IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO./23/2022**

HOLDEN AT LUSAKA **CAZ/08/420/2021**

(Civil Jurisdiction)

BETWEEN:

DAEWOO ENGINEERING & CONSTRUCTION LIMITED **APPELLANT**

AND

CONSOLIDATED FARMING LIMITED **1st RESPONDENT**

CLEMENT MUGALA **2nd RESPONDENT**
(Receiver/Manager of Keren Motors Limited [In Receivership])

CORAM: KONDOLO SC, MAKUNGU, SHARPE-PHIRI JJA

On 29th September, 2022 and 30th June, 2023

For the Appellant: *Mr. R. Peterson & Mr. C. J. Mumba of Messrs Chibesakunda & Company*

For the 1st & 2nd Respondents : Mr. S.M. Lungu SC and Mr. N. Ngandu of Messsrs Shamwana & Company

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J U D G M E N T

KONDOLO SC JA delivered the Judgment of the Court.

CASES REFERRED TO:

1. **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & 2 Others (2005) ZR 138**
2. **Parker v South Eastern Railway Co [1877] 2CPD 416 421**
3. **Saunders v Anglia Building Society [1970] 3 All ER 961**

4. **Freeman v Lockyer v Buckkhurst Park Properties (Mangal) Limited (164) CA 644**
5. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**
6. **Dixon v Deveridge (1825) 2 C.&P. 109**
7. **Twyman v Knowels (1853) 13 C.B. 222**
8. **Currie v Misa (1874) LR 10 Ex 153**
9. **Maamba Collieries Limited v Southern African Delivery Company (Pvt) Ltd CAZ/Appeal No. 122/2019**
10. **Georgina Mutale (T/A G.M. Manufacturers Limited) V Zambia National Building Society SCZ/5/2002**
11. **Ets Rwasa Salvator v Kaoma & 3 Others CAZ/247/2020**
12. **General Nursing Council of Zambia v Mbangweta (2008) 3 ZR 105**

LEGISLATION REFERRED TO

1. **Companies Act No. 10 of 2017, Laws of Zambia**
2. **High Court Rules, High Court Act, Chapter 27, Laws of Zambia**
3. **The Rules of the Supreme Court 1999 Edition (The White Book)**

1. INTRODUCTION

1.1. This appeal is against the Judgement of the High Court delivered by Mr. Justice Bonaventure C. Mbewe on 8th September, 2021.

1.2. In the High Court, the 1st Respondent was the Plaintiff, the Appellant was the 1st Defendant, and the 2nd Respondent was the 2nd Defendant.

1.3. We shall refer to the parties throughout this judgment as Appellant, 1st Respondent and 2nd Respondent.

2. BACKGROUND

2.1. The 1st Respondent purchased a Batching Plant and truck-trailers from the 2nd Respondent at the sum of US$705,000. The plant was located at the Appellant's premises.

2.2. The 1st Respondent sent people to collect the batching plant which was loaded onto the truck-trailers. Before they could leave, a dispute arose and the Appellant allegedly prevented the 1st Respondent from leaving the premises thus detaining both the plant and the truck trailers.

3. THE PLAINTIFF'S (1st Respondent) CLAIM

3.1. The 1st Respondent commenced an action by writ of summons for recovery of the plant and trailers claiming that they were wrongfully detained as it had acquired good title to the equipment and a had a right to the same. The following reliefs were sought;

i. ***An order for immediate release of the detained goods goods/equipment namely the Batch Plant Serial No.***

ECBP 2015/183 and the Truck-Trailers Registrations No. AAL 4108 T and AMM 2689 T;

ii. *A declaration that the Plaintiff has no obligation to rehabilitate the 1st Defendant and thus is a third party and not privy to the terms of contract of the said 1st and 2nd Defendant*

iii. *A declaration that the Plaintiff has no obligation to rehabilitate the 1st Defendants premises following dismantling of the Batching Plant;*

iv. *A declaration that the amount of US$ 139, 500.00 (K2, 813,715.00) being demanded by the 1st Defendant against the Plaintiff is past consideration and unreasonable under the circumstances;*

v. *Damages for loss of use of the truck trailers and the said equipment arising from detained equipment and truck trailers aforesaid.*

vi. *An order that the Defendants do immediately pay demurrage charges of USD 500 per day per each truck-trailer detained from the date of 5th October, 2020 till the date of release of the said truck trailers and the said loaded equipment therein;*

vii. Damages for inconvenience;

viii. Interest on all sums due to the Plaintiff

ix. Costs and any other relief the company may deem fit.

