IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 170 of 2023**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

AFRIZAM ELECTRICAL EQUIPMENT LIMITED **APPELLANT**

AND

NETPOWER SOLUTIONS LIMITED **RESPONDENT**

CORAM: SIAVWAPA JP, CHISHIMBA, PATEL, JJA

On 18th June and 11th July 2024

For the Appellant: Ms. W. Chirwa
Messrs. Kate Weston Legal Practitioners

For the Respondent: Mr. S. M. Mwila
Messrs. M.K. Achiume & Associates

J U D G M E N T

Patel, JA, delivered the Judgment of the Court.

Legislation & Rules referred to:

1. The High Court (Amendment) Rules Statutory Instrument No. 58 of 2020
2. The High Court Act, Chapter 27 of the Laws of Zambia.
3. The High Court (Amendment) Rules, Statutory Instrument No. 27 of 2012
4. The High Court (Amendment) Rules, Statutory Instrument No. 72 of 2018.
5. The Rules of the Supreme Court, 1965, 1999 Edition (White book) RSC

Cases referred to:

1. Indeni Petroleum Refinery Company Ltd v V.G. Ltd (84 of 2004) [2007] ZMSC 122 (3 September 2007).
2. BP Zambia PLC v Chipasha & Others (Appeal 189 of 2016) [2018] ZMSC 366 (10 December 2018).
3. Communications Authority v Vodacom Zambia Limited -SCZ Judgment No. 21 of 2009 refers.
4. Khalid Mohamed v The Attorney General (1982) Z.R. 49 (SC).
5. Attorney General v Marcus Kaumba Achiume (1983) ZR 1.
6. Nkhata & Others v Attorney General (1966) ZR 124.
7. Mudenda and another v Erricson AB Zambia ECZ No. 48 of 2017.
8. Galaunia Farms Limited v National Milling Company limited & National Milling Corporation Limited (2004) Z.R. 1.

9. Oliver Sitali and Others v Zambia Airforce and Another SCZ Appeal No. 145 of 2020.

10. Attorney General v Kakoma (1975) ZR 216.

11. Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) ZR 172.

12. Susan Mwale Harman vs Bank of Zambia SCZ Appeal No. 191 of 2015.

13. Ndongo vs Moses Mulyango & Anr - SCZ Judgment No. 4 of 2011.

14. G4 Secure Solutions Zambia Limited v Lupupa Kabezya Lewis -SCZ- Appeal No. 170 of 2015.

15. Zambia Breweries Plc v Lameck Sakala – SCZ Appeal No. 173 of 2009.

16. Minister of Home Affairs, The Attorney General v Lee Habasonda suing on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes (2007) Z. R. 207.

17. Zambia Telecommunications Company Limited v Aaron Mwene Mulwanda and Paul N'gandwe (2012) 1 Z.R 404.

Other works referred to:

1. Halsbury's Laws of England, 3rd Edition, Volume 22.

2. Phipson on Evidence, 14th Edition (London: Sweet & Maxwell).

3. Phipson on Evidence 17th Edition (London: Sweet & Maxwell).

1.0 INTRODUCTION

1.1 This is an appeal against the *ex tempore* Judgment of **B.G. Shonga J,** delivered in the Commercial Division of the High Court, on 31st January 2023, on an action commenced by the Respondent against the Appellant, which is now the subject of the appeal.

1.2 It is noted that the matter in the Court below, was commenced in the aftermath of the promulgation of the **High Court (Amendment) Rules of June 2020[1].** This Appeal brings to the fore, several issues, *inter alia*, case management, the role of, and the discretion reposed, in the adjudicator, in advancing the progress of a matter through the courts, the burden of proof, when findings of fact may be overturned by an appellate court and the basic tenets of judgment writing.

1.3 It also speaks to conduct expected of litigants, who chose to prosecute their claims in the commercial division and the more robust approach now required by all stakeholders across the divisions of the Court, without losing sight of the fundamentals of **section 13** of the High Court Act[2].

2.0 BACKGROUND

2.1 For this section, we shall refer to the parties as they were in the Court below.

2.2 The Respondent, (Plaintiff in the court below), commenced proceedings against the Appellant, (Defendant below) on 30th July 2021, and by its amended statement of claim of 22nd September 2021, claimed the following reliefs:

i. Payment of the sum of USD 183,017.98 being monies due and owing.

ii. Damages for breach of agreement.

iii. Interest.

iv. Further or other reliefs that the Court may deem fit.

v. Costs of suit.

