IN THE HIGH COURT FOR ZAMBIA **2015/HP/1388**

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

NKHOSI BREWERIES LIMITED **PLAINTIFF**

AND

NSIMBI TRUCKING (PTY) LIMITED **DEFENDANT**

BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO, ON 29TH MARCH, 2018

For the Plaintiff: *Ms. C.M. Mwansa - Messrs. EBM Chambers*

For the Defendant: *Mr. M.Z. Mwandenga- Messrs. Mwandenga & Co.*

JUDGMENT

CASES AUTHORITIES REFERRED TO:

1. *Zambia Railways Limited vs. Pauline S. Mundia Sialumba (2008) Vol. 1 ZR 287;*
2. *K. B. Davies and Company (Z) Limited vs. Musunu - Appeal No. 181 of 2006;*
3. *Colgate Palmolive (Z) Limited, Chuka and Others - Appeal No. 181 of 2005;*
4. *Printing Numerical Registering Company vs. Simpson (1875) L. R. 19 EQ 462;*
5. *Attorney General vs. Moyo* (2007) ZR 38;
6. *Holes Limited vs. Buildwell Construction Company Limited (1973) ZR 97;*
7. *Phillip Mutantika and Another vs. Kenneth Chipungu - SCZ No. 13 of 2014;*
8. *Khalid Mohamed vs. Attorney General (1982) ZR 49;*
9. *Nicolene Limited vs. Simmonds (1953) 1 All ER 882;*

10. *Associated Chemicals Limited vs. Delamain Zambia Limited and Ellis & Company (1998) ZR 9;*
11. *B. P. Zambia Plc vs. Interland and Motors Limited (2001) ZR 37;*
12. *Robson Sikombe vs. Access Bank (Z) Limited - SCZ Appeal No. 240/2013;*
13. *JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited (2002) ZR 112;*
14. *Match Corporation Limited vs. Development of Zambia (1999) ZR 13; and*
15. *Zambia Exports and Imports Bank Limited vs. Mkuyu Farms Limited, Elias Andrew Spyron & Mary Ann Langley Spyron (1993 - 1994) ZR 36 (S.C.).*

LEGISLATION AND OTHER WORKS REFERRED TO:

1. *Treitel: Law of Contract, 13th Edition, Sweet & Maxwell;*
2. *Brooms Legal Maxims, 10th Edition, Sweet & Maxwell;*
3. *Making Commercial Contracts, John Harris, BSP Professional Books, 1988;*
4. *High Court Act, Chapter 27 of the Laws of Zambia;*
5. *The Judgments Act, Chapter 81 of the Laws of Zambia;*
6. *Halsbury's Laws of England, 4th Edition (re-issue) Vol. 1 (1);*
7. *Commercial Law, Roy Goode, 3rd Edition;*
8. *Chitty on Contracts, Vol. 1 General Principles, 31st Edition, London, Thompson, Reuters (Legal) Limited, 2008; and*
9. *Halsbury's Laws of England, Vol. 9 (1).*

The delay in delivering this Judgment is regretted. It is due to the amount of cases in backlog re-allocated to this Court.

The Plaintiff, Nkhosi Breweries Limited launched this action against the Defendant, Nsimbi Trucking (PTY) Limited, on 17th September, 2015. The action was commenced by way of Writ of Summons and Statement of Claim, whose endorsement is as follows: -

1. *Damages for breach of contract entered into between the Plaintiff and Defendant on 18th February, 2014 for shipping of the Plaintiff's seven (7) trucks at a hire charge to the Defendant at the rate ZAR22,000.00 for each*

truck and shipping the Plaintiff's two (2) one (1) ton vans, all from Johannesburg, South Africa to Kafue, Zambia;