3.2. In its statement of claim, the 1st Respondent averred that it purchased a Batching Plant and truck-trailers at a public auction in which the 2nd Respondent was the seller. The items purchased were paid for in full but located at the Appellant's premises.

3.3. The 1st Respondent attempted to take delivery of the purchased equipment but the Appellant refused to permit its release on the basis that the 2nd Respondent was to restore the Appellants land to its previous condition in compliance with ZEMA regulations.

3.4. The Appellant demanded payment of USD139,500 (K813.715) from the 1st Respondent as rehabilitation costs. This was inspite of the fact that the 1st Respondent was not privy to the agreement between the Appellant and 2nd Respondent.

3.5. That the Appellant caused the 1st Respondent's temporal employee Ismael Mamoon to sign documents without prior written permission from the 1st Respondent or any Power of Attorney in line with the requirements of the law.

3.6. That being in the transport business, the detention of truck-trailers had caused the 1st Respondent great loss and it had also been deprived of enjoying commercial use of the detained Batch Plant equipment.

4. THE 1st DEFENDANTS (Appellants) CASE

4.1. The Appellant informed the 1st and 2nd Respondents that they had to first satisfy the Zambia Environmental Management Agency (ZEMA) obligations before the Batching Plant was removed from its premises.

4.2. The Appellant denied that it imposed any terms on the 1st Respondent or that it detained the trucks and the Batching Plant. It contended that its workers had helped to load equipment onto the 1st Respondent's truck trailers.

4.3. That the Respondents were free to remove their trucks from the Appellant's premises but the 1st Respondent ought to have been reasonably aware that the Batching Plant could not be removed until a decommissioning and closure report was submitted to ZEMA by the 2nd Respondent. Further, the sale did not absolve the 2nd Respondent from that responsibility which also included rehabilitation of the land and this was contained in the supply contract between the Appellant and the 2nd Respondent.

4.4. The claim for damages was denied and the Appellant averred that the sale of equipment to the 1st Respondent did not absolve the 2nd

Defendant from its obligations. That, if payable, the 1st Respondent's claim lies against the 2nd Respondent.

4.5. That the Appellant was exercising an equitable lien over the Batching Plant.

4.6. That after being told of the need to comply with the ZEMA conditions for decommissioning the Batching Plant, the 1st Respondent had agreed, in writing that it would be responsible for the decommissioning and rehabilitation at its cost. That the agreement was signed by a Mr. Mamoon who was an employee of the 1st Respondent and he understood what he was signing. That the 1st Respondents internal requirements were no concern of the Appellant.

4.7. **Counter Claim**

4.8. The Appellant filed a counter-claim in which it stated that it is expected to abide by the ZEMA regulations and if the 1st and 2nd Respondents neglect to fulfil the ZEMA conditions, the loss/cost would fall on the Appellant hence it counter claimed as follows;

1. **An order declaring that the 2nd Defendant (2nd Respondent) and/or the Plaintiff (1st Respondent) have an obligation to prepare and present a decommissioning and closure report in accordance with the ZEMA conditions in the decision letter issued in November, 2015;**

2. **An order that rehabilitation costs be borne by the Plaintiff and/or 2nd Defendant;**
3. **An order that until the decommissioning and closure report is prepared and rehabilitation costs paid, the Batching Plant shall remain in custody of the 1st Defendant (Appellant) and an order that if the rehabilitation costs are not paid within 30 days of the court order, the 1st Defendant shall be at liberty to sell the Batching Plant at a public auction and apply the amounts received to the rehabilitation with any unused sums received from the sale delivered to the Plaintiff;**
4. **Costs to be borne by either Plaintiff or 2nd Respondent.**

