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

CAZ Appeal No. 113/2022
CAZ/08/021/2022

BETWEEN:

SAKIZA SPINNING LIMITED **APPELLANT**

AND

WEAVE PLASTIC INDUSTRIES LIMITED **RESPONDENT**

CORAM : Chishimba, Sichinga and Sharpe-Phiri JJA

On 23rd March, 2023 and 21st July, 2023

For the Appellant : Mr. A. Dudhia of Messrs Musa Dudhia & Co.

For the Respondent : Mr. F. Chalenga of Messrs. Freddie & Co.

J U D G M E N T

CHISHIMBA, JA delivered the judgment of the court.

CASES REFERRED TO:

1) Walford & Others v Miles & Another (1992) 1 All ER 720
2) Star Finance and Property & Another v Nigerian Deposit Insurance Corporation (2012) LCN/5166 (AC)
3) Coco v A. N. Clark (Engineers) Limited (1968) Ch D. (1969) RPC 41
4) Attorney General of Hong Kong v Humphreys Estate Limited (1987) 1 A. C. 114
5) Fonderie Officine Meccaniche Tocconi Spa v Henirich Wagner Sinto Maschinen Fabrik GMBH (HWS), E. C Reports 2002p. 1-0735
6) Reynolds Chanda Bowa v Lusaka Stock Exchange Limited & Others Selected Judgment No. 30 of 2017
7) J. K. Rambai Patel v Mukesh Kumar Patel (1985) ZR 220
8) Collelt v Van Zyl Bros Ltd 1996 ZR 65
9) Ward v James 1966 2 ALLER 305
10) Zambia Tourism Agency v Charity Chanda Lumpa Appeal No. 12 of 2019
11) YB and F Transport Limited v Supersonic Motors Limited (2001) ZR 22

12) Abu Dhabi National Tanker Co. v Product Star Shipping Limited (The Product Star)(No. 2) (1993) 1 Lloyd's Rep. 397
13) Braganza v BP Shipping Limited (2015) UKSC 17
14) Wilheim Roman Buchman v Attorney General (1993 - 1994) ZR 131
15) Attorney General v Marcus Kampumba Achiume (1983) ZR 1
16) Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd [1975] 1 All ER 716
17) Petronec v Petroloe (2006)
18) Cable & Wireless PLC v IBM United Kingdom Limited (2002) EWITC
19) Petromec Inc v, Petroleo Brasileiro SA Petrobas (No 3) 2005 EYWCA Civ 891. [2006] 1 Lloyd's Rep 161
20) Antonio Ventriglia, Manuela Ventriglia and Southern African Trade and Development Bank SCZ No. 30 (2010)
21) Mususo Kalenga Building Limited, Winnie Kalenga v Money Lenders Enterprises SCZ Judgment NO. 4 of 1990
22) Barbudev v. Eurocom Cable Managnent Bulgaria (2011) EWHC 1560
23) Dhanani v Crasnianski [2012] EWHC 920 Comm
24) Hongkong (A. G) v Humphrey's Estate (1986) 111 N.R 135 PC (1987) H

LEGISLATION CITED:

1) The English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia
2) The High Court Act Chapter 27 of the Laws of Zambia
3) The Rules of the Supreme Court of England, 1999 Edition

OTHER WORKS REFFERED TO:

1) Ewan McKendrick, 2003. Contract Law: Text, Cases and Materials. Oxford University Press
2) Chitty On Contracts. 27th Edition. Volume 1 paragraphs 1-010 and 1-011

1.0 INTRODUCTION

1.1 At the time we heard this appeal we sat with Sichinga JA who has since proceeded on long leave. This is therefore a majority decisions. This appeal emanates from the judgment of the Hon.

Mr. Justice Charles Zulu dated 22nd December, 2021. By that decision, the court below dismissed the respondent's claims for the following, 35% of the shares in Strongpak Limited, an account for all profits made by Strongpak limited and damages for breach of confidence. The court below upheld the claim for damages in respect of losses caused to the respondent as a result of the appellant frustrating the memorandum of understanding in bad faith which he referred to as damages for breach of the duty to negotiate in good faith, to be assessed by the Registrar.

1.2 This appeal deals with a 'novel' issue of whether under our laws a claim for damages for breach of duty to negotiate in good faith can be sustained more specifically whether our laws recognize a duty to negotiate in good faith.

