



**LEGISLATION AND WORKS REFERRED TO:**

1. *Halsbury Laws of England, 4<sup>th</sup> Edition, volume 9*
2. *Smith and Keeman (1965), Mercantile Law, 7<sup>th</sup> Edition, Pitman, UK*
3. *Black's Law Dictionary (1979) 5<sup>th</sup>, West Publishing Company, USA*

The court regrets the delay in delivery of this judgment which was on account of the suspension of its jurisdiction.

The Plaintiff, African Conveying Solutions CC commenced this action against the Defendant, Tombwe Processing Limited on 7<sup>th</sup> October, 2011. The claim as it is contained in the writ of summons is for the sum of USD31,309.92, being an amount outstanding for the supply of goods and services. It also claims interest and costs.

In the course of the proceedings the parties executed a consent order by which the Defendant admitted owing the sum of USD20,610.88 of the amount claimed. Pursuant to the said consent order it was agreed that the Defendant would settle the said sum by two instalments of USD15,000.00 and USD5,610.00. The matter therefore only came up for trial on the determination of whether the balance of USD10,699.04 is due and payable.

The dispute in this matter arises from an agreement entered into by the two parties whereby the Plaintiff supplied to the Defendant goods and services valued at USD221,309.92. It is contended by the Plaintiff that there is a balance outstanding on the sum due of USD10,649.04 comprising additional freight charges of USD8,632.42, labour charges of USD2,873.00 and USD 207,00 being an amount omitted from an invoice issued earlier. The Defendant denies that the amounts are due and owing.

The Plaintiff's contentions are in the statement of claim and they are as follows. The parties entered into an agreement in September 2010,

whereby the Plaintiff agreed to supply goods and services to the Defendant at a cost of USD221,309.92. The Plaintiff duly supplied the contracted goods and services to the Defendant pursuant to which the latter made a payment in the sum of USD140,000.00 in November 2010, leaving a balance of USD81,309.92. At one point the Defendant informed the Plaintiff that it did not need the equipment that had just been imported into the country and the Plaintiff agreed to take back the equipment as long as the Defendant met the transport and labour charges for the equipment in the sums of USD8,632.42 and USD2,873.00 respectively. The Plaintiff informed the Defendant further that it had to pay a further sum of USD207.00 for imperial bolts and nuts which had been omitted from invoice number 09091006. Subsequently, the Defendant paid a further sum of USD50,000.00 to the Plaintiff which left the sum of USD20,610.88 outstanding before the extra costs incurred by the Plaintiff were added, bringing the total sum outstanding to USD31,309.92.

The Defendant's contentions are contained in its defence. They are that the parties did indeed enter into the agreement as averred by the Plaintiff but that the cost of the goods and services of USD221,301.92 is disputed. Further that the Defendant has paid all moneys due to the Plaintiff.

The Defendant also denied that it rejected any goods imported into the country by the Plaintiff or that it owes the extra charges and the sum allegedly omitted on the invoice.

It was also contended that the payment of the sum of USD50,000 by the Defendant to the Plaintiff marked the conclusion of the transaction and as such no other sums of money remain due and payable.

At the trial the parties called a witness each. The Plaintiff's witness was Darran Hilbig, PW whilst the Defendant's witness was Aldert Van Der Vinne, DW.

In his evidence, PW testified that in the third quarter of 2010 he was approached by DW to supply spares and equipment to the Defendant for

its conveyor system that had burned to the ground. As a consequence of this he issued proforma invoices giving details of the cost of purchasing and transporting the spares and equipment from the Plaintiff's point of sale to Zambia. These proforma invoices are at pages 1 to 8 in the Plaintiff's bundle of documents. After PW issued the proforma invoices he and DW exchanged visits to Zambia and South Africa, respectively, for purposes of holding meetings and agreeing on the order for the goods and services as contained in the proforma invoices. The freight for the goods was at this point quoted sea freight into South Africa and then road freight into Zambia.