2.3 The Defendant, duly filed its defence on 7 October 2021, as seen on **page 29** (and elsewhere) of the Record of Appeal, (RoA) following which the matter was referred to mediation. Subsequently, orders for directions were issued by the Court on 4th April 2022. A compliance conference was held on 31st May 2022 and Status on 5th August 2022. These are noted from **pages 192 to 195** and **39 & 40** of the RoA.

2.4 The date for commencement of trial was scheduled for 29th November 2022, and it is noted that trial commenced and ended on 31st January 2023, though there is no record of what or who caused the change in date.

2.5 The transcript of proceedings is noted from **pages 196 to 262** of the RoA.

2.6 At the conclusion of trial, the lower Court delivered an *ex-tempore* Judgment, which is noted from **pages 262 to 266** and the formal Judgment Order drawn by the Defendant, is seen at **pages 8 to 9** of the ROA respectively.

3.0 DECISION OF THE LOWER COURT

3.1 The main issue identified by the lower Court, centered on whether there was a contract between the Plaintiff and the Defendant. Upon hearing the

witnesses appearing on behalf of both the Plaintiff and Defendant, the learned Judge found, as a matter of fact, that there was a contract between the parties, be it written or oral.

3.2 The learned Judge stated that the question for determination was whether the Defendant owed the Plaintiff the sum of USD 183, 017.98. The learned Judge noted two statements on the evidence of Defence Witness 1 (hereinafter referred to as 'DW1'). One statement adduced by the Plaintiff and admittedly prepared by the Defendant, showing a balance of the claimed amount of money being USD 183,000 and the other being a balance of USD 70,000.

3.3 The learned Judge acknowledged a breach in the payment obligation of the Defendant based on the evidence of DW1. Although the Defendant's witness urged her to believe the statement exhibited in the Defendant's Bundle of Documents, she accepted the statement in the Plaintiff's Bundle for the following reasons:

(1) On the evidence of DW1, he prepared the statement which shows the balance of USD 183, 000.

(2) There is no evidence before Court to show that that statement was at any point withdrawn, and there was no communication to the Plaintiff that the statement was withdrawn nor was a corrected version supplied.

3.4 For the reasons above, the learned Judge found that the Defendant is indebted to the Plaintiff in the sum of USD 183, 017, 98. (The Judgment debt).

3.5 The learned Judge addressed the second claim, for an order compelling the Defendant to release the business agreement by its agent Peter Ndhlovu. It was noted that because there was no written contract adduced, the learned Judge determined that the parties proceeded on a verbal contract which is as enforceable as a written contract. However, she stated that there being no written contract or evidence thereof, the claim for an order compelling the Defendant to release the business agreement failed.

3.6 With regards to the Plaintiff's claim for damages and interests, the learned Judge referred to the case of **Indeni Petroleum Refinery Company Limited v V.G Limited**[1] in which the Supreme Court had the following to say:

> *"...the underlying principle and basis for an award of interest is that the Defendant has kept the Plaintiff out of his money and that the Defendant had the use of it to himself, so he ought to compensate the Plaintiff accordingly."*

3.7 The learned Judge also referred to the case of **BP Zambia v Expendito Chipasha,**[2] in which the Supreme Court guided that the law on the award of interest, is designed to compensate a Plaintiff, for the period that he has been kept out of use of his money. She stated that the award of interest in a money Judgment, serves the same purpose as damages. It was her considered view that it would be inequitable to award both damages and interest and elected to only award interest.

3.8 On the award of interest, the learned Judge referred to **Order 36 Rule 8** of the High Court Rules [2] and awarded interest, at 5.5 percent (5%) on the

Kwacha equivalent of the Judgment debt, from date of Writ, being 30th July 2021 to the date of Judgment, 31st January 2023.

3.9 Further, the learned Judge awarded interest from the date of Judgment until full and final settlement at the rate of 7 percent (7%).

3.10 Below are the orders made by the lower Court:

(1) That the Defendant is indebted to the Plaintiff to the tune of USD 183,017.98 cents (United States Dollars One Hundred and Eighty-Three Thousand and Seventeen and Ninety-Eight Cents)

(2) That Interest at 5.5 percent per annum on the Kwacha equivalent prevailing as at date of the Judgment, shall accrue from the date of the Writ of Summons, 30th July 2021, until the date of Judgment, 31st January, 2023.