2.0 BACKGROUND

2.1 The respondent commenced an action by writ of summons amended on 27th January, 2014, endorsed with the following reliefs:

a) A declaration that Strongpak Limited was incorporated in bad faith against the MOU entered into and signed between the appellant and the respondent;

b) A declaration that the respondent is entitled to 35% of the shares/equity in Strongpak Limited;

c) An order that the respondent be allowed its 35% shares in Strongpak Limited and the appellant should facilitate the transfer thereof;

d) An inquiry as to damages for the breach of the MOU, fiduciary and confidence;

e) Further or alternatively, an account of all profits made by the appellant and Strongpak Limited from the use of confidential information and implementation of the project of the respondent and an order for the giving of all proper directions for that purpose;

f) An order for payment of all sums found to be due to the respondent together with interest as by statute established; and Costs.

2.2 The appellant filed a defence on 29th March, 2012, amended on 5th November, 2020, refuting all the claims by the respondent.

3.0 EVIDENCE IN THE COURT BELOW

3.1 Mr. Lombe a director in the respondent entity, averred that he identified a business opportunity to supply cement bags to LaFarge Zambia Limited and Zambezi Portland Limited, at the time there being no company manufacturing and supplying the said bags. The respondent approached the above companies which expressed interest to buy the products once operational. The respondent further engaged Development Bank of South

Africa (DBSA), the Eastern and Southern African Trade and Development Bank (PTA Bank) based in Kenya for loan facilities to commence the project.

3.2 Both banks expressed interest to support the project provided the respondent secured an equity partner. DBSA offered to fund the project at 80%. The respondent settled for DBSA which in turn referred it to Development Bank of Zambia.

3.3 The respondent identified the appellant as an equity partner as it was already in the manufacturing business. After a series of communications with Mr. Kumar, a director in the appellant company, the parties entered into a memorandum of understanding (the MOU) in February, 2010. The said MOU is at pages 106 to 107 of volume one of the record of appeal.

3.4 The MOU terms provided that the appellant would hold 65% of the shares and the respondent take 35% shares in a new joint venture company to be incorporated. Through the joint venture's bank account, the parties would channel their respective equity contributions for onward purchase of machinery. A detailed shareholders agreement was to be drawn up by mutually agreed lawyers in due course.

3.5 The parties approached DBZ, which was funding similar projects through commercial banks. The parties subsequently engaged Indo Zambia Bank Limited, which was willing to provide the loan facilities for the project. According to the respondent he was kept in the dark as to how the project was progressing in terms of funding.

3.6 In May 2010, Mr. Lombe and Mr. Kumar travelled to Austria to meet suppliers, namely Starlinger and BSW. On 2nd June, 2010 the appellant paid a deposit of US$320,000.00 to BSW to secure the order for the supply of the machinery. When asked to settle its 35% equity, the respondent requested for an extension of time.

3.7 Differences arose as to the management agreement of the company to be established, the number of directors to be nominated by each party to sit on the board and equity contribution. The appellant took the view that the issues raised by the respondent went against the MOU. This was because the respondent wanted to settle its 35% equity in two instalments without stating the quantum of the first instalment which was to cater for the deposit to be paid to the supplier for plant and

machinery. Further, contrary to the MOU, the respondent suggested that its shares in the company to be formed be held by the appellant, but to be redeemed by the respondent upon payment of its portion of the equity.

3.8 According to the appellant, thought it was willing to walk away from the project, it decided to accommodate the respondent subject to conditions expressed in a letter dated 14th May, 2010. In a letter dated 24th May, 2010, the respondent rejected the conditions stating that the appellant was introducing new terms relating to the period of redeeming the shares. The respondent having proposed a period of one year subject to a further extension of six months. This was unacceptable to the appellant as it meant that it would have to pay for the machinery in full without any contribution from the respondent.

3.9 Unknown to the respondent, the appellant proceeded to incorporate the joint venture company, Strongpak Limited on 23rd June, 2010 and introduced a new shareholder. In a letter to the respondent dated 9th July, 2010, the appellant advised that Strongpak had to be "*... registered in order to enable us move forward on applying for bank finance, applying for*

investment and also for regularizing the advance payment made to BSW."

3.10 According to the appellant, it decided to proceed with the project on its own while leaving the door open for the respondent to come in once it met its obligations as per the letter of 9th July, 2010.

3.11 The respondent rejected the reasons advanced by the appellant for incorporating Strongpak Limited without its knowledge. Further, that the terms agreed upon in the MOU were not adhered to. In addition, the respondent took issue with the equity contribution of US$112,000 requested to be paid, the amount being more than the sum paid for machinery to BSW. According to the respondent, 35% of equity equated to the sum of $52,000.00.

3.12 The respondent wrote to the appellant in a letter dated 21st July, 2010 seeking to defer the payment of its 35% shares from 31st December, 2010 to the end of February, in the sum of $117,000.00.