2. *Special damages in the sum of K15,000.00 being costs of accommodation and travel to and from Johannesburg, South Africa in an attempt to ensure that the Defendant fully honoured its part of the contractual agreement between the parties hereto;*
3. *Payment of ZAR63,000.00 or its Kwacha equivalent K34,496.38 being the total balance left outstanding for the hire of the seven (7) trucks;*
4. *Delivery of the Van the Plaintiff purchased or alternatively the payment of USD13,000.00 or its Kwacha equivalent K102,179.93 being the full purchase of the Van;*
5. *Payment to the Plaintiff of the sum of USD5,000.00 or Kwacha equivalent K39,300.00 which was paid to the Motor Vehicle distributor/dealership in South Africa as a deposit for the second Van that the Defendant later collected from the said distributor/dealership without the Plaintiff's knowledge and authority;*
6. *Interests on sums of money found due and owing to the Plaintiff; and*
7. *Costs of this action.*

The Statement of Claim began by revealing the capacities of the two parties as being, a company incorporated under ***The Companies Act***[1] carrying on business of brewing opaque beer and a company limited by shares, incorporated and having its registered office in the Republic of South Africa, carrying on a business of trucking and shipping, respectively. Further, that on 18th February, 2014, the Plaintiff, entered into a contractual agreement with the Defendant for the shipping and delivery of seven (7) trucks at a hire charge to the Defendant at twenty two thousand South African Rand (ZAR22,000.00) each and also for the shipping and delivery of two

(2) 1 metric tons vans from Johannesburg, South Africa to Kafue, Zambia. The Plaintiff did purchase the seven (7) trucks and one (1) van from the truck and motor vehicle dealerships/distributors, which trucks and motor vehicles the Defendant did collect from the dealerships/distributors, but to date the Defendant has failed to deliver to the Plaintiff the van it purchased from Johannesburg, South Africa to Kafue, Zambia as per contractual agreement.

By the said contractual agreement, the Defendant undertook to ship the said seven (7) delivery trucks and two (2) 1 metric ton vans from Johannesburg, South Africa to Kafue, Zambia on condition that each truck was to be shipped with goods belonging to the Defendant at a hire charge of ZAR22,000.00 payable to the Plaintiff by the Defendant less commission of Two Thousand South African Rand (ZAR2,000.00) per truck, Four Thousand South African Rand (ZAR4,000.00) per truck for driver allowance and Seven Thousand South African Rand (ZAR7,000.00) per truck for fuel and therefore leaving a total balance of Nine Thousand South African Rand (ZAR9,000.00) per truck from the ZAR22,000.00 hire charge for each truck, which sums of money still remain unpaid to the Plaintiff to date.

The Plaintiff paid the Defendant directly through it Managing Director Mr. Jonas Zulu the sum of Five Thousand United States Dollars (US$5,000.00), which sums of money were to be paid by the Defendant to the motor vehicle dealership as a deposit for the purchase of the second van on behalf of the Plaintiff, which sums

were paid by the Defendant but later collected as a refund by the Defendant from the motor vehicle dealership without the Plaintiff's knowledge or authority and which sums the Defendant has to date failed to pay back to the Plaintiff. The Plaintiff made numerous requests to the Defendant to honour its part of the contract, but the Defendant has to date failed, refused and or neglected to fully honour its part of the contractual agreement. The Plaintiff alleges that as a direct consequence of the Defendant's actions, the Plaintiff has suffered loss and damages.

In response, the Defendant filed herein, Defence and Counter-Claim, on 26th October, 2015. In the defence, the Defendant admitted the existence of the contract for the shipping and delivery of 7 trucks and 1 van from Johannesburg, South Africa to Kafue, Zambia, but denied that the Defendant collected the said motor vehicles. The Defendant averred that the Plaintiff also purchased another van thereby bringing the number of vans initially purchased by the Plaintiff to two. The Defendant's Defence against the Plaintiff's claims could be summarised as follows:

1. That while it is correct that the Plaintiff and Defendant entered into a contract, dated 18th February 2014, to ship the Plaintiff's seven (7) trucks from Johannesburg, South Africa to Kafue Zambia, the Defendant contends that it was the Plaintiff's agent, one Stephen Mashingo, a South African national, with the agreement and concurrence of the Plaintiff that actually collected the said trucks herein

from the distributor/dealership. Further that for reasons known to the Plaintiff, Stephen Mashingo is still keeping one Van being claimed by the Plaintiff herein and accordingly, the Defendant denies that it failed to deliver the seven trucks as alleged by the Plaintiff in its claims;

2. The Defendant contends that the Plaintiff and Defendant had agreed that the Defendant would pay the driver that shipped the Vans a ration sum of ZAR4,000.00 and fuel expense of ZAR3,500.00. The total of these expenses for the two (2) Vans contracted for shipment was put at ZAR15,000.00 and this total sum, it is claimed by the Defendant, was deductable from the transportation costs agreed between the Plaintiff and Defendant presumably in the contract signed. That the Defendant paid the Plaintiff's said agent Mr. Mashingo a total sum of ZAR15,000.00;

3. The Defendant also contends that it was verbally agreed between the parties hereto that the Defendant would expend ZAR1,500.00 for each Van contracted to be shipped for purposes of undertaking necessary legal documents related to the Van in order for them to be shipped from South Africa to Zambia. This sum was deducted from the contract sum agreed in the contract herein. That the Defendant paid the Plaintiff's said agent a total sum of ZAR3,000.00;

4. The Defendant caused to be transported the first set of 2 trucks, which were laden with goods belonging to the Defendant's customers and 1 van on or about 14th March 2014, to Zambia. That the other van was in the custody of the Plaintiff's agent.
5. The Defendant avers that prior to transporting the vehicles, the Plaintiff claimed that the trucks which it had purchased had been pre-cleared but when the trucks arrived at the Livingstone Border in Zambia, it turned out that the trucks had not been cleared. That these two trucks were impounded at the border by Zambia Revenue Authority (ZRA) for non-payment of duties or taxes and remained so impounded for about 10 days or so;
6. The Defendant further caused to be transported another set of 2 trucks to Zambia also laden with the goods belonging to the Defendant's customers, but the said 2 trucks were also impounded at the Livingstone Border by ZRA for non-payment of duties or taxes and remained impounded for 14 days or so. The Plaintiff then requested the Defendant to delay the transportation of the third set of 2 trucks on account of the fact that the Plaintiff was having serious problems in clearing its trucks with ZRA;
7. Since the trucks had been impounded, the Defendant was not able to deliver the goods laden on the trucks within the time frame agreed with its customers. Following numerous complaints from the Defendant's customers, it

was verbally agreed that the customers should at the expense of the Plaintiff hire 2 trucks from Lusaka to transport their goods from the Livingstone Border on the understanding that the Plaintiff would reimburse the Defendant the money it was going to refund its customers in respect of the hire of the 2 trucks. These 2 trucks were hired by the customers at a total cost of K15,000 each to collect their goods and the Defendant duly refunded the K30,000.00 to its customers;

8. The third set of 2 trucks were later delivered directly to the Plaintiff in Kafue. Due to the fact that the Defendant was having problems with the Plaintiff over the clearing of its trucks with ZRA, the Defendant refused to transport the seventh truck to Zambia and it was verbally agreed with the Plaintiff that it could make alternative arrangements for the delivery of the same. The seventh truck was thus delivered to the Plaintiff by the Plaintiff's said agent Mr. Mashingo, hence the Plaintiff is not entitled to claim any money in respect of the transportation of the seventh truck from the Defendant.

9. The amount of US$5,000.00 paid by the Plaintiff to the Defendant was for the purchase of a third van and not for a second van as alleged by the Plaintiff. This amount was paid in or about March 2014 to the motor vehicle dealership by the Defendant on behalf of the Plaintiff as deposit towards the purchase of the third van on lay-by

terms but the Plaintiff in breach of the lay-by terms, refused, failed or neglected to pay the balance of the purchase price within 1 month as agreed. Accordingly, the motor vehicle dealership in or about December 2014, refunded the US$5,000.00 less charges and /or interest of ZAR2,750.00 per month. Thus only ZAR27,750 was paid to the Defendant, which the Defendant has been ready and willing to pay to the Plaintiff, but which the Plaintiff has refused to accept.

In sum, the Defendant states that the Plaintiff is not entitled to the reliefs sought.

In its counter-claim, the Defendant states that it is entitled to deduct the following money that it expended: -

1. Drivers' ratio and for fuel amounting to ZAR15,000.00;
2. Documentation for the 2 vans in the amount of ZAR3,000; and
3. Money paid on behalf of the Plaintiff to refund customers for hiring 2 trucks from Lusaka to transport goods from the Livingstone Border in the amount of K30,000.00.

The Defendant further counter-claims interest on the above sums, other reliefs as the Court may deem just and costs.

In its reply and defence to counter-claim, the Plaintiff avers that its associated company, Tradex Limited, engaged Stephen Mashingo to deliver 1 van from South Africa, which van is separate from the 2

vans referred to in the contract with the Defendant and that Stephen Mashingo's role ended with his delivering the said van for Tradex Limited and not the Plaintiff company.

The Plaintiff further avers that all agreements and or changes to the contract were to be put in writing as provided and stated in the said contract. It is also averred by the Plaintiff that the arrangement was for the Plaintiff to appoint an agent to clear the vehicles when they got to Livingstone and that no trucks were impounded.

The Plaintiff states that at that time K15,000.00 was equivalent to ZAR25,000.00 and therefore it does not make logical sense for one to be charged a hire price of ZAR25,000.00 (equivalent to K15,000.00 at that time) per truck from Livingstone to Lusaka, when the Plaintiff hired out its trucks to the Defendant from South Africa to Lusaka, Zambia at a hire charge of ZAR22,000.00 each. That it is the Plaintiff itself that engaged another contractor/agent for the delivery of the seventh truck to Zambia due to the inordinate delays of the Defendant and that no refund of any monies has been paid by the Defendant to the Plaintiff, despite the Defendant's numerous promises on refunding the same to the Plaintiff.

In sum, the Plaintiff denies the Defendant's counter-claim and avers that to date not even one van of the two as contained in the contractual agreement between the Plaintiff and the Defendant has been delivered to the Plaintiff. That there were no changes to the contract made in accordance with the express terms of the contract entered into on 18th February, 2014 and that the Defendant is not

entitled to any of the claims or reliefs sought in its counter-claim as it breached the contract by failing to fulfil its contractual obligations under the contract.

When the matter came up for trial, the Plaintiff's witness Ernest Chikonye, a General Manager of the Plaintiff company testified as PW1. He stated that the Defendant company through its representative, a Mr. Jonas Zulu approached the Plaintiff to discuss the possibility of the Defendant delivering trucks that the Plaintiff had bought in South Africa, as it was involved in ferrying goods between Johannesburg and Lusaka. It was explained to the Plaintiff that there was a business opportunity that it could explore by allowing the Defendant to hire the trucks to bring goods from Johannesburg instead of the trucks coming empty. On that basis, the two parties entered into an agreement, which was reduced in writing.

The key features of the contract were the delivery by the Defendant to the Plaintiff of 7 by 10 tons trucks from Johannesburg to Kafue, as well as 2 vans. The agreed cost for each truck was ZAR22,000.00, which was to be the hire charge to be paid by the Defendant to the Plaintiff and that the costs associated with delivering the trucks, including fuel, the hire of the drivers, toll fees, other related costs during transit were supposed to be deducted from the hire charge of ZAR22,000.00. The hire charge per truck less the delivery costs amounted to ZAR9,000.00 per truck, which was supposed to be payable by the Defendant to the Plaintiff. For

the vans, the charge was ZAR7,500.00 per van and the cost of delivery was to be deducted from the net hire charges that were agreed for the trucks. The parties also included a clause in the said agreement that stated that if any party to the contract would feel the need for changes to the terms agreed, they would be at liberty to request for such changes in writing. PW1 referred the Court to page 1 of the Plaintiff's Bundle of Documents, which show the said agreement.

PW1 testified that the net balance from each truck of ZAR9,000.00 that was to be paid by the Defendant to the Plaintiff has not been paid to date and that the 2 vans have never been delivered to the Plaintiff by the Defendant as agreed. According to PW1, the Plaintiff paid for the first van in full and yet the Defendant failed to deliver it. That the Plaintiff also paid a deposit towards the second van, but the supplier of the van where the deposit was made decided to refund the deposit after the expiry of the grace period given to settle the balance. It was also his testimony that the purchasing of the vans was being done on behalf of the Plaintiff by the Defendant, who through its Director Jonas Zulu collected a sum of US$15,000.00 from the Plaintiff. PW1 referred the Court to page 6 of the Plaintiff's Bundle of Documents, which shows that Jonas Zulu acknowledged receipt of the said sum being payment towards two Nissan hard body vans that the Plaintiff had purchased in South Africa. That the 2 vans have not been delivered by the Defendant as agreed in the contract.

PW1 further dismissed the Defendant's counter-claim saying that it was surprising to him that the Defendant was now counter-claiming from the Plaintiff money as stated in its counter-claim, when no vans have been delivered by the Defendant to the Plaintiff as provided in the contract and no adjustments were made to the contract. Further, that there was no way that the Plaintiff could have agreed to the Defendant's customers arranging 2 trucks to ferry their goods from Livingstone to Lusaka, a distance of less than half of Johannesburg to Lusaka, at the cost of K15,000.00 per truck, when in the contract the amount provided for hire per truck from Johannesburg to Lusaka is ZAR22,000.00 which was equivalent to K16,000.00 at the time.

In cross-examination, PW1 maintained that the arrangement between the two was reduced into writing and that if the parties saw a need for an adjustment, there was a clause specifically referring to how that had to be done. He conceded that the contract did not provide for who was to pay for the duties or taxes, but that it was to be done by the Plaintiff and which duties/or taxes the Plaintiff, in any event paid. He maintained that the 2 vans had not been delivered to date by the Defendant to the Plaintiff, but conceded that he was not aware that in the Statement of Claim, the Plaintiff claims only 1 van.

Further, PW1 maintained that the Plaintiff was claiming for trucks that were not delivered, but conceded that he was not aware of the number of trucks that were delivered. He stated that he was there

when the first 2 trucks and second 2 trucks were delivered, but had not been aware that the trucks had been impounded. PW1 stated that when importing a vehicle, it will be allowed into the country when duty is paid or one can arrange to pay at Lusaka ZRA ports within 7 days and that when the first set of 2 trucks arrived duty was paid within a week from the time that they arrived at the border. For the second set of 2 trucks, PW1 stated that he could not remember when the duty was paid as he was not involved since he is not the one who does the clearing of the vehicles. According to PW1, it was the hired agents' responsibility to clear at the border, but he could not remember the specific names of the agents that were hired.

PW1 maintained that any arrangement that was not provided for in the agreement, would necessitate an amendment to the agreement should the parties deem it necessary and that no such arrangement arose as there was no adjustment made to the contract. That the payment of duty/or taxes was deemed unnecessary to include in the said contract as it was obvious that it was an obligation of the importer, being the Plaintiff.

PW1 conceded that the third set of 2 trucks were delivered but stated that after the first set of 2 trucks were delivered, the balance of five trucks were not delivered in batches of two, but were delivered one after the other. That he was not always there at the Plaintiff's premises when the trucks were delivered as they would sometimes be delivered in the night or early morning. When asked

if six trucks were delivered to the Plaintiff, PW1 stated that ultimately all 7 trucks were delivered. That he was not aware that the seventh truck was not delivered by the Defendant.

PW1 stated that he was not aware of the amounts to be deducted from the hire charges and of the legal documentation for the exportation of these vehicles. He maintained that the Plaintiff did not engage Mr. Stephen Mashingo for the movement of the vehicles listed in the contract and that it was the Plaintiff's sister company Tradex Limited that engaged Mr. Mashingo to deliver a van that it had bought. He denied that Mr. Mashingo had been engaged by the Plaintiff for the movement of any of its vehicles. PW1 was referred to page 8 of the Defendant's Bundle of Document, which is an Affidavit deposed by Mr. Mashingo in which he deposes that he was given the mandate by the Plaintiff to collect 7 trucks from Boksburg and deliver them to the Defendant, who would then deliver to Zambia and that 6 trucks were delivered, while he delivered the seventh truck. Mr. Mashingo further deposes that he is still remaining with 1 van that he will deliver as soon as he resolves some issues. PW1 maintained that Mr. Mashingo was not engaged by the Plaintiff and that he was not aware of the contents of the said Affidavit. He further stated that if indeed such an arrangement arose, there would have been an adjustment to the contract.

PW1 also stated that even though he was not involved in the actual procurement of the vans and trucks in South Africa, he was the one

who drafted the contract and to the best of his knowledge and belief, only the 7 trucks were delivered, but not the 2 vans.

In re-examination, PW1 stated that when Jonas Zulu had first gone to negotiate the contract with the Plaintiff, he was in the company of Mr. Mashingo, whom he introduced as having worked with the Defendant in its business dealings in South Africa and as the person who was familiar with the shipping of vehicles from South Africa to Zambia. That at no time did the Plaintiff enter into any contract with Mr. Mashingo and that Mr. Mashingo was not a party to the contract between the Plaintiff and Defendant. PW1 stated that he was part of the meeting where negotiations were done between the Plaintiff and Defendant and it was at that meeting that he took down the minutes, which he later reduced into a written agreement that the Plaintiff and Defendant signed.

PW1 stated that no vans have been delivered by the Defendant to the Plaintiff and it was his belief that the van that the Plaintiff fully paid for is still in the custody of the Defendant. That the Plaintiff's sister company Tradex Limited was never part of the discussion nor was it ever mentioned during the discussion of the shipping of vehicles from South Africa to Zambia. That Tradex Limited, a company that deals in buying and trading agricultural products, is a separate legal entity from the Plaintiff. That the van that Mr. Mashingo delivered to Tradex Limited was not part of the arrangement between the Plaintiff and Defendant as can be seen from page 5 of the Plaintiff's Bundle of Document, which is a letter

head bearing the name of Tradex, where Mr. Chanda Mwiko, the Director of Tradex authorises Mr. Mashingo to drive its Nissan hard body. That Mr. Chanda Mwiko is not a director of the Plaintiff and has never been an employee of the Plaintiff.

The Plaintiff's second witness was Patrick Banda (PW2), an Executive Director of the Plaintiff company, who testified that he was introduced to Mr. Jonas Zulu, the proprietor of the Defendant company by a mutual friend. The purpose of being introduced to Mr. Jonas Zulu was for him to find somebody in South Africa that could facilitate the delivery of trucks and vans that had been purchased in South Africa by the Plaintiff. A contract was entered into between the Plaintiff who was represented by PW1 and the Defendant who was represented by Mr. Jonas Zulu.

According to PW2, the contract was for the delivery of 7 trucks and 2 vans by the Defendant. It was agreed by the parties that the Defendant would use the trucks to ferry goods at the agreed terms contained in the contract. PW2 stated that the salient terms of the contract were that the cost of fuel and drivers' upkeep would be met by the Defendant from the agreed hire charge and the balance from the hire charge of ZAR9,000.00 on each truck delivered would be surrendered by the Defendant to the Plaintiff. He further stated that to date the 2 vans have never been delivered by the Defendant and that the reason why 1 van has not been delivered is due to the fact that the supplier of the van decided to refund the deposit to the Defendant for non-payment of the balance on the purchase price.