5. HIGH COURT PROCEEDINGS

5.1. **Plaintiffs (1st Respondent) Witnesses**

5.2. **PW1, Musa Wanjowa,** the 1st Respondent's Finance Manager, stated that after full payment was made for the Batching Plant, their foreman Ismail Mamoon signed a Batch Plant Decommissioning Rehabilitation Commitment Form which was not provided for in the contract of sale between the Appellant and the 2nd Respondent.

5.3. He was informed that the equipment had been detained until the 1st Respondent submitted a decommissioning report to ZEMA.

5.4. That the equipment had been detained by the Appellant for 6 months and the 1st Respondent had suffered loss.

5.5. In cross-examination PW1 stated that after 15th October, 2020 there was an attempt to retrieve the trucks.

5.6. **PW2, Ishmail Mamoon, the foreman,** stated that the Appellant made him sign a Commitment Form but its contents and the consequences of signing it were not explained to him. He contended that he signed the document on the understanding that he was required to do so in order to collect the Batching Plant. In cross examination he agreed that he can read English.

5.7. **PW3, Morgan Mwinati the 1st Respondents Health and Safety Environment Inspector** stated that he was handed the form [commitment agreement] signed by Ismail Mamoon together with a ZEMA letter requiring the 2nd Defendant to submit an appropriate decommissioning and closure report.

5.8. He stated that the letter did not require the 1st Respondent to execute the 2nd Respondents obligations.

5.9. He testified that the first part of the plant was dismantled and transported to Lusaka and they were only prevented from leaving the

Appellant's premises after the 2nd part was dismantled and loaded onto the trailers.

5.10. **Defence Witnesses**

5.11. **DW1, Chilufya Mofya**, stated that ZEMA had granted the 2nd Respondent permission to construct a Batching Plant on the Appellant's premises to produce and supply concrete to the Appellant for its project of construction of the Kazungula bridge.

5.12. That ZEMA placed an obligation on the Appellant to submit an appropriate decommissioning and closure report and to hand back the project site in a rehabilitated state.

5.13. The 2nd Respondent was placed in receivership and the receiver (2nd Respondent) sold the Batching Plant to the 1st Respondent. When the 1st Respondent informed them that it wanted to dismantle and collect the crusher, the Appellant offered its services to the 2nd Respondent to rehabilitate the land on its behalf and indicated that the cost could be passed on to the company in receivership.

5.14. The Appellant helped dismantle the crusher unit and it allowed the Respondent to take it off the premises. The 2nd Respondent indicated that the 1st Respondent would have to meet that cost and the Appellant decided that it would require an agreement by which the 1st Respondent would agree to undertake the works.

5.15. That on 12th August, 2020, PW2 signed the Commitment Form after DW1 heard him talking to a Mr. Alloo who allowed him to sign it.

5.16. That ever since the form was signed, neither the 1st Respondent nor the 2nd Respondent has taken any steps to rehabilitate the land and the Appellant has never stopped the 1st Respondent from removing its truck trailers.

5.17. Under cross examination, DW1 stated that the Appellant's Batching Plant was dismantled and exported but the one belonging to Keren Motors Limited (Keren) [*Now Keren Motors Limited in Receivership*] was prevented from leaving. The 1st Respondent was permitted to take the trucks but the trailers with the equipment were detained and are still at the Appellants premises.

5.18. That the equipment was being held because the 1st Respondent is required to rehabilitate the site. DW1 admitted that the 1st Respondent was not a party to any of the agreements between the Appellant and 2nd Respondent and she did not know if the agreement made any mention of Keren rehabilitating the site.

5.19. She admitted that the 1st Respondent was merely supposed to collect the Batch Plant and leave. She admitted that nothing in the Appellant's agreement with the 2nd Respondent gave the Appellant power to detain

the Plant from leaving the project site. She agreed that the Appellant was not an enforcement agency of ZEMA.