3.13 On the 4th of August 2012, a meeting was called for signing of the shareholders' agreement which the respondent did not

attend. The reason being that its advocates having written the day before seeking to change the payment terms, which terms were not agreeable to the appellant. The appellant proceeded with the project on its own, with Strongpak paying the balance for the machinery equipment in the sum of $791,400.00 to BSW. Indo Zambia Bank was advised accordingly and approved the loan facilities to the appellant in the sums of $750,000.00 and $1,900,000.00.

3.14 The respondent averred that Strongpak Limited incorporated in June 2010 carried on business without the respondent receiving any benefits.

4.0 DECISION OF THE COURT BELOW

4.1 The learned Judge considered the evidence on record in light of the claims. Guided by the cases of **Walford & Others v Miles & Another** [1] and **Star Finance and Property & Another v Nigerian Deposit Insurance Corporation** [2], the court below accepted the common law position that generally, a memorandum of understanding is not a legally binding agreement because it lacks the necessary certainty. Therefore, the respondent was not entitled to a declaration of 35% of the

shares in Strongpak Limited as agreed in the MOU, because the MOU was legally non-binding.

4.2 The court held that the respondent was also not entitled to a share of profits generated by Strongpak Limited, because no equity contribution was provided by it to meet the cost of the project, or the investment or expenditure.

4.3 As regards the claim for damages for breach of confidence, the lower court considered the case of **Coco v A. N. Clark (Engineers) Limited** [3] and found the claim not to have been proved. This was because the respondent did not demonstrate that the information or the business concept shared with the appellant was fit enough to be classified as confidential in nature so as to invite an obligation of confidence on the part of the appellant not to abuse the information.

4.4 The claim for damages for breach of fiduciary duty on the basis that the incorporation of Strongpak Limited was done in bad faith, was upheld by the court below when it held that the appellant did not specifically traverse the alleged particulars of bad faith averred in the statement of claim. The court found that the allegations and facts relating to bad faith which Mr. Lombe

capitalized on in his testimony were materially pleaded. That the appellant seized the opportunity to incorporate Strongpak Limited to the exclusion of the respondent based on the respondent's blue print.

4.5 The learned Judge noted that the duty to negotiate in good faith was not a matter of choice but law and must be implied herein as per the caution of the court in **Walford v Miles** [1] that:

> ***"Every party to negotiations is entitled to pursue his (or her) own interest so long as he avoids making misrepresentations."***

4.6 The court below awarded damages to the respondent to be assessed by the Registrar.

5.0 GROUNDS OF APPEAL

5.1 The appellant being dissatisfied with the decision of the court below, has advanced the following grounds of appeal:

1) ***The court below erred in law and fact when it determined that the respondent is entitled to damages for breach of duty to negotiate in good faith, because Zambian law follows English law which does not recognize a duty to negotiate in good faith;***
2) ***The learned trial Judge erred in law by finding that the appellant was not negotiating in good faith when it was the respondent that was not negotiating in good faith; and***

3) ***The court below erred in law and fact by granting costs when the respondent was unsuccessful in their claims.***

6.0 APPELLANT'S HEADS OF ARGUMENTS

6.1 The appellant filed heads of argument dated 30th May, 2022. In respect to ground one, it was contended that the duty to negotiate in good faith, is a civil law, and not a common law concept for which reason there is no duty to negotiate in good faith under Zambian law.

6.2 It was submitted that it is trite that Zambia follows English Law, which is Common Law as per **section 2 of the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia**, where there are no corresponding Zambian laws. That there is no provision under Zambian law for us to follow Civil Law.

6.3 It was further submitted that there is no general rule in common law that requires parties to negotiate in good faith. English Courts do not recognise such an obligation for the reason that such a concept is too uncertain to be enforced. The works of the learned author, **Ewan McKendrick, 2003. Contract Law:**

Text, Cases and Materials, was cited where the author states that:

> ***"While English contract law is influenced by notions of good faith, it does not recognize the existence of a doctrine of good faith. In this respect, English law stands out from many other legal systems in the world."***

6.4 The appellant further referred to the authors of **Chitty on Contracts, 27th Edition. Volume 1 paragraphs 1-010 and 1-011** who state that in English contract law, **"... good faith is in principle irrelevant. ... The position of English Law also differs from that taken by other common law jurisdictions, in which doctrines of good faith or conversely, unconscionable conduct, have been construed."**

6.5 The appellant further cited the case of **Walford & Others v Miles & Another** [1] where Lord Ackner stated as follows:

> ***"How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must***

be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content."