(3) That Post Judgment Interest being interest from the date of Judgment until full and final settlement shall accrue at the rate of 7 percent.

(4) That costs are awarded in favour of the Plaintiff to be taxed in default of agreement; and

(5) Leave to Appeal granted.

3.11 On 13th February 2023, the Defendant, now Appellant, filed its Notice and Memorandum of Appeal.

4.0 THE APPEAL

4.1 Dissatisfied with the Judgment of the Court below, the Appellant filed a Notice and Memorandum of Appeal on 13th February 2023, advancing five (5) grounds of appeal, namely;

i. *The learned trial Court erred in law and fact when it found that the Appellant is indebted to the Respondent in the Sum of USD 183,017.98 in the absence of evidence to the same on the part of the Respondent and in the face of evidence to the contrary.*

ii. *The learned trial Court erred in law and fact when she failed to consider the evidence of the Appellant's attendant Bundle of Documents.*

iii. *The learned trial Court erred in law and fact when it based its judgment on a statement that was not the final statement in the face of evidence to the contrary.*

iv. *The Court below erred in law and fact when it held that there was no evidence that the Defendant did not withdraw the financial statement contrary to the evidence on record.*

v. *The lower Court erred in law and fact when it proceeded with trial and delivering a judgment without affording the Appellant proper representation.*

5.0 THE APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have considered and appreciated the Appellant's Heads of Argument filed on 6th June 2023. With reference to grounds 1 and 4, which were argued together, it was the Appellant's submission, that the general background to the relationship of the Parties was not in dispute. What was also not disputed is that the Appellant had fallen behind in making payment to the Respondent. What is disputed, and caused the acrimony between the Parties, was the actual statement of account between the Parties. It was the thrust of the Appellant's submission under grounds 1 and 4, that the question for determination before the lower Court, ought to have been, how much was due to the Respondent.

5.2 It was the Appellant's submission that the burden of proof rested with the Respondent, who had the burden of proving, that the Appellant owed it the sum of USD One Hundred and Eighty-Three Thousand and seventeen and ninety-eight cents (USD183,017.98).

5.3 The Appellant has submitted that in the Court below, there were only two (2) statements produced, showing the statement of account between the Parties and both of which were produced by the Appellant, who also included copies of the Invoices in its Bundle of Documents. It is the Appellant's further submission that owing to the glaring irregularities in the account reconciliation, which revealed that certain invoices were duplicated and others where payment had been made were not removed from the statement of account, the lower Court erred in placing reliance on

the said statement and without the Respondent having produced any statement or verification of indebtedness of its own.

5.4 The Appellant has challenged the findings of fact made by the lower Court and has urged this Court to set those aside. It is submitted that they are not supported by the evidence before the lower Court, are perverse and based on a misapprehension of the facts. The Appellant placed reliance on the decisions in the cases of **Communications Authority v Vodacom Zambia Limited**[3] and **Khalid Mohamed v The Attorney General**[4].

5.5 In arguing ground 2, it is submitted that the lower Court, erred in accepting the statement of account, without considering the evidence of the Appellant's bundle of documents that were available to the Court. The Appellant has argued that the lower Court, failed to consider the actual statement of account which was the cardinal issue. It was also argued that the lower Court erred, in shifting the burden of proof from the Respondent to the Appellant by noting that the Appellant failed to prove that its earlier statement of account was inaccurate.

5.6 With respect to ground 3, it is argued that the lower Court erred, in placing reliance on a statement, that was not the final statement, in the face of clear evidence to the contrary. The Appellant also called into question the evidence of the witnesses of the Respondent, and referred to the evidence of **PW2**, which if properly analysed, would lead to the conclusion, that the debt was not proved to the level required. The Appellant has therefore attacked the unbalanced evaluation of the evidence by the lower Court and

has called in aid the principles espoused by the cases of **Attorney General v Marcus Kaumba Achiume**[5] and **Nkhata & Others v Attorney General**[6].