6. HIGH COURT DECISION

6.1. The trial Judge identified the issue for determination as being whether the 1st Respondent assumed the 2nd Respondent's obligations by the purchase of equipment and by virtue of the documents signed by its staff who were sent to collect the equipment.

6.2. The Appellant has counter-claimed from the 1st Respondent that it prepares a decommissioning and closure report and pays rehabilitation costs for the plant site.

6.3. The Court noted that the ZEMA decision letter (p.106 ROA) placed obligations on the 2nd Respondent to prepare and submit an appropriate decommissioning report but it was put into receivership and sale of its assets before it could fulfil the condition.

6.4. The Court further observed that the circumstances in which the Batch Decommission Commitment Form (p.226 ROA) was signed does not show that any negotiation occurred and was signed on behalf of the 1st Respondent by the person who was sent to collect the equipment.

6.5. The letter between the 2nd Respondent and the Appellant on the collection of the plant by the 1st Respondent stated that the 1st

Respondent would collect the assets at their cost. The Court held that the costs referred to did not include rehabilitation of the land and no evidence was led to prove otherwise.

6.6. The ZEMA obligations fall on Keren, as established by the ZEMA decision letter and the agreement between Keren and the Appellant, and though in receivership, Keren is still bound by those obligations.

6.7. The commitment agreement is of no legal effect as it was not a condition of the sale between the 1st and 2nd Respondents.

6.8. The Court rejected the Appellant's argument that it had an equitable lien because it was trying to enforce the lien after title had changed. This should have been done before change of ownership.

6.9. The Court at paragraph 5.8 (p.44 ROA) observed that the 1st Respondent did not lead any evidence of the loss it suffered as a result of the detention of its trucks.

6.10. The Court awarded the 1st Respondent damages at the rate of USD500 per day for each truck from 5th October, 2020 until date of release because it was reasonable and the trial Court took into account that the 2nd Respondent had notified the Appellant that it had sold the equipment to the 1st Respondent.

6.11. The trial Court further awarded the 1st Respondent the following reliefs;

a. *A declaration that the 1st Respondent was not privy to and therefore not part of the contract between the Appellant and the 2nd Refendant;*

b. *The 1st Respondent has no obligation to rehabilitate the land at the project site.*

c. *The amount of US$139,500.00 (K2,813,715) claimed from the 1st Respondent by the Appellant is past consideration and unreasonable.*

d. *Damages for lodging, transportation and food for workers to be assessed by the D/R.*

e. *Damages for inconvenience.*

f. *Interest on all sums.*

g. *Costs.*

6.12. The Court allowed the counter-claim against the 2nd Respondent with whom the Appellant had a contractual relationship and who had not defended the counterclaim. The Court declared that the 2nd Respondent had an obligation to prepare and submit the decommissioning-report in accordance with the ZEMA Decision Letter and must meet the costs of rehabilitating the land previously occupied by the Batching Plant.

7. APPEAL

7.1. The Appellant filed 5 grounds of appeal as follows;

1. **The learned trial Judge erred in law and fact when he held that the Appellant could not pass the 2nd Respondent's obligations to the 1st Respondent by the commitment agreement as it has no legal effect.**
2. **The learned trial Judge erred in law and fact when he awarded the 1st Respondent demurrage charges of USD500 per day for each truck-trailer detained without the 1st Respondent having adduced any evidence as to how it computed the amount of USD500 per day per truck-trailer.**
3. **The learned trial Judge erred in law and misdirected himself when he granted the 1st Respondent demurrage charges of USD500 per day per truck trailer without any evidence in support despite stating in the Judgment that damages for loss of the said purchased equipment arising from the detention could not be granted in the absence of evidence to that effect.**
4. **The learned trial Judge erred in law and in fact when he failed to consider the strict rules of pleadings that**

apply to commercial matters and the implications of the failure to comply with the strict rules of pleadings in the Commercial Court.