According to PW2, the Defendant has not delivered 1 van which is still in its possession in South Africa and it has not paid the Plaintiff the refund for the other van, which was paid to its Director by the supplier of the van.

PW2 testified that the Plaintiff, acting through Mr. Chabwera Phiri, the Director of Tradex Limited, handed over the sum of US$15,000.00 to Mr. Jonas Zulu, which money came from the Plaintiff and that Mr. Jonas Zulu, who is the Director of the Defendant company, acknowledged receipt of the said sum. The Court was referred to page 6 of the Plaintiff's Bundle of Documents, which is a note of acknowledgment of the said sum.

It was also the testimony of PW2, that 7 trucks were delivered, abet with lots of challenges that were encountered. The Plaintiff was not sure on the number of trucks that were delivered by the Defendant, but stated that probably Five of the trucks were delivered by the Defendant. He further stated that the agreed balance from the hire charge of ZAR9,000.00 per truck has never been paid to the Plaintiff in accordance with the contract. He referred the Court to page 1 of the Plaintiff's Bundle of Document, which is a copy of the contract that the parties entered into.

On the counter-claims raised by the Defendant, PW2 stated that the counter-claim of ZAR15,000.00 is denied on account of the fact that the 2 vans have never been delivered, therefore there cannot be a claim for Drivers' allowances, as well as fuel expenses relating to the delivery of the 2 vans. PW2 further denied the Defendant's

counter-claim of ZAR3,000.00 for documentation for the vans on account of the fact that 1 van is still in South Africa with the Defendant, while the contract for the other van was cancelled and the deposit refunded directly to the Defendant. He also denied the counter-claim for K30,000.00 that the Defendant alleged that it paid for 2 trucks hired by its customers to ferry the goods from Livingstone to Lusaka, on account that it was not a term of the contract that the parties entered into. PW2 further stated that even if the parties had agreed to vary the contract, which is denied, the sum counter-claimed is overstated as the parties had agreed to the sum of ZAR22,000.00, which at the time was equivalent to K17,000.00, for hire charges of the each truck delivered from South Africa to Kafue, Zambia, a distance which is more than that between Livingstone and Kafue.

In cross-examination, PW2 maintained that the parties had entered into a contract that was prepared by PW1, but conceded that the contract did not provide for payment of duty. He stated that he does not have any business relations with Mr. Mashingo and maintained that the payment for the vans was handed over to the Defendant by the Plaintiff through a Director of its sister company Tradex Limited. He maintained that no van under the contract has been delivered by the Defendant and that the only van delivered by Mr. Mashingo was for Tradex Limited, which had nothing to do with the Plaintiff.

PW2 further stated that he was not aware of any penalties levelled by the supplier of the van and that he had travelled on four occasions to South Africa where Mr. Jonas Zulu failed to meet with him. He said that he was aware that there was documentation that needed to be processed for importation of motor vehicles and that Mr. Jonas Zulu was given US$15,000.00 for payment of the balance on 1 van, which he took possession of and the other US$5,000.00 which was a further deposit on the second van. That duty was never a consideration in this transaction as the Defendant was aware that the Plaintiff would clear the duty at the border as it did with the trucks. The Court was referred to page 7 of the Plaintiff's Bundle of Documents, which is a payment requisition showing payment of duty by Tradex Limited.

PW2 admitted that there were trucks that were impounded at the border for non-payment of duty and that these trucks had goods which were being transported by the Defendant for its customers, but denied that he had authorised the Defendant to allow its customers to hire vehicles to transport the goods from Livingstone to Lusaka as that was not part of the contract that the parties entered into. PW2 stated that he was not aware of the contents of the Affidavit deposed by Mr. Mashingo which is at page 8 of the Defendant's Bundle of Documents and that it was the first time that he was seeing this Affidavit.