5.7 In its arguments advanced with respect to ground 5, the Appellant has attacked the order of the lower Court, when it forced the Appellant to continue with the hearing and proceeded to deliver Judgment, which deprived the Appellant of the opportunity of adequate representation. The Appellant has canvassed the position, that this breached the basic tenets of natural justice and has also submitted that the lower Court, ought to have granted an adjournment, on pain of costs, as opposed to ordering the matter to proceed, in the face of the first adjournment sought by the Appellant. By proceeding in this manner, the lower Court failed to administer justice and equity concurrently, which prejudiced the Appellant.

5.8 The Appellant has also canvassed that the lower Court failed to evaluate the evidence of the Appellant's witness in a fair and balanced manner and has implored this Court to do what is just in the circumstances.

6.0 THE RESPONDENT'S HEADS OF ARGUMENT

6.1 We have equally considered and appreciated the Respondent's Heads of Argument filed on 21st August 2023.

6.2 As it relates to grounds 1 and 4, it is the Respondent's submission that it was the Appellant's duty, as a party, trying to prove the existence of the fact, to adduce evidence which supported the existence of that fact. In this case, the fact being that they had withdrawn the statement and supplied the Respondent with a new statement.

6.3 It is its submission that there is no basis upon which the findings of the Judge should be assailed as she properly evaluated the evidence that was before the lower Court. The Respondent has submitted that the Appellant being unhappy, has launched this appeal arguing that the findings of facts were erroneous. It the view that the Appellant has failed to prove how the findings of the Court were erroneous.

6.4 In relation to grounds 2 and 3, it is the Respondent's submission, that the second statement, was merely a quest by the Appellant, to reduce the money due to the Respondent, and changed its earlier statement at Court to its own advantage.

6.5 It is the Respondent's submission, that what was shifted in this case, was the evidential burden between the parties, who both had the responsibility to adduce evidence of their case. It was the argument that a distinction must be drawn between the burden of proof and the evidential burden and drew the Courts attention to **Phipson on Evidence**[2] in which it was explained at pages 56 to 57 as follows:

> *"While the persuasive burden is always stable, the evidential burden may shift constantly, as one scale of evidence or other preponderates. The onus probandi in this sense rests upon the party who would fail if no evidence at all, or no more evidence, as the case maybe, were given on either side-i.e. it rests before evidence is gone into, upon the party asserting the affirmative of the issue, and it rests, after evidence is gone into, upon the party against whom the tribunal, at*

the time the question arises, would give judgment if no further evidence were adduced."

6.6 It is the Respondent's submission, that the Appellant not only had the responsibility to adduce evidence, but to show the relevance of the said evidence adduced. It was submitted that the Appellant only adduced some of the invoices issued by the Respondent, the Appellant did not expand on them or even address them in the witness statements of its witnesses.

6.7 As it relates to ground 5, the Respondent submitted that the reasons advanced by Counsel for the Appellant on pages 243 and 244 cannot be said to be exceptional, compelling and/or in the interest of justice.

6.8 The Respondent referred to the case of **Mudenda and another v Ericsson AB Zambia,**[7] as an example to show that Courts, have frowned upon the trend of counsel attending Court unprepared, and advancing excuses for not representing their clients diligently. It was the submission that the Appellant is seeking to equate counsel's unpreparedness and breach of fiduciary duty to act reasonably and with reasonable competence, to a denial of proper representation.

6.9 Lastly, it was the submission that this ground be dismissed, as the Court was not at fault in denying the adjournment, as it was in the interest of justice that a commercial matter that was commenced in 2021, be concluded, and further that counsel did not advance any exceptional and compelling reasons.

7.0 THE HEARING

7.1 At the hearing, learned Counsel placed reliance on their respective Heads of Argument as filed in Court. Counsel Chirwa also submitted that the lower Court failed to give a clear, fair and reasoned Judgment. She urged the Court to note that the dispute between the Parties, was not one where liability was in doubt, but that what was in in contention, was the quantum.

8.0 DECISION OF THE COURT

8.1 We have carefully considered the grounds of appeal, the impugned *ex tempore* Judgment of the lower Court and the submissions of counsel respectively. Although the Appellant has argued this appeal on five grounds, it is clear to us that the first four grounds are interrelated and these speak to the fundamental issue, namely:

Did the Respondent discharge the burden of proof and prove the debt owed to it?