5. **The trial Judge erred in law and fact when he failed to award costs to the Appellant as the Appellant had partially succeeded on its claims and was awarded some reliefs against the 2nd Defendant (2nd Respondent).**

7.2. **Appellant's Arguments**

7.3. **In ground one** the Appellant argues that the pleadings show that the 1st Respondent at no point pleaded or refuted that by virtue of PW2 signing the Batch Plant Decommissioning Commitment Form, it had an obligation to prepare the decommissioning and closure report required by ZEMA. That the trial Judge therefore erred when, in the absence of pleadings to that effect, he held that the Commitment Agreement was of no effect. The case of **Anderson Kambela Mazoka & Others v Levy Patrick Mwanawasa & 2 Others** [1] was cited on the nature of pleadings.

7.4. It was submitted that the 1st Respondent intended to be bound by the Commitment Agreement signed by PW2 who did not refute signing it. That PW2 had apparent authority because he was the

person acting on behalf of the 1st Respondent who was, for that reason, estopped from asserting that it was not bound by the agreement.

7.5. Further that the defences of fraud, misrepresentation or *non est factum* to escape liability were not pleaded. It was opined that the agreement was binding because it was signed and fraud was not proved. The case of **Parker v South Eastern Railway Co** [2] was cited where it espoused the foregoing and further where it was held that it is immaterial to the question of liability that a party has neither read the document nor knew its contents.

7.6. It was submitted that according to the case of **Saunders v Anglia Building Society** [3], under a plea of *non est factum* a document should be held to be invalid where the element of consent is totally lacking. That *in casu*, the record shows that PW2 had signed agreements on behalf of the company in the past and that on this occasion he had phoned his office and he was authorised to sign the agreement by a Mr. Aloo. The case of **Freeman v Lockyer v Buckkhurst Park Properties (Mangal) Limited** [4] was cited.

7.7. **Section 23 of the Companies Act No. 10 of 2017** was also cited to bolster the argument that because the agreement was signed

by its officer, the 1st Respondent could not escape liability as a third party has no obligation to ensure that an employee purporting to act on behalf of a company has been given authority to do so.

7.8. **Grounds 2 and 3** were argued together and they basically assail the trial Court's award of USD500 per day per truck-trailer as demurrage charges to the 1st Respondent.

7.9. The main argument advanced under these grounds is that the trial Judge arrived at this award without referring to any evidence or facts as to how he arrived at the awarded sum. That the only fact alleged by the 1st Respondent was that the truck-trailers were detained but no evidence was led as to loss suffered as a consequence of the alleged detention.

7.10. It was further argued that the Court could not take judicial notice of demurrage charges because they are based on calculations in relation to specific facts and cannot be inferred from notorious facts.

7.11. It was submitted that the trial Court's finding that the 1st Respondent had suffered loss was perverse and should be reversed. The Appellant cited various authorities on reversal of

findings of fact including **Wilson Masauso Zulu v Avondale Housing Project Limited** [5].

7.12. It was submitted that contrary to settled law, the trial Court, in the absence of evidence, determined that the demurrage award of US$500 per day was reasonable. That the law requires the quantum of damages to be specifically proved. In support of this the Appellant cited the cases **Dixon v Deveridge** [6] and **Twyman v Knowels** [7].

7.13. **In Ground 4** on the alleged failure by the trial judge to comply with the strict rules of pleadings in the commercial court, the Appellant reproduced the 1st Respondent's statement of claim dated 8th May 2019 and the Appellant's defence and counter-claim as well as the 1st Respondent's reply and defence to the counter-claim.

7.14. We shall not reproduce the arguments advanced by the Appellant under this ground for reasons that will become clear later in this Judgement.

7.15. **In Ground 5,** on the failure by the trial Judge to award the Appellant costs despite having succeeded in its counter-claim against the 2nd Respondent, it was submitted that even though

it was a discretionary power, the trial Judge had not exercised his discretion judiciously.