6.6 The appellant submits that in English law, there is no concept of a duty to negotiate in good faith, therefore the learned Judge in the court below erred by awarding the respondent damages for breach of duty to negotiate in good faith.

6.7 In this regard, the appellant contended that the court below erroneously relied on the submissions of the respondent in relation to the case of **Attorney General of Hong Kong v Humphreys Estate Limited** [9] which authority does not refer to the concept of a duty to carry out negotiations in good faith

because there is no reference to the quotes stated at page 29 line 5 to 3 of page 30 of the record of appeal. That the respondent's submission were not an accurate summary of the above case.

6.8 It was further submitted that the court below misapplied the law when it stated that ***"The duty to negotiate in good faith was not a matter of choice, but law, and the same must be implied in this case"***, as there is no such statement in the case of **Attorney General of Hong Kong** [4]. That the *ratio decidendi* in that case is that an incomplete agreement is not legally binding and a party can withdraw from it even if the counterparty has altered its position to its detriment. Further that the case dealt with the issue of *estoppel*.

6.9 The appellant further contended that there was no claim by the respondent for damages for breach of duty to negotiate in good faith, nor one for misrepresentation in the pleadings.

6.10 In addition, the case of **Fonderie Officine Meccaniche Tocconi Spa v Henirich Wagner Sinto Maschinen Fabrik GMBH (HWS)** [5], cited by the respondent is a German decision. Germany is a civil law country with a different legal system.

That the court below misapprehended the cases and relied on a civil law principle not permitted by the **English Law Extent of Application Act**.

6.11 In ground two, it was contended that it is in fact the respondent that was not negotiating in good faith because it delayed in signing the MOU; objected to a clause in the MOU being reflected in the shareholders' agreement not to interfere in day-to-day operations of the company; wanted to depart from the clause on the number of directors each party would nominate. Further, while in Austria, Mr. Lombe did not meet BSW leaving only Mr. Kumar to meet BSW; proposed a period of one year to redeem and buy back shares subject to a further extension of six months contrary to what was agreed earlier and sought to defer payment of shares from 31st December, 2010 to end of February, 2011.

6.12 It was further contended that the lower court erroneously determined that the appellant introduced a 'stranger' to the MOU because Mr. Palkash was in fact, a shareholder of the appellant. That the only reason for putting Mr. Palkash as the holder of 1% of the joint venture company was because

company law in Zambia requires every company to have more than one shareholder. Mr. Palkash was supposed to transfer the 1% shares to the respondent once it paid its portion of the equity. We were urged to find that it was the appellant that was not negotiating in good faith.

6.13 The appellant argues in ground three that it is trite law, that costs are granted in the discretion of the court and follow the event. That a successful party should not be ordered to pay the unsuccessful party the costs. That the respondent failed in all its claims and was thus the losing party and that an order for costs ought to have been made in favour of the appellant.

6.14 The cases of **Reynolds Chanda Bowa v Lusaka Stock Exchange Limited & Others** [6] and **J. K. Rambai Patel v Mukesh Kumar Patel** [7] were cited as authority that the losing party must bear the costs of the other party and that the successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs. We were also referred to the following cases on the discretion of the court in awarding costs, **Collelt v Van**

Zyl Bros Ltd [8] Ward v James[9], Zambia Tourism Agency v Charity Chanda Lumpa [10] and YB and F Transport Limited v Supersonic Motors Limited [11]

6.15 The appellant prayed that the grounds of appeal be upheld and that it be awarded the costs in the court below and of this appeal.

7.0 ARGUMENTS BY THE RESPONDENT

7.1 The respondent filed heads of argument on 10th August, 2022. In ground one, the respondent contends that the appellant's summary of the facts in the **Walford case** do not reflect that there were in fact two claims for damages which were made by the plaintiffs therein and which the House of Lords was called upon to determine.

7.2 It was submitted that in the said case, the defendants were found liable for selling their business to a third party after agreeing with the plaintiffs not to deal with any third party. The plaintiff succeeded after it was found that the defendants had falsely represented that they were no longer in discussion with any other potential purchaser when in fact they were. The

plaintiffs had incurred expenditure in reliance on that misrepresentation and were awarded damages.

7.3 However, on the claim for lost profit on the transaction, the House of Lords found that there was no binding lockout agreement on the facts, and that even if there had been, there were no grounds to imply such an obligation. For that reason, the second claim was dismissed, the court holding that:

> ***"as a matter of principle, an agreement to negotiate in good faith was not generally enforceable under English law as being unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies."***

7.4 It was submitted that similar to this case, the court below held that the MOU was non-binding and dismissed the claim for lost profits arising from the company incorporated by the appellant to the exclusion of the respondent while the parties had ongoing discussions relating to the terms of the shareholders' agreement.