Upon conclusion of the discussions and reaching agreement, the Defendant paid an initial sum of USD140,000.00 towards the agreed sum for the goods and services agreed to be supplied, which enabled the Plaintiff to supply the first consignment of equipment on 3<sup>rd</sup> January 2011. The Defendant acknowledged receipt of the equipment as is evidenced by the documents at pages 10 to 12 of the Plaintiff's bundle of documents. At one point DW requested that the belts and various spares be flown into South Africa from source and thereafter transported by road and other instances air into Lusaka. This was on account of time constraints.

PW testified further that he travelled to Zambia in March 2010 with a Mr. Herman DuPreez an employee of the Plaintiff to meet DW and a Mr. Manohaana. The purpose of the visit was to train the Defendant's staff in installing the conveyor belt. Subsequently, DW indicated that the Defendant no longer required the equipment that had been imported into the country and the two agreed that PW would transport the equipment back to South Africa on condition that the Defendant accepted to bear the cost for labour and travel related to the return of the equipment, which the Defendant accepted to do.

PW testified further that upon his return to South Africa he emailed DW informing him that there were extra charges for freight and labour in the sums of USD8,632.92 and USD2,873.00 respectively. He also indicated that there was a further sum of USD207.00 which had been omitted from

an earlier invoice number 090910-06 for imperial nuts and bolts. He referred to the documents at page 35 for the extra freight charges and page 13 for the amount omitted in the invoice. He ended by stating that the Defendant paid a further sum of USD50,000 bringing the balance to USD32,303.92 which the Defendant has refused to pay despite demand by the Plaintiff.

In cross examination PW testified that the letter at page 4 of the Plaintiff's bundle of documents indicated that the Defendant was informed of the labour and transportation costs. He testified further that the Defendant accepted to bear the labour and transportation expenses by way of emails which were not before the Court. Further that, DW instructed him to return the equipment and spares but that he did not have any documentary evidence to prove that in the bundle of documents.

In re-examinations PW testified as follows: the equipment that was returned was specifically manufactured to the Defendant's needs in Canada under instructions of DW; its purpose was to assist in the installation of the conveyor belt; that DW was informed via emails a number of times that the Defendant would have to bear travel costs; and that the Defendant was invoiced as per documents at page 30 in the Plaintiff's bundle of documents. The Plaintiff proceeded to close its case.

The Defendant's witness DW was Aldert Van Der Vinne, the Managing Director of the Defendant. His evidence was as follows; the Defendant engaged the Plaintiff to supply a number of spares and equipment for the repair of its conveyor system which was gutted sometime in 2010; among the spares and equipment that the Defendant had ordered, the prices of some of the items had been inflated from their initial costs; one such item was the tool used for repairing the main conveyor belts; and as a consequence of this, the Defendant decided not to accept the conveyor repairing tool especially that after it had been used to repair the conveyor belts it would be of no further use to the Defendant. DW testified further that the parties agreed that the Defendant would pay the Plaintiff the balance of US\$20,610.88 for the spares and equipment supplied to the

Defendant. There was at this point, no dispute on the amount payable to the Plaintiff and the Plaintiff agreed to keep the conveyor belt repairing tool after the Defendant informed the Plaintiff that the same was no longer required.

Subsequently, the Defendant was surprised to learn from the Plaintiff that there were additional costs charged in the form of labour and freight charges. These charges were not agreed upon and the Defendant denies owing the Plaintiff the sum of US\$10,699.04. The Defendant has however paid the balance of US\$20,610.00 through its appointed advocates.

Under cross examination DW testified as follows: it is true that the Defendant contracted the Plaintiff to provide it with spares and equipment in 2010 for a value in excess of US\$200,000.00; the amount of US\$10,699.49 is not the balance on the agreed sum of US\$221,000.00 because the Defendant had settled the agreed balance of US\$20,000.00; and the Defendant had paid for all the freight charges.