And secondly, *did the lower Court offend the principles of natural justice and deny the Appellant an equal and fair opportunity to present its case?*

8.2 It is manifestly clear, that the dispute between the Parties, was simply an exercise in account reconciliation. There were no principles of law that needed to be settled or determined. We have noted from **page 192** of the Record of Appeal (RoA), that the learned Judge in the lower Court, at a scheduling conference, did refer the matter to mediation. There is however no report of the mediation from the Record before us. It is regrettable that the Parties did not avail themselves of the opportunity in settling this

matter at mediation. We caution Parties, that deliberate failure to attend and participate in a court ordered mediation, may result in a costs order, no matter the eventual success of the Party. This is clearly provided in **Order 8 rule 3** of The High Court (Amendment) Rules[4].

8.3 The Appellant has called in aid the principle of the burden of proof and has relied on **Phipson on Evidence**[3] at para 6-06 at page 151 and quoted as follows:

> *"So far as the persuasive burden is concerned the burden of proof lies upon the party who substantially asserts the affirmative of the issue. If, when all the evidence is adduced by all the parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on consideration of good sense and should not be departed from without strong reason."*

8.4 It has been argued that the Respondent, in its bundle of documents relied on a statement produced by the Appellant. This is seen at **pages 60 to 62** of the RoA. We have noted that the Appellant, thereafter, produced another statement seen at **pages 122 to 124** of the RoA. We shall refer to these as the first and second statement respectively. The Appellant has submitted that it raised issues with the first statement, as it had errors, such as duplicated invoices, and others, where payments were made, though not reflected in the said first statement. The Appellant has argued, that due to these inconsistencies, the Appellant reached out to the Respondent, who however insisted, that the account between the Parties, was based on the first statement.

8.5 We have noted that from the sparse Bundle of Documents of the Respondent, (the Plaintiff in the Court below), seen from **pages 58 to 64**, that there were no invoices, no letters or copies of e-mail correspondence. The only supporting document to the Respondent's claim in the sum of USD 183,017.98 is the first statement as narrated above. **Page 58** is the cover page, **page 59** is the Index, **pages 60 to 62** is the said first statement and **page 63,** is the only letter of demand issued by Counsel, presumably before commencement of the action.

8.6 On the other hand, the Appellant's bundle of documents is noted at **pages 76 to 130** of the RoA. A scrutiny of the Index appearing at **page 77** reveals copies of forty-four (44) invoices, a statement of account (which we have referred to as the second statement) and an e-mail of 18th February 2019. The second statement shows an outstanding amount of USD 70, 100.98

8.7 The issue for determination, as we have already identified, is whether the lower Court erred, in placing the burden of proof on the Appellant, as opposed to being satisfied that the Respondent, (the Plaintiff in the lower Court) had proved its case. It has been argued by the Appellant, that the lower Court erred when it failed to consider the evidence of the Appellant, that the second statement was issued, after it had conducted a reconciliation, and found that the amount owing was the sum of USD70,100.98. The Appellant has submitted that the lower Court made an erroneous finding of fact, based on the reason that the Appellant, not having withdrawn its first statement, meant that the indebtedness of the Appellant had been proved in the sum of USD183,017.98

8.8 The settled authorities on this principle abound and we refer to the case of **Galaunia Farms Limited v National Milling Company limited & National Milling Corporation Limited** [8] where the Court stated as follows:

> *"A Plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to Judgment."*

8.9 It is trite, that it is within the province of the Court, to dismiss a claim where it has not been proved to the level required, even in the absence of a defence. This was settled by the case of **Oliver Sitali and Others v Zambia Airforce and Another**[9]**.** We have looked at the witness statements of **Eric Fulaza** and **Annie Kalaluka**, which appear at **pages 133** to **134** and **136** to **137** of the RoA and who were called as PW1 and PW2 in the lower Court. Without speaking to the several attempts by counsel for the Appellant, to seek an adjournment of the matter, an issue to which we will revert later in our judgment, we have combed the transcript on the pages stated, and do not find any evidence that the debt in the sum of USD 183,017.98 was conclusively proved. PW1 neither produced the contract, on which this claim was based, nor copies of any invoices, the subject of the claim. He then stated that he had a draft on his computer, but which was not brought before the Court. When asked if any notice of termination had been issued, on account of the alleged non-adherence to the payment terms by the Appellant, he confirmed that there had been no notice of termination. **Pages 206** to **207** of the RoA refer.