7.5 The lower court awarded the respondent damages on the basis that the appellant's actions were fundamentally on account of bad faith and awarded damages for the losses incurred, which

the court stated are also referred to as damages for breach of duty to negotiate in good faith. That as in the **Walford case**, the respondent herein was awarded damages for the losses it incurred due to the appellant cautiously frustrating the MOU in bad faith.

7.6 The respondent further submitted that the court below is mandated under **section 13 of the High Court Act Chapter 27 of the Laws of Zambia** to administer law and equity in its duty in the administration of justice. That even though the court referred to the award as breach of duty to negotiate in good faith, the mere reference to it as such does not oust the fairness which the court was called upon to administer so that as far as possible, all matters in controversy between the parties may be completely and finally determined.

7.7 The respondent went on to refer to the learned author Lord J Steyn's Book entitled **Contract Law: Fulfilling the Reasonable Expectation of Honest Men 1997 113 LQR 433** on the concept of good faith. In discussing the house of Lord's decision in **Walford v Miles** the author expressed the hope that the

concept of good faith would not be rejected out when the issue arose in future.

7.8 The respondent cited the cases of **Abu Dhabi National Tanker Co. v Product Star Shipping Limited** [12] and **Braganza v BP Shipping Limited** [13] as recent English cases that show a shift towards acceptance of the duty to negotiate in good faith. The English Court of Appeal's decision in **Petromec Inc v. Petroleo Brasileiro SA Petrobas** [19] was drawn to our attention in which the **Walford** case was distinguished in that there was no concluded contract between the parties since all negotiations were subject to contract. It was submitted that based on the misleading actions of the appellant in the pursuit of its own interest which led to a conscious frustration of the MOU, there was liability that ensued which caused the respondent to suffer losses, and the said liability was actionable in law and needed to be atoned for in damages. That the principle to negotiate in good faith has been implied in a number of English cases.

7.9 In ground two, the respondent maintained that the court below was on firm ground to hold that the respondent was entitled to damages in respect of losses caused to it as a result of the

appellant frustrating the MOU in bad faith. The respondent clearly pleaded bad faith on the part of the appellant in negotiations with the respondent and called evidence to prove the bad faith. That the appellant neither traversed the allegations of bad faith nor called any evidence to support the alleged bad faith against the respondent.

7.10 It was argued that the learned Judge did consider the issue of damages for breach of fiduciary duty raised by the respondent on the basis that the incorporation of Strongpak Limited was made in bad faith. The court below restated the particulars of bad faith as pleaded in the respondent's statement of claim and noted that the appellant, in its amended defence did not specifically traverse the alleged particulars of bad faith.

7.11 The court below further stated the acts of bad faith on the part of the appellant as including the absence of notification for the incorporation of Strongpak Limited while posturing to the respondent that the incorporation was in furtherance of the joint venture when in fact not. That the reasons advanced in the letter by the appellant dated 9th July, 2010 purporting to pacify

the exclusion of the respondent was not valid but pretentious and void of good faith.

7.12 The alienation of the respondent in the shareholding structure in Strongpak Limited and the introduction of a third party and stranger to the MOU without a full and frank disclosure were said to be examples of bad faith on the part of the appellant.

7.13 It was contended that the appellant is raising new issues not pleaded by arguing that the respondent is the one that was not negotiating in good faith. That this was not raised in the court below. Therefore, the appellant is not entitled to raise issues on appeal that were never raised in the court below as espoused in the cases of **Wilheim Roman Buchman v Attorney General** [14], **Antonio Ventriglia, Manuela Ventriglia and Southern African Trade and Development Bank** [20] **and Mususo Kalenga Building Limited, Winnie Kalenga v Money Lenders Enterprises** [21].

7.14 Lastly, with respect to ground three, the respondent submitted that the court below was on firm ground to award the respondent costs, in its discretion, as it was the successful party in the court below. In terms of **Order 62/3/5 of the**

Rules of the Supreme Court of England, 1999 Edition, a defendant can only be awarded a portion of costs where they had substantially succeeded in rebutting the serious charge against them. In this case, the appellant failed to rebut the allegation of bad faith against them which were resolved in the respondent's favour. The respondent as authority referred to the case of **J. K. Rambai Patel v Mukesh Kumar Patel** [7] (supra) where the court guided that:

> ***"... costs are in the discretion of the court but there are certain guidelines which we must follow in exercising that discretion. A successful party will not normally be deprived of his costs unless there is something in the nature of the claim or in the conduct of the party which makes it improper for him to be granted the costs."***

7.15 It was submitted that even if the appellant successfully rebutted the other claims, there was something in the nature of the appellant's conduct which makes it improper for it to have been granted costs. This is evident in the way the court below referred to the actions of the appellant as being disingenuous in incorporating a company without the knowledge of the respondent. That by the appellant's own unconscionable

conduct, it was disentitled to be awarded costs in the claims against it which it successfully rebutted.