DW went on to testify that the Defendant had received the invoices at pages 9 to 20, 24, 28, 29, 30 and 36 of the Plaintiff's bundle of documents and that the invoices had freight charges included in them. Further, that the invoice at page 9 included delivery to be made by DHL (Z) Limited but the delivery had nothing to do with the Defendant. He went on to testify that the invoice at page 36 of the Plaintiff's bundle of documents shows additional freight charges amounting to US\$8,632.00 but that the invoice was only brought to the Defendant's attention after the parties had already agreed on what was payable. The charge of US\$8,632.00 and that reflected on page 35 of the Plaintiff's bundle of documents was never agreed upon by the parties. Further that, the parts that are listed on the document at page 30 of the Plaintiff's bundle of documents were returned to the Plaintiff by the Defendant. That the parties agreed that the Plaintiff would take back the parts and that the freight charges were not payable on the items because PW came with them in his vehicle as they were small.

DW also testified that the Defendant rejected the items marked as miscellaneous tools at page 30 of the Plaintiff's bundle of documents. The reason for rejecting them was that the Defendant did not require them and it was agreed that PW would take them back. In terms of how the tools would be transported, he testified that PW agreed to take them back in his car.

There was no re-examination and the Defendant proceeded to close its case.

At the conclusion of the trial, I directed counsel to file submissions. Pursuant to the said directive, the Plaintiff's submissions were filed on 15<sup>th</sup> March 2013 whilst the Defendant's were filed on 18<sup>th</sup> April, 2013.

The Plaintiff's submission is a twelve page document. Page 1 to part of page 6 contains counsel's recital of the contents of the pleadings and the evidence tendered. I will not consider this portion of the submissions because I have already summarized the pleadings and evidence tendered in this matter. The arguments in the submissions begin at page 6.

Counsel for the Plaintiff, Ms K. Munuka argued that the issues for determination are: whether the Plaintiff supplied the goods and services required by the Defendant in accordance with instructions; whether the freight charges constituted part of the cost of the goods supplied to the Defendant; and whether the Plaintiff informed the Defendant of its liability to pay the additional charges.

As regards the first issue, counsel argued that the Defendant requested the Plaintiff to supply it with various goods and equipment which it supplied. Further, that the Defendant did not at any time complain that the goods supplied by the Plaintiff were not according to its specifications or request. It was argued that following delivery of the goods the Defendant decided not to take all the goods and as such it was agreed that the Plaintiff would take them back as long as the Defendant paid for the freight.

As regards the extra charge of US\$270.00, counsel argued that the amount represents a sum that was omitted from an invoice in respect of goods and equipment that the Defendant had received and utilized. Counsel submitted that the Defendant's refusal to purchase the equipment was not on account of any fault on the part of the Plaintiff and as such the labour costs and freight charges that are in respect of returning the equipment were wholly necessitated by the Defendant's refusal to purchase the equipment in issue. Counsel argued that there is an obligation on the part of the Defendant to pay for freight because it had in the past paid for freight. My attention was drawn to ***Halsbury's Laws of England (4<sup>th</sup> Edition)*** paragraph 353 at page 226.

As regards the second issue, counsel argued that the goods and equipment supplied to the Defendant attracted freight charges. The only exception was where the Defendant made its own arrangements in transporting the goods as is evidenced by the documentation at page 9 of the Plaintiff's bundle of documents, where the freight for the goods listed therein was to be covered by the Defendant's DHL account.

It was argued that it was not sufficient for DW to allege in cross examination that the Plaintiff would bear the cost of labour and freight for the goods and equipment that it rejected in the absence of tendering such evidence in chief or pleading to that effect. Further that, the onus is on the debtor to prove that whatever moneys had been paid were specifically in respect of the amount claimed. Reference was made to the case of ***Rudnap Zambia Limited Vs. Spyron Enterprise Limited*** <sup>(1)</sup>. It was argued further that the Defendant did not plead the defence of there having been an agreement for the Plaintiff to incur the costs of additional charges that arose. The labour charge arose as a result of the Plaintiff having provided a service to the Defendant and the Defendant never contested receiving such service. In articulating the foregoing argument counsel relied upon the case of ***Byrne Vs. Kanweka*** <sup>(2)</sup> whose principle she argued is that parties are bound by their pleadings and evidence outside the pleadings would ordinarily be inadmissible.



