Act.

5.24 We were urged to allow ground four of the appeal.

5.26 In ground five, the appellants contend that they proved their case on a balance of probability. First, it was submitted that they proved that the 2<sup>nd</sup> respondent's action of disconnecting power supply to their property was illegal because it did not own the transformer to which power was connected since it belonged to the 1<sup>st</sup> respondent. Secondly, the appellants contend that they proved that the 1<sup>st</sup> respondent breached its implied duty to ensure that they had power to their property provided their service account was not owing and that the appellants did not give instructions to have the power disconnected to their property. We were referred to the South African case of **Marius Blom and Another v Tshwane Metropolitan Municipality Council**<sup>2</sup> where it states:

*"Before me, there is absolutely nothing in principle which bars recovery of damages by plaintiff for loss of income. It is therefore consequential that submission made on behalf of the defendant has to fail. The plaintiff is entitled to be placed in the position in which it was, but for the unlawful conduct, depriving the plaintiff's benefit of the supply of electricity."*

- 5.27 It was submitted that the appellants are entitled to recover both general and special damages against the respondents for their unlawful conduct of depriving power supply to the appellants' property.
- 5.28 Turning to the final ground of appeal, it was submitted that the learned trial Judge did not apply the law in exercising the discretion whether or not to award costs or on how to apportion costs. Reference was made to ***Order 40 Rule 6 of the High court Rules***<sup>2</sup>.
- 5.29 It was submitted that the 2<sup>nd</sup> respondent commenced a counterclaim against the appellants which failed and was dismissed. Therefore, the 2<sup>nd</sup> respondent cannot be seen to benefit from the failure of another independent claim. We were referred to ***Order 15/2/4 of the Rules of the Supreme Court***<sup>3</sup> on the definition of a counter claim and the case of ***Amon v Bobbet***<sup>3</sup> on the requirement to treat a counter claim as an independent claim.
- 5.30 It was submitted that since both the appellants' claim and the 2<sup>nd</sup> respondent's counter claim failed, the most just and fair order that the trial court should have directed was that, as between the appellants and the 2<sup>nd</sup> respondents, each party should have borne their own costs. That only the 1<sup>st</sup> respondent was entitled to costs as against the appellants. The appellants' submissions ended on this note.

## **6.0 1<sup>st</sup> respondent's submissions**

- 6.1 In response to the appellants' heads of argument, the 1<sup>st</sup> respondent filed heads of argument on 4<sup>th</sup> September, 2020. Mrs. Kunda, learned counsel



for the 1<sup>st</sup> respondent, relied on the same, which are specific to grounds one, four, five, and six.

- 6.2 In response to ground one, counsel begun by pointing out that the appellants' arguments as regard the relationship between the 1<sup>st</sup> appellant and the 2<sup>nd</sup> respondent do not depict the grounds that are set out in the memorandum of appeal. Having brought this observation to the fore, counsel submitted that the issues emanating from the first ground as set out in the memorandum of appeal are as follows:

*-Whether or not at the material time when the 2<sup>nd</sup> respondent disconnected the electricity supply to the appellants' property, the dedicated transformer had ceased to belong to the 2<sup>nd</sup> respondent?*

- 6.3 Before setting out to respond to ground one, counsel rebutted the appellants' position regarding the status of the parties. It was submitted that whilst the 1<sup>st</sup> appellant alleged, in his testimony, that Omars Investment Limited was a tenant on his premises, which statement was objected to as unpleaded, there was no amendment to the pleadings to reflect that status. Counsel relied on the case of **Christopher Lubasi Mundia v Sentor Motors Limited<sup>4</sup>** on the functions of pleadings. It was submitted that the appellants did not amend their pleadings, and the Court of Appeal is not the correct forum for amendment of pleadings.

- 6.4 On the substantive response to ground one, it was submitted that it was a notorious fact from the pleadings on record that the 2<sup>nd</sup> respondent applied to the 1<sup>st</sup> respondent for electricity supply and was granted permission to purchase and install a 500 KVA transformer for a dedicated electricity

power supply to its property, stand no. 9066 Katanga Road, Lusaka and subsequently procured and installed the transformer at a cost of K245,168.20.