8.10 Under continued cross-examination, PW1 attempted to explain the process of invoicing and confirmed that each time the scoping changed, it resulted

in a change to the amount to be invoiced. When asked if the invoices were before Court, he said they could be availed to the Court. He confirmed that they placed reliance on the financial statements without the attendant invoices. This evidence is noted at **page 214** of the RoA. When questioned as to the mode of communication between the Parties, he confirmed that as the person responsible for communicating the final invoice, he communicated via e-mails, but that these e-mails were not before the Court. **Page 216** refers. He also referred to meetings that were held and confirmed that minutes were recorded of those meetings. As has been noted in **paragraph 8.5** above, the RoA reflects no such minutes.

8.11 PW2 an engineer by profession, had not had sight of the contract of engagement between the Parties, and confirmed that she had no role to play in preparing or managing the outstanding account between the Parties. **Pages 222** and **225** of the RoA refer. The witness further confirmed that she could not vouch for any information in the statement. **Page 241** of the RoA refers.

8.12 We have noted that there was no re-examination of these witnesses. In the *ex-tempore* Judgment, delivered minutes after the end of the trial, the learned Judge stated as follows:

''I accept the statement that is in the Plaintiff's Bundles for the following reasons:

(1) On the evidence of DW1 he prepared the statement which shows the balance of 183,000 Dollars.

(2) *There is no evidence before Court to show that the statement was at any point withdrawn. No communication to the Plaintiff that the statement was withdrawn, and a corrected version supplied. For that reason, I find and determine that the Defendant is indebted to the Plaintiff to the tune of 183,017 Dollars and 98 cents."*

8.13 Even without examining the evidence of the Appellant's witness, we are of the considered view, that the finding of the lower Court, was perverse and against the weight of the evidence placed before the Court. A perusal of the defence, filed by the Appellant, clearly reveals that the Appellant pleaded the issue of inconsistent invoices and the failure to reconcile.

8.14 The Respondent appears to canvass the position that the lower Court was on firm ground in arriving at the findings of fact, and has called in aid a decision of the Supreme Court, (though with no citation), in the case of **Attorney General v Kakoma**[10] where the Court is reported to have stated as follows:

> *"A court is entitled to make findings of fact where the parties advance directly conflicting stories, and the court must make those findings on the evidence before it and having seen and heard witnesses giving that evidence."*

8.15 We are however of the considered view, that the authority is cited out of context, and does not lend itself to this case. The dispute in *casu,* related to a statement of account and figures which needed to be proved. It does not

relate to *stories,* conflicting, or otherwise as was the case in the cited decision.

8.16 The Respondent appears to canvass the point, that it was equally incumbent upon the Appellant, to prove its part of the case and has invited us to consider the distinction between the burden of proof and the evidential burden. The Respondent has also submitted that the onus to disprove the invoices, rested on the Appellant. We have difficulty in reconciling this line of submission with our finding that the Respondent did little, or next to little, to prove its entitlement to Judgment, let alone judgment in the entire sum claimed.

8.17 We place reliance on the cases of **Wilson Masauso Zulu vs Avondale Housing Project Limited**[11], **Susan Mwale Harman vs Bank of Zambia**[12], **Nkhata & Others v Attorney General**[6] and **Communications Authority v Vodacom Zambia Limited**[3], which clearly settle the principle, that an appellate Court, can only reverse findings of fact made by the trial Judge, where the findings in question were either perverse, or made in the absence of any relevant evidence or upon a misapprehension of the facts, or that they were findings, which on a proper view of the evidence, no trial court acting correctly could reasonably make.

8.18 In the case of **Ndongo vs Moses Mulyango & Another**[13], the Apex Court held as follows:

> *"An appellate court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a*

misapprehension of facts, or that they were findings which on a proper view of the evidence, no trial Court acting correctly can reasonably make."

8.19 Based on the evidence examined above, we come to the inescapable conclusion, that the lower Court erred, by failing to review the matter in its entirety, and based on what we have already noted, the findings of the Court were perverse and not supported by the evidence before the Court.

8.20 We have no hesitation in allowing grounds 1 to 4 of the grounds of appeal.

8.21 We stated in **paragraph 8.1** that we would address the second issue, which attacks the way the lower Court proceeded, and which forms the substance of ground 5 of the appeal. We also noted in **paragraph 1.2** above, that while case management is a preserve of the adjudicator, the same must be administered within the provisions of **section 13** of the High Court Act and in accordance with the rules of the Court. This is a hard balance to maintain, as there will always be one party that will cry foul.