As regards the last issue Counsel argued that the Plaintiff had informed the Defendant of the additional costs that had arisen following the rejection of the equipment when it decided not to purchase the same. She argued that in the case of **Zambia Consolidated Copper Mines Vs. Woodward Enterprises Limited** <sup>(3)</sup>. The court held that where the buyer wrongfully neglects or refuses to accept and pay for goods, the seller may maintain an action against him for damages for non-acceptance. It was argued that the Defendant's refusal to accept the equipment allows the Plaintiff to maintain an action either for damages or for repayment of the additional charges arising from such non-acceptance as is the case in this matter. It was argued that by the Plaintiff proceeding to transport the equipment whilst awaiting payment for the applicable charges, the Defendant was saved expenses which it would have inevitably incurred. This, it was argued, is because the freight charges in respect of the equipment were incurred by the Defendant's unwarranted actions. Counsel therefore argued that the Plaintiff was entitled to restitution as per the principle in the case of **Proctor and Gamble Phillipine Manufacturing Corp. Vs. Peter Cremer GMBH and Co. (The Manilla)** <sup>(4)</sup>.

Counsel concluded her arguments by submitting that on several occasions the Plaintiff informed the Defendant of its liability to pay the additional charges in respect of the items it had rejected, labour costs and the amount omitted from the invoice. Further, that as to the time when freight costs were payable, the same were payable with the cost of goods to be supplied at all times. Counsel relied on the case of **Bank of Boston Connecticut Vs. European Grain and Shipping Limited (The Dominique)** <sup>(5)</sup>. Counsel ended by praying that the Plaintiff had proved its case on a balance of probabilities and as such its claim must succeed.

In the Defendant's submissions Counsel for the Defendant Mr. G. Lungu began by setting out the evidence tendered in the matter. He then proceeded to set out the undisputed fact that, the parties entered into a

contract for the supply of spare parts. He then defined contract as per ***Smith and Keenan's Mercantile Law***.

It was argued that the two parties discharged their obligations and that the Defendant refused to accept the labour costs and freight charges claimed by the Plaintiff because they were not agreed upon. Counsel argued further that there was no agreement for the Defendant to incur the disputed additional freight charges and labour costs upon the Plaintiff returning with the goods to South Africa.

It was submitted that the Plaintiff over supplied the spare parts which the Defendant had no use for. This, it was argued, is what prompted the Plaintiff to volunteer to take the said parts back to South Africa using PW's vehicle as opposed to a carrier. As a consequence of this, the Defendant argued that there can not be additional costs.

It was also argued that all the costs included in the invoices sent to the Defendant were paid in full by the Defendant. Further, that even assuming that there was an oral contract between the parties in which the Defendant agreed to pay the extra charges, there was no consideration to validate the said contract. Counsel relied on the case of ***Currie Vs. Misa*** <sup>(6)</sup> and defined an oral contract as per ***Black's Law Dictionary***.

Counsel ended by denying the Defendant's liability and prayed that the matter be dismissed for lack of merit with costs to the Defendant.