- 6.5 On the meaning of a dedicated transformer, we were referred to the testimony of DW1, where he stated that it is one that the 1<sup>st</sup> respondent cannot connect to another customer from that installation as the capacity is paid for and dedicated to a particular customer. It was submitted that the witness stated that 1<sup>st</sup> appellant was issued with a quotation by the 1<sup>st</sup> respondent to be connected to different transformers, but he said he had no money to bring power to his premises.
- 6.7 It was submitted that the 1<sup>st</sup> respondent was bound by any agreement entered into for dedicated power supply. That the 1<sup>st</sup> respondent could only connect a third party to a dedicated transformer with its client's consent.
- 6.8 It was contended that the 1<sup>st</sup> appellant was connected to the dedicated transformer on a temporal builder's supply at the instance of the 2<sup>nd</sup> respondent, after a consented agreement on grounds that the appellants paid the 2<sup>nd</sup> respondent K122,584.10 in order to be allowed to tap electricity power supply from its dedicated transformer which they verbally agreed to. Reference was made to page 240, line 5-25 of the record of appeal.
- 6.9 It was submitted that the 1<sup>st</sup> respondent was not privy to the agreement between the appellants and the 2<sup>nd</sup> respondent. That the 1<sup>st</sup> respondent had a power supply agreement with the 2<sup>nd</sup> respondent, and therefore the

latter was the correct party to bring an action against the 1<sup>st</sup> respondent. Reliance was placed on the case of ***Dunlop v Selfridge***<sup>5</sup> where it was held that “*only parties to a contract can sue on it.*”

6.10 It was submitted that the 1<sup>st</sup> respondent only had proprietary right to the physical asset, but the capacity in terms of the KVAs, which is the power carried in the transformer, is dedicated to the client. That the capacity of the transformer was fully dedicated to the 2<sup>nd</sup> respondent only. From this explanation, it was submitted that the learned Judge did not misdirect herself in law and facts. We were urged to dismiss the 1<sup>st</sup> ground of appeal for want of merit.

6.11 With respect to ground four, counsel raised two questions to be answered:

- i. *Was there an existing power supply agreement between the appellants and the 1<sup>st</sup> respondent?*
- ii. *Did the 1<sup>st</sup> respondent breach any express or implied conditions in the said power supply agreement?*

6.12 It was submitted that the appellants did not have any existing supply agreement with the 1<sup>st</sup> respondent as they never executed a formal application form. Further, that they neither paid a capital contribution as required under the ZESCO conditions of supply, nor did they pay for the quotation to provide them with power. It was contended that the ingredients to form a valid agreement were missing. In support of this submission reliance was placed on ***sections 1 and 2 of the ZESCO conditions of Supply No. 543 of 2012*** on the requirement to complete an application form and to pay a capital contribution within a stipulated timeframe.



6.13 Counsel submitted that none existence of a power supply agreement between the appellants and the 1<sup>st</sup> respondent discounts in totality the claim of breach of express or implied conditions. We were urged to dismiss this ground of appeal for lack of merit.

6.14 In ground five, we were asked to consider the following questions:

- i. *Whether or not the learned trial Judge misdirected herself in law and fact, by failing to award both general and special damages against both the 1<sup>st</sup> and 2<sup>nd</sup> respondents? And*
- ii. *Whether or not the appellants proved the case on a balance of probabilities.*

6.15 Counsel submitted that the appellants relied on the case of ***Maurius Blom and Another v Tshwane Metropolitan Municipality Council supra*** which states in part that:

*"The plaintiff is entitled to be placed in the position in which it was, but for the unlawful conduct, depriving the plaintiff benefit of the supply of electricity."*

6.17 It was submitted that the 1<sup>st</sup> respondent neither conducted itself in an unlawful manner nor did it deprive the appellants the benefit of supply of electricity. Reference was made to the 1<sup>st</sup> respondent's witness (DW1) testimony on record, to the effect that the 1<sup>st</sup> respondent received a report from the appellants that they were not receiving power to their premises. That upon investigation, it was discovered that the cable supplying power to the appellants' premises was removed. It was submitted that, at the time of the upgrade, the 1<sup>st</sup> respondent worked together with the 2<sup>nd</sup> respondent by connecting the cable identified by the 2<sup>nd</sup> respondent to the

feeder pillar. That this was consistent with DW2's testimony who stated that at the time of the upgrade, the 2<sup>nd</sup> respondent determined the cables which were to run to the feeder pillar, and as later seen, the cable taking power to the appellants' premises was not among the cable identified by the 2<sup>nd</sup> respondent.