8.22 We have noted at **page 197** of the RoA, that Counsel for the Respondent presented an application for an adjournment, on the ground that counsel with conduct had left the Firm, and that he had taken conduct the day before. It is not clear from the record, what or who caused the trial, scheduled to be heard on 29th November 2022, to be moved to 31st January 2023. There is however no evidence to suggest that the Appellant missed any of the dates, nor that the Appellant had caused any prior adjournments. It is also noted from the Record, that Counsel Shachinda, appeared for the first time when the matter came up for trial.

8.23 We have further noted that the lower Court made an order for trial to proceed, and that Counsel could make the same application during the trial. We have also noted that Counsel Shachinda, renewed his application for an adjournment at no less than three stages during the trial, all of which were declined by the lower Court. This is noted from pages **197**, **201**, **220** and **242** of the RoA. We have noted that Counsel called in aid the provisions of **Order 35 rule 3(1)** of the Rules of the Supreme Court[5], and submitted that the paramount consideration, in determining whether to grant an adjournment, is the interest of justice.

8.24 As ordered by the learned Judge, Counsel renewed his application for an adjournment, after the Plaintiff had closed its case and before the Defendant opened its case. Counsel also informed the Court, that its key witness, Mr. Peter Ndhlovu, who had filed his witness statement, was not in Court that morning as he had a sudden family emergency that morning. The learned Judge declined the last attempt at seeking an adjournment and ordered the Defendant (the Appellant) to proceed to call its single witness and thereafter close its case. This is noted at **pages 244** to **246** of the ROA. We have also noted that the trial which commenced at 09:41 hours, ended at 12:55 hours and the learned Judge proceeded at 12:56 hours to render an extempore Judgment which is seen at **pages 262** to **265** of the RoA.

8.25 We are alive to the provisions of **Order 35 rule 3** of the Rules of the Supreme Court[5] cited by Counsel for the Appellant, and are clear that an adjournment of a proceeding under this rule, or under the inherent jurisdiction, is a judicial act, which may be reviewed on appeal, but as it is a

matter of discretion, as an appellate Court, we will be slow to interfere. The following are some of the matters, *(as per order 35 rule 3)* that should be considered when deciding whether to grant the adjournment or not:

1. *The importance of the proceedings and their likely adverse consequences to the party seeking the adjournment.*
2. *The risk of the party being prejudiced in the conduct of the proceedings if the application were refused.*
3. *The risk of prejudice or other disadvantage to the other party if the adjournment were granted.*
4. *The convenience of the court.*
5. *The interests of justice generally in the efficient dispatch of court business.*
6. *The desirability of not delaying future litigants by adjourning early and thus leaving the court empty.*
7. *The extent to which the party applying for the adjournment had been responsible for creating the difficulty which had led to the application."*

8.26 **Judge Thomas A Zonay, in a Text entitled "Judicial Discretion, Ten Guidelines for its Use"** has stated:

"Judicial discretion is said to be the act of making a choice in the absence of a fixed rule. The choice must not be made arbitrarily or capriciously but with regard to what is fair and equitable under the circumstances and the law. Clearly discretion involves situational circumstances".

8.27 In a decision by the Supreme Court in the case of **G4 Secure Solutions Zambia Limited v Lupupa Kabezya Lewis**[14], the Apex Court upheld the decision of the lower Court, in the exercise of case management, in declining an application for adjournment. In the **G4 Secure Solutions** case, there was evidence before the lower Court, that the Party applying for the adjournment had knowledge of the trial date, and the lower Court had previously granted adjournments at the request of the same party,

The Apex Court considered only one broad issue for its determination at **page J14,** that is *''whether the lower court properly exercised its discretion when it dismissed the Appellant's application for an adjournment.''*

8.28 The Apex Court was however reluctant, to set down considerations, to determine how trial Courts ought to exercise their discretion, when faced with similar circumstances. In its reasoning, the Supreme Court, at **page J18** stated as follows:

> *''What comes out clearly from most of the said cases is that the decision as to whether to grant an adjournment is entirely in the discretion of the court. Further, that an appellate court must be very slow to interfere with the exercise of that discretion by a trial court. That appellate courts should only interfere where the interests of justice demand such interference.''*