8.0 APPELLANT'S ARGUMENTS IN REPLY

8.1 The appellant filed arguments in reply dated 20th August, 2022. In response to the submission by the respondent on ground one, the appellant noted that the respondent admitted that the House of Lords has stated that English law does not recognize a duty to negotiate in good faith and that the concept of a duty to negotiate in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.

8.2 As regards the **Walford case**, the appellant maintained that the case clearly establishes that there is no duty to negotiate in good faith. That the interpretation the court below placed on the case of **Attorney General of Hong Kong** is erroneous and perverse as it made findings on a misapprehension of facts. We were urged to reverse the findings on the authority of the case of **Attorney General v Marcus Kampumba Achiume** [15] because the court below ordered a civil law remedy not applicable in

Zambia and English Law. The said finding was said to be perverse.

8.3 As regards the reliance on section 13 of the High Court Act, it was submitted that the provision only permits legal or equitable claims or defences under common law and not civil law. The appellant further denied frustrating the MOU arguing that it was in fact trying to keep the joint venture on the road map.

8.4 As regards the cases of **Abhu Dhabi National Tanker Co**. and **Braganza** cited by the appellant, it was submitted that in that case the court dealt with an already enforceable contract where negotiations were completed, unlike in the present case. The appellant maintained that English courts still do not recognize a duty to negotiate in good faith. As authority, the cases of **Barbudev v. Eurocom Cable Managnent Bulgaria** [21] **and Dhanani v Crasnianski** [22] were cited.

8.5 In ground two, the appellant insisted that the findings relied upon by the respondent were not only perverse but also an unbalanced assessment of the evidence before the lower court. The appellant denied the allegations of bad faith found by the court below as unproven and reiterated its earlier submissions

in detailing how the Judge fell in error. In a nutshell the appellant contended that the respondent was, by his conduct the party acting in bad faith.

8.6 Lastly, with respect to ground three, the appellant maintained that the respondent did not succeed on any of its claims as set out in the amended statement of claim and costs should not have been awarded to it.

9.0 DECISION OF THE COURT

9.1 We have considered the appeal, the authorities cited and arguments advanced by the learned Advocates for parties. The issues raised for determination are as follows:

(i) Whether the claims for damages for breach of duty to negotiate in good faith is tenable/sustainable under Zambian Laws.

(ii) Whether there is duty imposed by law to negotiate in good faith.

(iii) Whether the court below property exercised its discretion by granting costs to the respondent in the court below.

9.2 It is not in dispute that the parties engaged in negotiations and executed a MOU in February 2010. The terms being that a joint venture company would be incorporated with shareholding ration of 65/35% to the appellant and respondent respectively.

(Contributions for the purchase of the machinery were to be deposited into the joint venture company's bank account. A shareholders' agreement to be drawn up in due course.

9.3 It is further not in issue that the respondent incorporated Strongpak Limited (joint venture) on 23rd June 2010 with itself and another person. This new shareholder was indicated, to the exclusion of the respondent. We had earlier given a detailed background and the parties positions leading to the suit and will not rehash.

9.4 The issue to be determined under grounds one and two is whether parties engaged in negotiations owe each other a duty to negotiate in good faith. Or simply put whether this relief is tenable or available in law. The lower court awarded damages against the appellant in respect of losses caused to the respondent as a result of the appellant frustrating the MOU in bad faith, which the learned trial Judge alternatively referred to as damages for breach of duty to negotiate in good faith.

9.5 According to the learned authors of **Chitty on contract (Vol 1) General Principles Sweet & Maxwell 13th Edition,** in civil law systems, and most legal systems outside the common law

worlds, "*the law of obligation recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith principle of fair open dealing. English law has characteristically, committed itself to no such overriding principle...,*"

9.6 Good faith in other common law systems has been stated to be a matter of controversy to what extent obligations of good faith are to be found in contractual relationships. The United States of America and Australia are quite open to the use of good faith, holding that an agreement to negotiate in good faith may be contractually enforceable. Under Canadian and English Laws there is no duty to negotiate in good faith. Is this the position in our jurisdiction?