7.16. It was submitted that even though the main claim went against it, costs should have been awarded for its success in the counterclaim. The case of **Sparrow v Hill** was cited in this regard.

7.17. It was prayed that the appeal be allowed.

8. THE HEARING

8.1. When the matter came up for hearing, the 1st Respondent stated that it had inadvertently not filed its heads of argument in opposition and asked for leave to file them out of time.

8.2. The Appellant objected on the ground that this Court had no jurisdiction to consider the application in the manner it was presented because the application was being made outside the statutory period and time had not been extended.

8.3. After considering the submissions by the parties we found that the application was improperly before us and on that basis it was declined.

8.4. Having taken the stated course of action the 1st Respondent lost its right to respond and we proceeded to hear the Appellant.

9. ANALYSIS AND DECISION OF THIS COURT

9.1. We have considered the record of appeal and the heads of argument filed by the Appellant. We are alive to the fact that even though the Respondent was prevented from filing its heads of argument, the Appellant is still required to argue its appeal before this Court.

9.2. We shall begin by considering ground 1, followed by grounds 2 and 3 which shall be considered together and thereafter grounds 4 and 5 which shall be considered separately.

9.3. **In ground 1** the Appellant argues that the Commitment Agreement signed by PW2 on behalf of the 1st Respondent was binding for the following reasons;

a. PW2 did not dispute signing it.

b. PW2 consulted a Mr. Aloo who authorized him to sign it.

c. PW2 had previously signed other agreements between the parties.

d. The 1st Respondent did not plead fraud.

9.4. In his witness statement, which was admitted into evidence, PW2 stated that he thought he was signing a document to facilitate the collection of the Batching Plant. He claimed that the contents and consequences of

the form were not explained to him. In short, he was claiming that he had misunderstood the nature of the document he was signing.

9.5. PW2's action of signing the agreement under the alleged circumstances might ordinarily have been protected under the *non est factum* rule but that defence must be specifically pleaded, which the 1st Respondent did not do.

9.6. The closest the Statement of claim came to pleading the rule was under paragraph 8 (p.51 ROA) but which in our opinion is insufficient because the record shows that consent was not totally lacking.

9.7. We hold the view that the validity of the commitment agreement could not be assailed merely on the ground that it was not negotiated and was only signed by PW2 who simply went to pick up the equipment. The record shows that it was not the first time that PW2 was signing an agreement on behalf of the 1st Respondent and he called the office to seek authorisation and Mr. Aloo authorised him to sign. See the case of **Parker v South Eastern Railway Co (supra)** cited by the Appellant.

9.8. The other reason the trial Judge dismissed the enforceability of the Commitment Agreement was because it constituted past liability. The Appellant has not addressed this point which in essence means that it is not disputing the trial Judges finding on this point.

9.9. The trial Judge did not explain its reasoning vis-à-vis past consideration but it was a point advanced in the 1st Respondents submissions before the lower court. It was, in that regard, submitted that the Commitment Agreement arose directly from the sale agreement between the Appellant and the 1st Respondent and consideration had already passed between the parties. That the Commitment Agreement was without consideration at all from the Appellant as its bedrock was the agreement between the Appellant and the 2nd Respondent to which the 1st Respondent was a non-party.

9.10. We agree with this position because for a contract to be enforceable there must be consideration. It is an indispensable element of a contract and a contract without consideration is not enforceable. Lord Lush in the landmark case of **Currie v Misa** [8] stated that consideration must ***"consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other."***

9.11. *In casu,* there was nothing accruing to the 1st Respondent from the Appellant and for this reason, we find that ground one fails.

9.12. **Grounds two and three** on the award of damages for demurrage of US$500 per truck-trailer per day are similar and will be addressed together.