The dispute in this matter hinges on the issue whether or not the parties agreed that the Defendant would pay the additional costs of USD10,699.04. This is a sum of USD8,632.92 for additional freight, USD2,873.00 labour and USD207.00, being an amount omitted from invoice number 09091006 tender to the Defendant by the Plaintiff earlier. It would appear that the additional cost of freight arises from the allegation by PW that initially the parties agreed on sea freight for the goods into South Africa then road freight into Lusaka which was altered in some instances to air freight into South Africa in certain instances into Lusaka as well. This however is not clear from the pleadings and evidence

of PW. The additional freight and labour also appears to arise from PW's evidence that he took back some of the goods that the Defendant indicated it would have no use for. Further that the Defendant was informed of this cost by the Plaintiff by way of email dated 31<sup>st</sup> March 2011 at page 35 of the Plaintiff's bundle of documents and that DW agreed that the Defendant would bear the cost. It has also been contended that the sum of USD207.00 which was omitted from invoice number 09091006 is explained in the said email.

The Defendant has denied that it agreed to settle these extra charges.

Before I embark on determining the issue I have stated above it is important that I identify certain facts that are not in dispute as follows:

- 1) The parties entered into an agreement for the supply of goods and services by the Plaintiff to the Defendant
- 2) The parties did not execute a formal contract document which identifies specifically what goods and services, would be supplied, when and at what cost. Nor can the rights and obligations of the parties be ascertained out of a written formal contract document. What this court has before it is an exchange of emails, correspondence, invoices and other documents;
- 3) Certain goods and services were delivered and made available to the Defendant; and
- 4) There were some goods returned to the Plaintiff by the Defendant and there was no formal written agreement executed by the parties in respect of the goods that were returned.

As a consequence of 2 above it is not possible for this court to determine what the parties agreed upon precisely or to determine their rights and obligations. I am therefore only left to look at the correspondence and invoices passing between the parties.

The Plaintiff has relied heavily on the documents at pages 4 and 35 of the Plaintiff's bundle of documents to prove its claim. PW stated in his evidence that the document at page 4 of the Plaintiff's bundle of

documents proves that DW agreed to incur costs of labour and travel. He emphasized that this is contained in paragraph 2 of the said document.

The full text of paragraph 2 referred to in the preceding paragraph states as follows:

*“If it is decided (sic) that I will be required to train your staff for 3 days on the above equipment an extra charge of USD250.00 will be charged per day for labour, if it is decided I am to do the installation of all the conveyer belting with my own equipment an extra charge of USD250.00 will be charged, an estimate of 3 weeks will be required on site. All travel costs will be charged to your account.”*

In my considered view, the foregoing passage is not an agreement by the parties that the Defendant will bear the labour charges. It is at best a suggestion that in the event of agreement by the parties the Defendant would bear the labour charges. My finding is fortified by the fact that the passage begins with the word “IF” which presupposes need for agreement. Further, there is no response from the Defendant to the Plaintiff indicating that the former agreed to or accepted the proposal.

The passage does not also prove that travel costs were agreed upon. To PW’s credit he does admit in cross examination that the document does not prove this fact but that proof of the fact is contained in other emails that were not produced before this court. I cannot surmise that such evidence does indeed exist in view of the Plaintiff’s omission to lay it before me.

As for the claim for freight charges, PW in paragraph 10 of his witness statement relied on the document at page 35 of the Plaintiff’s bundle of documents to prove that USD8,632.92 freight charges were agreed upon. He testified in this respect that upon his return to South Africa he emailed DW informing him that all freight documentation had been received and that there was an extra charge of USD8,632.92. Further that, there was an additional charge of USD2,873.00 for labour and USD207.00 which was omitted from invoice number 090910-06.

The paragraph in the document at page 35 of the Plaintiff's bundle of documents that relates to the sum of USD8,632.92 is the last paragraph and in its entirety states as follows:

*"Please add USD8,632.92 (R63,200.72 divided by R7.3208) to the outstanding amount, FREIGHT DOCUMENTATION IS AVAILABLE IF YOU WANT TO SEE THEM."*

In my considered view, the foregoing paragraph can best be described as a directive or request by the Plaintiff to the Defendant to increase freight charges by the sum of USD8,632.92. It does not amount to an agreement by the parties that the freight charges should be increased by that amount because there is no proof of negotiations or genesis leading up to an agreement to increase the freight charges. Consequently, since the Defendant did not act upon the directive or accept the request, no agreement in this respect was reached.