9.7 The appellant has taken the position that no such duty to negotiate in good faith exists in common law jurisdictions because courts therein consider such a concept as being too uncertain to be enforced. On the other hand, the respondent to a certain extent has conceded that no such duty to negotiate in good faith exists but contends that courts will imply a duty of

good faith where there is an injustice in the conduct of a party to negotiations.

9.8 The parties referred to a number of authorities particularly the cases **Walford v Miles and Attorney General of Hongkong v Humphreys Estate Limited** (supra). The appellant contends that the court below erroneously relied upon the said cases particularly the holding in the latter case that a party who breaks off contract negotiations in bad faith is liable for the loses caused to the other party. The Appellant strongly contends that the above words were not stated in the **Attorney General** case. We have read the case of **Attorney General of Hongkong vs. Humphreys Estate Limited** [34]. A summary of the facts of the case is as follows, the Hong Kong Government reached an agreement in principle with Humphreys Estate, a developer over the exchange of land and building. Several steps were taken, and money expended by the government on the basis of the transaction. Subsequently Humphreys Estate developer withdrew from the negotiations. The case dealt with estoppel by conduct which the Hong Kong government contended that parties were *estopped* from giving effect to the

agreement in principle. The judiciary committee of the Privy Council held that the developer was entitled to withdraw. That Hong Kong government had to go further than showing that they acted to its detriment and to the defendant's knowledge. It had to show that Humphrey's estate created or encouraged a belief that it would not withdraw and that the government relied on that belief. In the above case, the agreement was subject to contract though payment was made. Communications between the parties made it clear that each party proceeds on the basis that it was free to back out of the transaction.

9.9 We hold the view that the court below erroneously relied upon the A.G of Hong Kong case which is inapplicable as it dealt estoppel. Nowhere did the privy Council hold as stated by the court below.

9.10 As regards the German case of **Fonderie Officine Meccaniche Tocconi Spaa** cited by the respondent, the decision is relevant and applicable to civil law and for that reason is equally inapplicable.

9.11 In respect of the **Walford v Miles** case cited by the appellant, the respondent contends that the summary of the facts do not

reflect that there were in fact two claims for damages made by the plaintiffs. We have read the House of Lords decision in the **Walford** case. The brief facts being that the defendants and claimant entered into negotiations to sell/buy the business property. The defendant agreed that they would exclusively negotiate i.e. (a 'lock out' agreement) with the claimant if a comfort letter from the bank was obtained. This letter was secured by the claimant; however the defendants sold the property to a third party. The claimant sued for breach of the lock out agreement. The issues were whether there was an implied term to negotiate with the claimant or whether the lock out agreement was unenforceable for uncertainty. The House of Lords held in favour of the defendants holding that the lock out agreement was too uncertain and the implied term was inconsistent with the party's adversarial position. That a contractual clause to agree or to negotiate in good faith, would not be enforceable.

9.12 It is an authority that an agreement to negotiate, or agreement to agree in good faith is unenforceable in English law. With respect to whether there is a duty to negotiate, the House of

Lords held that an agreement to negotiate in good faith is not recognized as an enforceable contract. The court referred to its earlier decision in **Courtney & Fairbairn Ltd v Tolaini Bros (Hotels) Ltd** [10] at 720, where Lord Denning MR said:

> ***'If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot recognize a contract to negotiate. The reason is because it is too uncertain to have any binding force ... It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law ... I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.'***

9.13 The court in the **Walford case** went on to hold that:

> ***"While accepting that an agreement to agree is not an enforceable contract, the United States Court of Appeals (in United States Court of Appeals, Third Circuit in Channel Home Centers Division of Grace Retail Corp v Grossman (1986) 795 F 2d 291) appears to have proceeded on the basis that an agreement to negotiate in good faith is synonymous with an agreement to use best endeavors and, as the latter is enforceable, so is the former. This appears to me, with respect, to be an unsustainable proposition. The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty. The same does not apply to an agreement to use best endeavors. This uncertainty is demonstrated in the instant case by the provision which it is said has to be implied in the***

agreement for the determination of the negotiations. How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations. Each party to the negotiations is entitled to pursue his (or her) own interest, so long as he avoids making misrepresentations. To advance that interest he must be entitled, if he thinks it appropriate, to threaten to withdraw from further negotiations or to withdraw in fact in the hope that the opposite party may seek to reopen the negotiations by offering him improved terms. Mr. Naughton, of course, accepts that the agreement upon which he relies does not contain a duty to complete the negotiations. But that still leaves the vital question: how is a vendor ever to know that he is entitled to withdraw from further negotiations? How is the court to police such an 'agreement'? A duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. It is here that the uncertainty lies. In my judgment, while negotiations are in existence either party is entitled to withdraw from these negotiations, at any time and for any reason. There can be thus no obligation to continue to negotiate until there is a 'proper reason' to withdraw. Accordingly, a bare agreement to negotiate has no legal content. ..."