6.18 It was submitted that DW2 conceded in cross-examination that, at the time of the upgrade, the 2<sup>nd</sup> respondent gave its contractor, who was working on the upgrade, the power sharing agreement between it and Omars Investments Limited, and the notice of disconnecting the cable supplying power to the appellant's premises. That in cross-examination, DW2 admitted that the intention of giving the said documents to the 2<sup>nd</sup> respondent's contractor was to cut power from its dedicated transformer to the neighbour, as it required full capacity. That DW2 further stated that the 2<sup>nd</sup> respondent was responsible for showing the 1<sup>st</sup> respondent which cables to connect to the feeder pillar.

6.19 It was submitted that the evidence on record shows that the appellants were advised by the 1<sup>st</sup> respondent to apply for a permanent supply since the initial application that connected them to the 2<sup>nd</sup> respondent's dedicated supply was temporal, and for building purposes only. We were urged to dismiss the fifth ground of appeal for lack of merit.

6.20 In response to the final ground of appeal, it was submitted that the settled position with respect to costs is that they are awarded at the discretion of the court. That this position is articulated in a plethora of authorities including *General Nursing Council of Zambia v Mbangweta*<sup>6</sup>. That in

considering the question of costs, a Judge must adhere to certain principles as was explained in the case of *Emmanuel Mutale v Zambia Consolidated Copper Mines Limited*<sup>7</sup> as follows:

*"With regard to the argument as to costs, the general rule is that a successful party should not be deprived of his costs unless his conduct in the course of the proceedings merits the court's displeasure or unless his success is more apparent than real, for instance where only nominal damages are awarded."*

- 6.21 It was submitted that the lower court correctly applied its mind in awarding the costs to the 1<sup>st</sup> respondent.
- 6.22 Counsel contended that the appellants have admitted this at page 18 in paragraph 10 of their heads of argument where they state as follows:

*"... in all this the only party that was entitled to costs as against the appellants was the first respondent company and should the appellants appeal fail against 1<sup>st</sup> respondent, save for the costs of the appeal proceedings, the High Court Judgment should be varied so that costs are only payable by the appellants to the 1<sup>st</sup> respondent and not the 2<sup>nd</sup> respondent."*

- 6.23 It was submitted, going by the appellants' submissions, that the learned trial Judge did not err in law when she awarded costs of the entire proceedings to the respondents.
- 6.24 We were urged to dismiss the appeal in its entirety on the strength of the 1<sup>st</sup> respondent's submissions and authorities cited, with costs to the 1<sup>st</sup> respondent.

## 7.0 2<sup>nd</sup> respondent's submissions

7.1 Mr. Cornhill, learned counsel for the 2<sup>nd</sup> respondent, relied on the 2<sup>nd</sup> respondent's heads of argument filed on 4<sup>th</sup> September, 2020. With respect to the sixth ground of appeal, counsel also relied on the provisions of ***section 23 (1) (d) of the Court of Appeal Act***<sup>4</sup>.

7.2 With respect to the first ground of appeal, counsel begun by stating that that appellants amended their statement of claim twice. That initially they averred that they are directors of Omars Investment Limited, and as such they manage the warehouse on stand No. 9066 Chinika, Lusaka. That in examination in chief, PW1 testified that the appellants were never directors of Omars Investment Limited, but leased the property to them. That in reliance upon the case of ***Jere v Shamayuwa and Another supra*** invited the Court to accept the version presented in chief.

7.3 It was submitted that whilst the Court is entitled to consider this evidence because it was not objected to, ***Order 18 Rule 7/11 Rules of the Supreme Court supra*** provides as follows:

*"Where the evidence at trial establishes facts different from those pleaded... which are not just a variation, modification or development of what has been alleged, but which constitute a radical departure from the case pleaded, the action will be dismissed."*

7.4 It was submitted that the facts given in evidence on the relationship between the appellants and Omars Investment Limited being landlords and tenants amounts to a radical departure from the relationship presented by the statement of claim of being directors. It was argued that the appellants



could not have prevailed in litigation due to this material difference between the pleadings and the evidence.

- 7.5 It was submitted that the appellants' arguments on the ownership of the transformer are not supported by record. That the documents at page 127 and 137 of the record of appeal show that the agreement was between the respondents.
- 7.6 Counsel contended that the evidence of DW1 shows that the cable conveying power to Omars Investment Limited was terminated on the day the 800 KVA transformer was commissioned. That pursuant to the letter from the 1<sup>st</sup> respondent at page 131 of the record of appeal, the transformer would only pass to the 1<sup>st</sup> respondent after one year. It was submitted that the 800 KVA was the property of the 2<sup>nd</sup> respondent on the day power supply to the appellants was terminated. We were urged to dismiss the first ground of appeal for being misconceived.
- 7.7 The 2<sup>nd</sup> respondent's response to the first argument in ground two that the transformer was not dedicated was that the appellants misapprehended DW1's testimony. That the supply is what was dedicated, and not the transformer. It was argued that since the supply was dedicated to the 2<sup>nd</sup> respondent, the 1<sup>st</sup> respondent could only connect Omars Investment Limited, and not the appellants, with consent of the 2<sup>nd</sup> respondent.
- 7.8 It was submitted that the supply to Omars Investment Limited was a product of a contract between it and the 2<sup>nd</sup> respondent. That the appellants, who were neither shareholders nor directors in Omars Investment Limited, were not privy to the contract. That it was therefore, a

contractual right for the 2<sup>nd</sup> respondent to procure the disconnection of the supply to Omars Investment Limited. It was argued that although the appellants benefitted from the arrangement, they were not privy to the contract between Omars Investment Limited and the 2<sup>nd</sup> respondent, and as such could not claim any damages arising from the contract.

- 7.9 It was submitted that the alleged illegality committed in disconnecting the supply line to Omars Investment Limited lacks particularity. That illegality is the contravention of statute, and it cannot arise by implication. Counsel contended that a party alleging illegality must specify which statute has been contravened. It was submitted that the statute provides the consequence or sanction.
- 7.10 In distinguishing the case of *Mususu Kalenga Building Limited and Another v Richman's Money Lenders Enterprises supra*, relied upon by the appellants, it was submitted that that case is premised on the *Landlord and Tenant's (Business Premises) Act<sup>5</sup>*, which provides for modes of termination of leases of business premises. That its ratio cannot be extended to apply to all contracts.
- 7.11 Counsel submitted that the law recognises an innocent party's right to treat a contract as discharged on account of breach. It was contended that there is no authority that the innocent party requires a court order to pronounce a breach and guide him on his remedies. Counsel argued, it would be tantamount to saying that an employer can only terminate an employment contract after obtaining a court order to that effect, which rule would belabor the court.

- 7.12 It was submitted that it had not been denied that Omars Investment Limited breached the contract. That apart from defaulting on the payment, it left the building supplied. Counsel contended that the 2<sup>nd</sup> respondent was within its rights to procure that power be terminated.
- 7.13 With respect to ground four, no submissions are advanced.
- 7.14 In response to ground five, we were referred to the case of ***Michael Chilufya Sata v Zambia Bottlers Limited***<sup>8</sup> in which case the appellant sought damages for personal injuries and consequential loss and damage caused by the negligence and/or breach of statute by the respondent in the manufacture and bottling of one of the sprite beverage.
- 7.15 On the strength of this case, it was submitted that ground five is devoid of merit and should be dismissed.
- 7.16 Turning to ground six, we were referred to the case of ***Evereal Garage Limited and Autoforce Limited v Kalumbwa Kaputo and 23 others***<sup>9</sup> which approved earlier Supreme Court decisions in ***Costa Tembo v Hybrid Farms Limited (2003)***<sup>10</sup> and ***General Nursing Council of Zambia v Ing'utu Milambo Mbangweta supra*** where it was held as follows:
- "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."*
- 7.17 It was submitted that whilst it is trite that the counterclaim constituted a separate claim, it was a claim against Omars Investments Limited. That its rejection by the court cannot be the reason to set aside the costs awarded against the appellants, whose claim was dismissed.

7.18 We were urged to dismiss the appeal with costs.

## 8.0 The decision of the Court on appeal

8.1 We have carefully considered the spirited submissions of counsel on the grounds of appeal. The appellants abandoned ground three as it substantially raises the same issues as in ground two. Further, we are of the view that grounds one and two are interrelated. We shall address them in concert. Grounds four, five and six will be dealt with separately.