8.29 In the same case, the Apex Court considered several authorities from across various jurisdictions, all of which settled the principle, that the decision to grant an adjournment is entirely in the discretion of the Court. The Supreme Court at **page J20** to **21**, guided trial Courts as follows:

"A Court should not refuse an application for an adjournment if such refusal would lead to an injustice to the party making the application unless the grant of the adjournment would occasion irreparable prejudice to the other party and that prejudice cannot be atoned for in costs. ***Another factor that the Court is permitted to take into account when deciding whether to allow an application for an adjournment is the demands of case management but again, such demands should not override the overall objective of doing justice to the parties."*** *(emphasis is by the Court).*

8.30 Properly guided by the Supreme Court, and as noted by the provisions of **Order 35 rule 3**[5], we note that in turning our attention to ground 5 of the appeal, our attention is only directed to the case management power, exercised by the lower Court, and we are not dealing with the merits of the Judgment, which we have already pronounced upon above.

8.31 Save to say, that in the situational context of the matter under appeal, the lower Court appeared not to have paid any attention to the risk of hardship or prejudice that may have been occasioned to the party applying for the adjournment, under the consideration of case management alone. It has already been noted that there was no prior conduct or similar application made by the Appellant, for it to have been denied, what appears to be its first application, for an adjournment.

8.32 On the basic tenets of *Judgment Writing*, we have examined the Judgment appealed against and have already addressed the submissions of Counsel as above. We have also noted the brevity of the Judgment of the lower Court,

and the reasoning, and evaluation of evidence, or lack thereof. The Supreme Court has guided in the case of **Zambia Breweries Plc v Lameck Sakala**[15], a case relied on by the Appellant of the requirements of a judgment. In the case of **Minster of Home Affairs, The Attorney General v Lee Habasonde suing on behalf of the Southern Africa Centre for the Constructive Resolution of Disputes,**[16] the Supreme Court gave guidelines on judgment writing and stated as follows:

> *"Every Judgment must reveal a review of the evidence where applicable, a summary of the arguments and submissions if made, findings of fact, the reasoning of the court on the facts and applicable law and authorities if any, to the facts and a conclusion."*

8.33 Similarly, the case of **Zambia Telecommunications Company Limited v Aaron Mwene Mulwanda and Paul N'gandwe,**[17] is instructive to the effect that a judgment must not be interpreted; it should be thorough, exhaustive and **clear on all issues.**

8.34 Order **XXXVI rule 2A (a)**[1] of Statutory Instrument 58 of 2020 has also re-stated the requirements of a judgment.

> *"Where an action is defended, the judgment shall contain a concise statement of the case, the points for determination, the decision of the case, and the reasons for that decision.*
>
> As noted in **paragraph 1.2** of our judgment, we offer this guidance to trial Courts, even in the exercise of case management.

8.35 Reverting to the appeal before us, and having found merit in the grounds of appeal, we set aside the Judgment of the lower Court, with orders as outlined below.

8.36 The wasted resource of Court time and attendant costs has not escaped us, more so in a matter, where Counsel for the Appellant, has equally admitted that the issue in dispute, was not liability, but simply, quantum.

8.37 Although we are mindful on the principle of costs, and the authorities that speak to it, we are of the considered view that the conduct of both parties, being as it is, and the fact that they both failed to take advantage of the referral to Mediation, as a means to settle the dispute, we arrive at the conclusion that costs must, as a necessary consequence, be borne by the Parties respectively, both here and in the Court below.

9.0 CONCLUSION

9.1 What remains, in the interest of justice, is for us to consider the need for any consequential order to do justice between the Parties. Noting that the Appellant has admitted its indebtedness to the Respondent, the dispute only being one of quantification, we make the following orders:

i. That Judgment is entered for the Respondent in the admitted sum of United States Dollars 70,100.98

ii. That the balance in dispute be referred for assessment before the Learned Registrar of the Commercial Division, to assess the quantum of the disputed amount.

iii. On the total Judgment sum to be assessed, (or sooner agreed by the Parties), we award interest at 1% above LIBOR, from the date of action to the date of settlement.

iv. Costs in this Court, and below, to be borne by the Parties.

M. J. SIAVWAPA
JUDGE PRESIDENT

F.M CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE