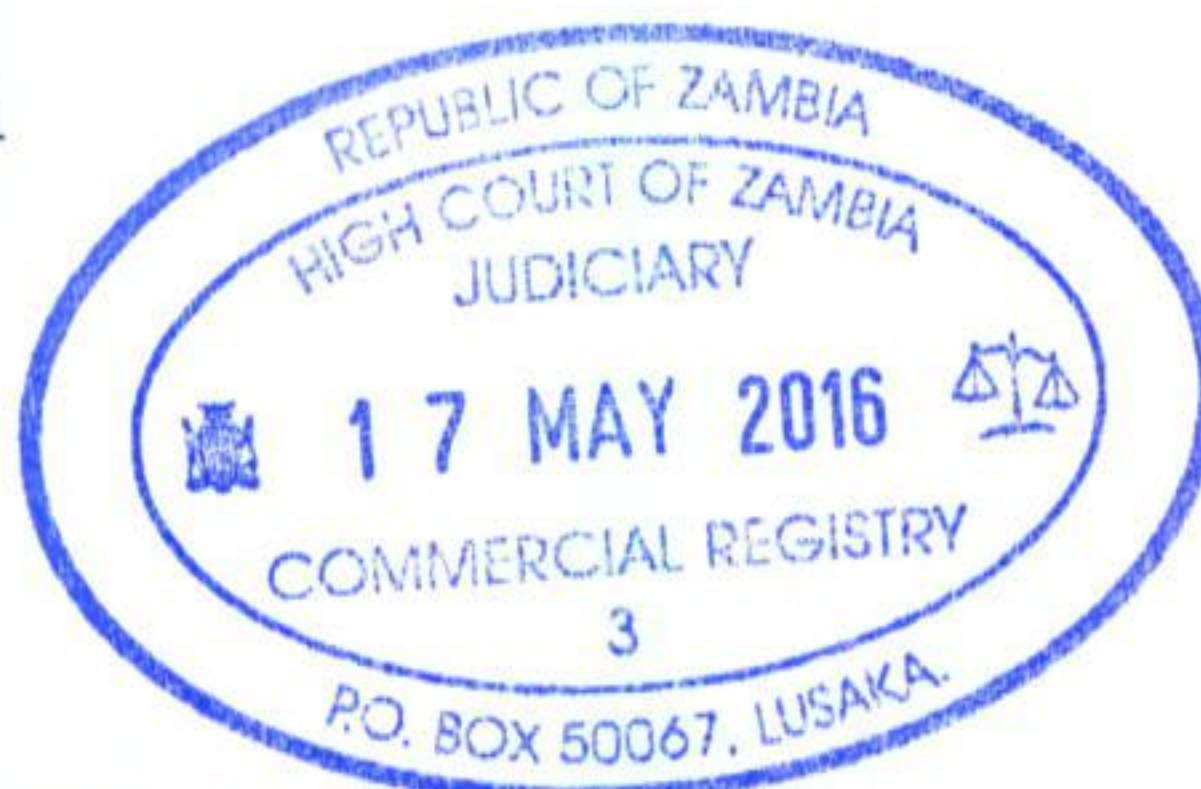


IN THE HIGH COURT FOR ZAMBIA  
AT THE COMMERCIAL REGISTRY  
HOLDEN AT LUSAKA  
(Civil Jurisdiction)

2013/HPC/0359



**BETWEEN:**

AFRI-LINK IMPORT AND EXPORT LIMITED  
AND

PLAINTIFF

MULTI-INDUSTRY LIMITED

DEFENDANT

**BEFORE HON. MADAM JUSTICE PRISCA MATIMBA NYAMBE, SC  
AT LUSAKA IN CHAMBERS**

For the Plaintiff:

Mr. W Mweemba  
*Messrs Mweemba & Co.*

For the Defendant:

Mr. K M G Chisanga  
*Messrs K M G Chisanga Advocates*

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**JUDGMENT**

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**Legislation referred to:**

Halsbury's Laws of England Volume 25, 4<sup>th</sup> Edition in paragraphs 725 and 726

By this action the Plaintiff seeks the following reliefs:-

1. Payment of the sum of K71,600.00 being sum due for transportation services.
2. Interest.

3. Costs; and
4. Any further relief the court may deem fit to award.

By an agreement dated 18<sup>th</sup> March 2013 entered into between Afri-Link Import and Exports Limited and Multi-Industry Limited, Afri-Link Import Limited was contracted by the Defendant to transport the following vehicles:-

1. Thirty (30) units of Dongfeng 20 ton brand new Tippers.
2. Thirteen (13) Units of Dongfeng Tipper trucks and Mechanic Horses with thirteen (13) Low bed Trailers, from the Port of Dar-es-Salaam, Tanzania, and to bring all of them safely to Manica Bonded Warehouse at Makeni, Lusaka for Multi-Industry Ltd without any damages. Any damages occurring on the road from the place of collecting to the place of delivery was to be the responsibility of Afri-Link Import and Exports Company expenses.

According to the Agreement Letter signed by the Defendant and **Mr. Nyendwa** and **Mr. Mukelabai** on 6<sup>th</sup> June 2013, the Defendant paid the said **Mr. Nyendwa** and **Mr. Mukelabai** US \$13,500.00 and ZMK450.00 for them to transport the remaining fifteen (15) Tippers and spares to Lusaka, Zambia without any damages and hand them over to Manica without parts missing.

Additionally on 28<sup>th</sup> May 2013 an amount of K15,000.00 was paid to and collected by **Mr. Nyendwa**.

The Plaintiff contends that it duly performed its part of the bargain and delivered all the said units to the Defendant by 20<sup>th</sup> June 2013. That there is still due and payable to the Plaintiff in respect of services rendered a balance of K71,600 after the Defendant made an advance payment of US \$8,400.00 and K2,000 on 18<sup>th</sup> March 2013. AND the Plaintiff claims:-

1. Payment of K71,600.00 being payment due from the Defendant to the Plaintiff for transportation services;
2. Interest at bank lending rate from the date of Writ until payment;
3. Costs incidental to this action;
4. Further relief the Court may deem necessary to award.

In its defence the Defendant stated that although the Plaintiff delivered the vehicles it was contracted to deliver, one of them arrived damaged contrary to the terms of the agreement.

In the event the Defendant Counter-claimed a total sum of K158,178.00 or any higher or lesser sum in respect of the repairs of the damaged vehicle; and interest on the said sum at the current bank lending rate; and costs incidental to these proceedings.

In its reply the Plaintiff effectively admitted that the tipper was damaged in a road traffic accident while being driven by the Plaintiff and/or its agents en route from Dar-es-Salaam, Tanzania to Lusaka Zambia. The Plaintiff admits that there was an agreement that all deliveries should be in good condition; but

that the damages concerned were as a result of a mechanical fault not contemplated in the agreement.

The Plaintiff admitted further that the initial sum for the business transaction was K41,500.00 as labour charges, but that it incurred extra expenses in transit which were unforeseen.

From the point of view of commercial activity, there are instances when one person becomes a bailee of goods belonging to another person, such as carriage of goods by sea, air and land. In the case in *casu* the goods were transported by land.

**In Halsbury's Laws of England Volume 25, 4<sup>th</sup> Edition in paragraphs 725 and 726 it is stated as follows:-**

*“One feature of the position under common law of such a bailee is that he commonly has a lien for his charges or expenses and by virtue of his lien he is accepted as having an insurable interest in the goods bailed not merely to the extent of his charges or expenses as at any given date but up to the full value of the goods”.*

*“Quite apart from his interest by virtue of his lien or otherwise, unless there are special terms of his contract to the contrary, a bailee may be legally liable to the owner if the subject matter of the bailment is damaged or destroyed”.*

*“Where a bailee assumes the obligation to insure the goods while in his possession, he will be answerable in damages if he fails to insure, and this obligation gives him an insurable interest up to the full value”.*

It is not in dispute that the Plaintiff and the Defendant entered into an agreement dated 18<sup>th</sup> March 2013, whereby the Plaintiff was contracted by the Defendant to collect and deliver the Defendant’s vehicles from the Port of Dar-es-Salaam, Tanzania, to Manica Bonded Warehouse, Lusaka Zambia. The agreement appears at pages 1 – 3 of the Defendant’s Bundle of Documents.

It is also not in dispute that it was an express term of the said agreement that the Plaintiff would deliver the said vehicles without any damages and that any damages occasioned to the vehicles from the point of collection to the point of delivery would be the responsibility of the Plaintiff.

It is further not in dispute that while the Plaintiff was transporting the Defendant’s vehicles one of the vehicles, a Tipper was damaged following a road traffic accident.

The Plaintiff accepts the fact that the vehicles were damaged while in its possession while being transported from the point of collection, but argues that it was not liable to repair the Defendant’s Tipper, since the damages arose from an accident that was neither its fault nor foreseeable. The agreement does not state that the Plaintiff would only be liable for damages arising from its fault or those that are foreseeable. It is not a question of whether or not the Plaintiff was to blame for the accident or not for liability to arise. Liability arises by the failure to insure the vehicles where the Plaintiff had accepted

monies to insure the vehicles but failed to do so. In *casu* the Plaintiff received monies from the Defendant to take out Insurance covers on the vehicles from Dar-es-Salaam to Lusaka. The Policies produced by the Plaintiff in its supplementary Bundle of documents were for use only on the Tanzania portion of the trip. As matters turned out the accident happened on the Zambian portion of the trip. I do not accept the **PW1**'s evidence that the Defendant had told him that the vehicles do not require to be insured as they belonged to Government. If the Defendant had requested the Plaintiff not to insure the vehicles, why would it have paid money to the Plaintiff to take out Police Covers in the first place. The Plaintiff took a calculated risk by not insuring the vehicles all the way from Dar-es-Salaam to Lusaka, and it must bear the consequences. By accepting the obligation to insure the vehicles, the Plaintiff was liable and insurable in damages, for failure to move the vehicles. As stated by the Learned Authors **Halsbury's Laws of England** quoted above, where a bailee assumes the obligation to insure the goods while in his possession, he will be answerable in damages, if he fails to insure; and this obligation gives him an insurable interest up to the full value.

The Agreement was very clear and unambiguous. The Plaintiff would deliver the vehicles safely without any damages and that any damages occasioned to the vehicles from the point of collection to the point of delivery would be the responsibility of the Plaintiff. As the vehicle was damaged while in its possession and having failed to insure the same, the Plaintiff is liable for the damages that occurred.

The evidence of **PW1** was contradictory. On one hand **PW1** agreed that the Plaintiff was liable to effect repairs to the Defendant's vehicles damaged while

in its custody, while on the other hand he stated that it was not liable as damages were neither the Plaintiff's fault nor foreseeable. It follows that the evidence that the Plaintiff offered to repair the vehicle is somewhat contradictory and cannot be accepted. Rather I find the Defendant's evidence who maintained that the Plaintiff refused to attend to the repairs of the damaged vehicle more probable.

Since the Plaintiff refused or neglected to repair the Vehicle, the Defendant was entitled to withhold the balance of K41,500.00 due to the Plaintiff.

Moreover the Plaintiff was not entitled to charge any additional amounts for spares as according to the Agreement the spares were part of the whole consignment for which a fixed amount was agreed and payment was made and received by the Plaintiff.

In the event, the Defendant's Counter-claim is allowed for all repairs undertaken by the Defendant following the Plaintiff's failure to repair the damaged vehicle. I am satisfied on a balance of probability that the listed items were found to have been damaged, during the accident accepting the fact that the weight of the vehicle on impact occasioned the damages listed. This is in fact corroborated by the evidence of **DW2** who explained how the accident happened. He stated that he passed through a hill that had been cut in between and then fell into a ditch or drainage. The Cabin went into the ditch or drainage and stone hit the grill and bonnet.

Equally the evidence adduced does not support the Plaintiff's proposition that it is entitled to be remunerated on a *quantum meriut* basis.

With all the above in view the Plaintiff has failed to prove all its claims, in total and the action is accordingly dismissed with costs to the Defendant, to be taxed in default of agreement.

Right to Appeal granted.

Dated this.....<sup>17<sup>th</sup></sup>.....day of .....*May*.....2016



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**Prisca M. Nyambe, SC**  
**JUDGE**