9.13. The trial Judge at page J32 (p.44 ROA) said as follows;

> ***"The Plaintiff has claimed damages for loss of use of the said purchased equipment arising from detention. The Plaintiff however did not lead evidence of the loss it suffered as a result of the said detention ..... In civil litigation in our jurisdiction, it is incumbent on a party that makes a claim to prove its case on a balance of probabilities"***

9.14. The trial Judge, however proceeded to award damages for demurrage at US$500 per day for each truck trailer from 5th October, 2020 till date of release. The basis of the quantum was that he found it *reasonable as the 2nd Defendant (2nd Respondent) did notify the 1st Defendant (Appellant) of the sale of the equipment.*

9.15. He also awarded damages for expenses incurred for lodging, transportation and food on workers.

9.16. Despite having earlier stated at page J32 that the 1st Respondent did not lead evidence of the loss it suffered as a result of the said detention the trial Judge nevertheless proceeded to award the 1st Respondent

demurrage charges of US$500 per day per truck-trailer without providing any basis for the award apart from saying that it was "reasonable". We agree that the amount awarded was not justified at all.

9.17. It is however a fact that the Appellant did not dispute that it had prevented the 1st Respondent from taking its truck trailers which were loaded with the Batching Plant equipment.

9.18. The evidence of DW1 under cross examination at pages 852 to 857 of the record of appeal shows that the Appellant prevented the 1st Respondent from taking its truck-trailers and at the time of his testimony the equipment had been at the Appellants premises for seven months.

9.19. The gravamen of the Appellants legal position was its argument that the Commitment Agreement signed by PW2 was enforceable.

9.20. Having found that the Collateral Agreement is unenforceable, the Appellant had no right to detain the 1st Respondents truck trailers and is thus liable to the 1st Respondent in damages.

9.21. In the case of **Maamba Collieries Limited v Southern African Delivery Company (Pvt) Ltd** [9] which was on all fours with this case where the trial judge awarded a sum of US$500 for loss of use of a truck, we had this to say,

"Our reaction to ground 2 is that even though damages for loss of business was pleaded, the Respondent did not provide any evidence with regards to quantum. We agree with Counsel for the Appellant that the trial Judge erred by awarding the Respondent the sum of US$500 per week without adequate evidence. As held in the case of ***Georgina Mutale (T/A G.M. Manufacturers Limited) v Zambia National Building Society SCZ Judgment No. 5 of 2002*** *[10] in the absence of specific evidence of the value of the loss, justice would have been better served by referring the matter to the Deputy Registrar for assessment of damages instead of giving a figure which bears no relationship to anything in particular in the case."*

9.22. In the premises grounds 2 and 3 succeed only to the extent that the demurrage charge of US$500 per truck-trailer per day awarded to 1st Respondent is set aside.

9.23. However, having found that the Appellant is liable to pay damages for detaining the trucks, the calculation of the quantum of damages payable is referred to the Registrar or Deputy Registrar of the High Court for assessment.

9.24. **With regard to ground 4**, we must state in passing that even though the pleadings were not very detailed regarding the commitment Agreement and the detention of the truck-trailers by the Appellant, the evidence presented to the Court by both parties addressed the two issues.

9.25. However, in any event, having found as we did in grounds 1, 2 and 3 ground 4 is rendered otiose because its ultimate goal is to support the enforceability of the Decommissioning Commitment Form signed by PW2.

9.26. Coming to the issue of costs **under Ground 5,** we recall that in the case of **Ets Rwasa Salvator v Kaoma & 3 Others,**[11] we were referred to and agreed with the holding in the case of **General Nursing Council of Zambia v Mbangweta** [12] where the Court 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."***

9.27. The trial Court did not give any reason for denying the Appellant costs with regard to the counter-claim which was successful against the 2nd Respondent. We see no reason to deny the Appellant costs in that regard and this ground of appeal succeeds with the consequence that costs are awarded against the 2nd Respondent on the counter-claim.

9 28. In the final analysis, the appeal with regard the 1st Respondent fails save for the assessment of damages which has been referred to the Deputy Registrar. Costs in this regard are awarded to the 1st Respondent to be taxed in default of agreement.

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M.M. KONDOLO SC
COURT OF APPEAL JUDGE

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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N.A. SHARPE-PHIRI
COURT OF APPEAL JUDGE