8.2 In grounds one and two, the appellants' contention is that the learned Judge misunderstood and failed to appreciate that at the material time when the 2<sup>nd</sup> respondent disconnected electricity power supply to their property, the ownership of the transformer had ceased to belong to the 2<sup>nd</sup> respondent. Further, that by that failure to understand the ownership of the transformer, the lower court erred when it held that the 2<sup>nd</sup> respondent was entitled to unilaterally disconnect power to Omars Investments Limited. The assailed finding of the court is at page 23 of the record of appeal (page J16 of the Judgment). From lines 16 to 25, it reads as follows:

*"My examination of the contract between Omar Investment and the 2<sup>nd</sup> defendants to tap power from their dedicated transformer reveals that it was dependent on the fulfillment of condition that they pay 50% of the cost of the transformer. Having failed to make the requisite payment, the 2<sup>nd</sup> defendant, through their contractor, who was working on the upgrade, gave Omars notice to disconnect the cable supplying power to the plaintiffs' premises. The view I take is that they were fortified in engaging their contractor to disconnect the cable as they did not want Omar Investment to continue to tap power from their dedicated transformer."*



8.3 The 1<sup>st</sup> respondent, through its witness, DW1, in his detailed testimony on record (from pages 350 to 359) explained that ZESCO sells the capacity and not the transformer. The transformer remains the property of ZESCO. DW1 explained to the trial court that a customer had the option to have a dedicated supply or a shared supply. He stated that *"Dedicated means that on that installation you cannot connect other customers. A customer therefore pays more for a dedicated supply other than shared supply."*

8.4 At page 352 of the record of appeal, DW1 went on to state what transpired at the material time when the 2<sup>nd</sup> respondent disconnected electricity power supply to the appellants' property. He stated as follows:

*"At the time of changing transformers, the cable going to Omars premises was left out of circuit. Zesco received a complaint through one of the customer services centres I manage. The complaint was that Omars was disconnected. As Zesco, we went with a team of technical people to go and investigate and when they went to site they discovered that the cable was left out of the circuit. Capital Fisheries indicated they would take up the entire capacity. We advised Omars to apply for their own transformer."*

8.5 Further, at page 116 of the record of appeal is an agreement for ZESCO power distribution between the Capital Fisheries Limited and Omars Investment Limited, by which terms the latter agreed to reimburse the former 50% of the construction and equipment cost of a ZESCO sub-station.

8.6 Having considered the merits of the appellants' claims and the evidence on record, the learned trial Judge found as a fact that Omars Investment Limited breached the terms of the agreement by failing to pay 50% of the cost of the transformer. Since it was a dedicated transformer as was

explained by DW1, the learned Judge took the view that the 2<sup>nd</sup> respondent was entitled to disconnect the cable supplying power to Omars Investment Limited.

- 8.7 We cannot fault the learned Judge for the findings she made because she evaluated the evidence as presented and strictly construed the agreement between Omars Investment Limited, of the one part and the 2<sup>nd</sup> respondent, of the other part, in relation to the conditions contained therein. She referred to the learned authors of *Chitty on Contracts* on the requirements for the formation of a contract before making her findings.
- 8.8 In endorsing the position taken by the lower court we note Mrs Kunda's submission that the 1<sup>st</sup> respondent was not privy to the agreement between the appellants and the 1<sup>st</sup> respondent with the 2<sup>nd</sup> respondent. That the correct party to bring an action against the 1<sup>st</sup> respondent would be the 2<sup>nd</sup> respondent. However, a perusal of the agreement at page 116 of the record of appeal reveals that in fact neither the appellants nor the 1<sup>st</sup> respondent were privy to the agreement between Omars Investment Limited and the 2<sup>nd</sup> respondent.
- 8.9 From the evidence on record, what we decipher is that the agreement between Omars Investment Limited and the 2<sup>nd</sup> respondent, met with the 1<sup>st</sup> respondent's approval. We say so because when the 1<sup>st</sup> appellant reported to the 1<sup>st</sup> respondent about being disconnected after the upgrade transformer was installed, the latter's reaction, as per DW1's testimony, was as follows:

*"We had advised the client to apply for a transformer, had they paid they could have continued enjoying Zesco services. They should come back to ask for permanent supply at which point we could have quoted them for a transformer on the basis that the other transformer is a dedicated one."*

- 8.10 The fact that the appellants were not privy to any agreement between Omars Investment Limited and the 2<sup>nd</sup> respondent was confirmed by the 1<sup>st</sup> appellant himself. In cross-examination, he told the trial court:

*"I was not privy to the discussion between Omars Investment and the 2<sup>nd</sup> Defendant with regards to connection of power. Power flowed to the premises without me paying anything"*

- 8.11 We find that by all accounts, the appellants were strangers to the agreement in dispute. In sum, the point that the transformer belonged to Zesco is not in dispute, notwithstanding that it was paid for by the 2<sup>nd</sup> respondent. ZESCO accepted that the 2<sup>nd</sup> respondent had a dedicated transformer, which could only be used by it. The usage of the transformer by a third party required the consent of the 2<sup>nd</sup> respondent because the transformer was dedicated to it. Grounds one and two are bereft of merit and are accordingly dismissed.