9.14 Therefore, it can be concluded that in common law jurisdictions, there is no duty to negotiate in good faith as it is inherently repugnant to the adversarial position of the parties

when involved in negotiations or inconsistent with the position of a negotiating party. However, there is an obligation on each party to the negotiations that in pursuing their own interests, they do so without making misrepresentations. There being no duty to negotiate in good faith, let alone a duty to negotiate, it follows that a party cannot be awarded damages for breach of the duty to negotiate in good faith.

9.15 As regards agreements to negotiate in good faith, it has been historically regarded by English Courts (common law jurisdiction) that they are unenforceable, on grounds of uncertainty. See the leading judgment on obligations to negotiate in good faith **Walford v Miles** (supra). As a matter of principle, an agreement to negotiate in good faith is generally unenforceable as it is inherently inconsistent with the position of a negotiating party.

9.16 There are a few exceptional English decisions in which an express obligation in an agreement between the parties to negotiate in good faith was held to be enforceable. In the case of **Petronec v Petroloe** [17] (I Lloyds Report) certain conditions have to be fulfilled in order for it to be enforceable . In *casu* there

was no express obligation to negotiate in good faith as reflected in the **Cable & Wireless PLC v IBM United Kingdom Limited** [18]. The contract in the above case included a clause requiring the parties to attempt in good faith to resolve disputes in good faith.

9.17 It appears that where an obligation to use good faith to negotiate does not sufficiently prescribe the parameters and obligations of negotiation, the courts have concluded this type of negotiations unenforceable.

9.18 In terms of **section 2 of the English Law (Extent of Application) Act Chapter 11 of the Laws of Zambia**, Zambia is a common law jurisdiction and thus is bound by the common law principle that a duty to negotiate in good faith is as unworkable in practice as it is inherently inconsistent with the position of a negotiating party. We are of the view and hold that our laws or jurisdiction do not recognize a duty to negotiate in good faith. Therefore, the appellant cannot be entitled to damages for breach to duty to negotiate in good faith. The lower court erred in law and fact by holding that the appellant was entitled to the said damages.

9.19 In ground two, the court below awarded damages to the respondent on the basis that the appellant was not negotiating in good faith. That the appellant frustrated the MOU in bad faith by breaching the duty to negotiate in good faith and that the appellant did not challenge the allegations or particulars of bad faith made in the statement of claim as amended. The court found that the incorporation of Strongpak Limited and obtaining a loan from Indo Zambia Bank without the knowledge of the respondent while urging the respondent to meet its equity contribution of 35% in order to participate in the project were done in bad faith.

9.20 Having earlier held that a claim for damages for breach of duty to negotiate in good faith is untenable in our jurisdiction, we hold the view that the court below erred in law and fact by awarding damages on the basis that the appellant frustrated the MOU in bad faith by breaching the duty to negotiate in good faith. In any event, notwithstanding our position above, a perusal of the pleadings shows the conduct of the respondent by going back and forth on clauses in the MOU and shifting positions on when it can settle its equity thereby frustrating the

appellant. Evidence was led by the appellant to that effect which was not challenged. Nonetheless, the claim of negotiating in bad faith is untenable and unenforceable. There is no duty imposed by law on parties to negotiate in good faith.

9.21 In ground three, the appellant contends that the court below should not have awarded the respondent costs in its discretion having only succeeded in one claim which was disputed. It is trite that costs are in the discretion of the court. That generally costs follow the event and a successful party should not normally be deprived of costs unless on account of wrong conduct on their part in the action. In the view we have taken, we will award costs to the appellant in the court below and on appeal.

9.22 **CONCLUSION**

9.23 We reiterate that there is no recognition of the doctrine of good faith under English law and in Zambia that requires parties to negotiate in good faith because such a concept is too uncertain to be enforced. The doctrine or concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties involved in negotiations.

9.24 For the forgoing reasons, we hereby set aside the judgment of the court below and uphold the appeal. Costs to the appellant to be taxed in default of agreement.

F. M. Chishimba
COURT OF APPEAL JUDGE

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

N. A. Sharpe-Phiri
COURT OF APPEAL JUDGE