As regards the claim for USD207.00, the relevant paragraph in the document at page 35 is the first paragraph which reads as follows:

*"I have returned to work today and have been going through your invoices, please note that on invoice number 090910-06 the 1000 off 1/4 x 3/8 bolts, nylock nuts and washers plated were omitted, please add USD207.00 to the amount outstanding."*

This passage like the previous passage is a directive to the Defendant by the Plaintiff to increase the amount on invoice number 090910-06 by USD207.00. There is no evidence i.e. of acceptance of the said directive by the Defendant and neither is there evidence to show that prior to the email being sent the parties had agreed to amend invoice number 090910-06 accordingly. I have stated in the earlier part of this judgment that the parties did not draw up a formal contract to govern their relationship in this transaction. Their agreement as I have stated is evidenced by the various correspondence passing between the parties and the invoices. As such in order for the price adjustment in the invoice to be effected, it should have been accepted by the Defendant by it

acknowledging that indeed the invoice omitted certain items valued at USD207.00 or negotiated a change in the invoice and accepted the altered invoice. There is no evidence on record to show that this happened.

In view of the findings I have made in the preceding paragraphs, I find that the Plaintiff has failed, on a balance of probabilities to prove that it is entitled to the sum claimed of USD10,699.04. Therefore, in answer to the issue I have raised in the earlier part of this judgment, I find that the parties did not agree on the Defendant paying the additional charges and the Plaintiff is therefore not entitled to the sum of USD10,699.04. The Plaintiff's fate is compounded by the fact that an addition of the three figures that allegedly constitute the USD10,699.04 claimed, exceeds USD10,699.04. The sum of USD8,632.92, USD2,873.00 and USD207.00 is a figure in excess of USD11,000.00. Therefore, I am at large as to how the Plaintiff arrived at the figure USD10,699.04.

In arriving at the foregoing findings I have considered the arguments advanced and authorities referred to by counsel for the Plaintiff. The first argument was that the Defendant was obliged to pay for the additional freight charges and incidental costs because the Defendant had in previous course of dealings with the Plaintiff paid for such goods returned. I have dismissed this argument for two reasons. The first is that there was no evidence led by the Plaintiff to show that in its previous dealings with the Defendant the latter had borne the extra costs for freight and incidentals whenever goods were returned. Further, the Plaintiff does not make any such contention or averment in the statement of claim neither was evidence also led to that effect. In **Halsbury Laws of England 4<sup>th</sup> edn, volume 9** at paragraph 353 which counsel for the Plaintiff referred to it states as follows:

*"It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other*

*transactions in which known usages have been established and have prevailed; and this has been done upon the principle of presuming that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but meant to contract with reference to those known usages. A fortiori, this must be the case where the express agreement is wholly or partly oral.*

*Thus in the absence of evidence of a contrary intention, a court may import into a contract any local custom or usage which is notorious, certain, legal and reasonable and, provided that it can be shown that the custom or usage normally governs the particular type of contract in question, it will be regarded as part of that contract in precisely the same manner as if it had been expressly agreed between the parties."*

It is clear from the foregoing passage that extrinsic evidence must be led if a court is to impute custom or usage. Further, the custom or usage sought to be imputed must arise from a notorious fact. The Plaintiff's counsel as I have stated did not lead any evidence through PW to prove the alleged custom, usage or practice whereby the Defendant paid all freight charging, and neither is it a notorious fact to enable this court impute such custom, usage or practice. To this end, counsel for the Plaintiff's conduct in making such submissions amounts to testifying at the Bar which is not permissible. Secondly, I have already found as a fact that the terms and conditions of the contract that governed the relationship of the parties are contained in the various correspondence passing between the parties. As such, these documents should have contained a provision to the effect that in determining the rights and obligations of the parties, past conduct of the two will be taken into consideration.