- 8.12 The appellants' contention in ground four is that ZESCO breached express or implied conditions in the power supply agreement when it refused or neglected and/or failed to reconnect electricity supply to the appellants' property. They refer to a letter dated 28<sup>th</sup> November, 2015 by the 2<sup>nd</sup> respondent to the Omars Investment Limited giving notice to disconnect electricity power supply.

- 8.13 In light of our findings on the previous ground of appeal, we are at pains to grasp the essence of this ground which is equally grounded on the point of law of privity of contract. The question put forward for our consideration was whether the 1<sup>st</sup> respondent had the legal authority to reconnect power to the appellants' property upon discovering that an illegal disconnection occurred following complaints by the appellants, whether failure or default in doing so, constitutes breach of the electricity supply agreement. What the appellants have skillfully avoided to do, in their submissions, is to point us to the electricity supply agreement to which they were a party. In cross-examination at page 347 of the record, the 1<sup>st</sup> appellant conceded that there was no power agreement between himself and the 1<sup>st</sup> respondent. He went on to state there was equally no agreement between himself and the 2<sup>nd</sup> respondent.
- 8.14 Having admitted that he did not have any power supply agreement with the 1<sup>st</sup> respondent, this ground of appeal cannot be sustained. We uphold the findings of the lower court. Ground four is dismissed for lack of merit.
- 8.15 In the fifth ground of appeal, the argument is based on the alleged unlawful conduct by the 1<sup>st</sup> respondent, which entitles the appellants to general and special damages. What is clear from the circumstances of this case is that the appellants seek to ride on the breached agreement entered into between Omars Investment Limited and the 2<sup>nd</sup> respondent. We have already established that the appellants, did not have a subsisting power supply agreement with the 1<sup>st</sup> respondent, which the latter breached to entitle them to general or special damages. On the circumstances of this



case we do not find that the 1<sup>st</sup> respondent conducted itself in an unlawful manner. We have also established that the transformer by which they sought to be joined was paid for by the 2<sup>nd</sup> respondent for its exclusive use. Ground five is without merit and it accordingly fails.

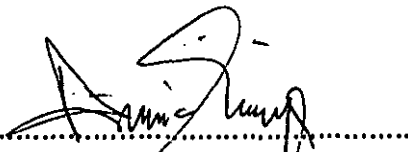
8.16 Turning to the final ground of appeal, it is trite law that costs are in the discretion of the court. Further, that as a general rule, a successful party should not be deprived of his costs, unless his conduct in the course of the proceedings merits the court's displeasure, or unless his success is more apparent than real. In casu, the appellants' displeasure is that they should not have had to bear the costs of the respondents because the 2<sup>nd</sup> respondent had a counterclaim, which equally failed. They contend that they and the 2<sup>nd</sup> respondent ought to have borne their own costs. That the lower court's Judgment should be varied so that the appellants are only liable for the 1<sup>st</sup> respondent's costs.

8.17 We agree that ordinarily costs follow the event. In other words, a successful party should not be deprived of his costs, unless the successful party did something wrong in the action or in the conduct of it. In justifying its position, the learned Judge ought to have made it clear that in this action, it is the appellants that took the respondents to court, notwithstanding that there was a counterclaim. We therefore see no good reason to vary the lower court's Judgment. Ground six is accordingly dismissed.


**9.0 Conclusion**

**9.1** Having considered all the grounds of appeal, we find that they lack merit.


The appeal is accordingly dismissed with costs to the respondents.



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*D.L.Y. Sichinga, SC*  
**COURT OF APPEAL JUDGE**



.....  
*P.C.M. Ngulube*  
**COURT OF APPEAL JUDGE**



.....  
*A.M. Banda-Bobo*  
**COURT OF APPEAL JUDGE**