The second argument was that DW's statement that the Plaintiff had in fact agreed to bear all the extra costs was an afterthought as it had not been specifically pleaded. It was argued that in view of the fact that the Defendant did not lead any evidence in chief or plead on this issue it

failed to prove it. Counsel relied on the case of **Rudnap (Z) Limited Vs. Spyron Enterprises Ltd.** <sup>(1)</sup> In the said case the facts were as follows. The Defendant's counter-claimed money due for the supply of goods and for services rendered. The Plaintiff admitted the supply of goods but claimed that the cost thereof had been included in a cheque for a larger sum which had been paid to the Defendant. There was a running account between the Plaintiff and the Defendant upon which various moneys were paid from time to time. There was no specific evidence that the larger sum paid by the Plaintiff to the Defendant included the amount claimed in the counter-claim. The Plaintiff was a limited company renting premises from another limited company. The Defendant carried out building work to the premises at the request of a man who was alleged to be an agent for the Plaintiff Company. The plaintiff denied that the man who entered into the contract was its agent. The alleged agent was not called to give evidence.

The relevant portion of the holding of the court was that the onus was on the debtor to prove whatever moneys had been paid were specifically in respect of the amount claimed. It was not enough for the debtors' witness to say that a cheque for a far larger amount had been paid to the creditor.

The principal expressed in the **Rudnap** case as is reflected in the holding is good law. However it is not of relevance to this case because the circumstances in that case are different from the circumstances in this case. In the **Rudnap** case, the issue of payment by the Plaintiff for the goods supplied to it by the defendant was a contention which the Plaintiff had to prove. In other words, in answer to the Defendants counter claim, the Plaintiff contended that it had actually paid for the goods. There was therefore need for the Plaintiff to prove the said contention. In our case the Defendant did not contend that the Plaintiff agreed to bear all the extra costs. DW only made such statement in response to a question in cross examination and emphasised the fact that no such agreement was reached. There was therefore no need for the Defendant to prove or plead



the said response as in any event the responsibility of proving that the extra costs were to be borne by the Defendant lay with the Plaintiff.

Further, the Defendant has no obligation whatsoever to disprove a claim against it. Therefore, even assuming the assertion by DW was to be termed a counterclaim, its proof or otherwise has no bearing on the Plaintiff's claim which in any event has failed and I accordingly dismiss the argument.

The third argument is that the Plaintiff had informed the Defendant of the additional costs that had arisen as a consequence of its rejecting the goods and as such the Defendant is liable. I have already dealt with this in the earlier part of this judgment. Therefore I shall not dwell on it in detail here. Suffice to say that informing a party as to additional costs does not amount to agreement to pay for the goods. Further, the case of **Zambia Consolidated Copper Mines Limited Vs. Goodward Enterprises Limited**, <sup>(3)</sup> which the Plaintiff called in aid of its arguments on this issue does not aid the Plaintiff. The holding in that case at page 48 is as follows:

*"Where the buyer **wrongfully neglects or refuses to accept and pay for goods**, the seller may maintain an action against him for damages for non acceptance."*

(The underlining is the court's for emphasis only)

It is clear from the facts of this case that the Defendant did not "wrongfully neglect or refuse to accept ..." the goods. The Plaintiff in this case had accepted the Defendant's refusal to take the goods and decided to take them back to South Africa, whilst in the **Zambia Consolidated Copper Mines** case the holding suggest that there was no agreement between the parties on the Appellant's rejection of the goods. For that reason the **Zambia Consolidated Copper Mines** case is distinguished from this case and has no relevance to the issue in this matter.

Having found no merit in this action, I accordingly dismiss it with costs. The same are to be agreed in default taxed.

Leave to appeal is granted.

**DELIVERED THIS 24<sup>TH</sup> DAY OF FEBRUARY, 2015**

**NIGEL. K. MUTUNA  
HIGH COURT JUDGE**