In re-examination, PW2 reiterated that Mr. Mashingo was not an agent of the Plaintiff, but had acted as an agent for its sister

company Tradex Limited. He re-stated that the Defendant was obligated to deliver the trucks and vans from South Africa to Zambia in accordance with the Contract. When referred to page 8 of the Defendant's Bundle of Documents, PW2 stated that the words *"were supposed to"* indicates that the two vans were not delivered. He further re-stated that the ZAR5,000.00 was deposit paid on the van and that the Defendant did not at any time pay duty for the trucks from its pocket as that was not part of the contract. That the duty for the 7 trucks that were delivered was paid for by the Plaintiff as it was its obligation. He reiterated that the Plaintiff is not in any way indebted to the Defendant.

That marked the close of the Plaintiff's case.

The Defendant called one witness, who is Jonas Tyson Zulu (DW1), who is a cross border transporter and Director of the Defendant company. DW1 stated that he has a warehouse in South Africa near the bus station and that he is given goods to transport. It was his testimony that he met with the Director of the Plaintiff company for purposes of discussing the delivery of 7 trucks and 2 vans that the Plaintiff wanted to be moved from South Africa to Zambia. That he accepted to deliver the vehicles and a contract was drawn by the PW1, which the parties appended their signature to and which is at pages 1 - 2 of the Defendant's Bundle of Documents.

According to DW1, after the contract was signed by the parties, PW2 said that he would travel to South Africa to hand over the motor vehicles to him and to show him the person who would be

giving him the motor vehicles. That PW2 travelled to South Africa and went to his warehouse with Stephen Mashingo, where he explained to him that the trucks had been secured and were with the said Mr. Mashingo. He further told him that when he had a load, he should phone Mr. Mashingo, give him a driver for the trucks and then he could load the truck. It was his testimony that prior to this meeting he did not know Mr. Mashingo.

DW1 further testified that PW2 informed him that he had not purchased the vans and asked him to show him where he could get cheaper durable vans. That he showed PW2 a place called *"4 x 4"*, where vehicles which are involved in accidents are repaired and that PW2 paid cash above ZAR100,000.00 for one vehicle. That PW2 also left a deposit on two vehicles at ZAR5,000.00 for each and informed him that the vehicles will not be in the Plaintiff's name, but will be in the name of his other company Tradex Limited.

According to DW1, the first vehicle, a van was ready after a week of documentation being processed and it was delivered to Zambia. The documentation processed were Interpol, Police clearance and other legal documents, including road traffic clearance. That he paid ZAR1,500.00 for the documentation and fuel costs expended on processing the documentation. He stated that the first vehicle, a van, was delivered to Zambia together with two trucks and that Stephen Mashingo drove the van to Zambia. That the van was not a problem at the border but the 2 trucks were impounded and remained marooned at the border for 10 days, as they could not

reach an agreement on payment of duty, until the Plaintiff finally paid the duty.

DW1 testified that 2 more trucks were shipped to Zambia, but these were also impounded at Livingstone port offices because some documents were altered. That PW2 then flew to South Africa and informed him not to send the remaining trucks to Zambia, until further notice. PW2 further informed him to request the Defendant's customers to pick up their goods that were loaded on the trucks which were impounded at the Livingstone Boarder as he was in the process of appealing the duty imposed on the trucks.

It was the testimony of DW1 that since he had already loaded the third set of 2 trucks, he had no alternative but to go to the Cross Border Traffic to get permits for them to travel to Zambia, but that when they were checked, it was found that they had been cleared out of South Africa, hence he did not need to get the permits for them. He phoned the agent in Zambia who advised him that the trucks could travel as he would buy the cross border permits from Road Traffic and Safety Agency (RTSA) in Livingstone. These trucks were delivered to the Plaintiff.

DW1 also testified that he phoned PW2 to ask him about the outstanding balance on the two vans and he was informed by PW2 to collect US$15,000.00. That he collected the said sum and went back to South Africa where he paid the motor dealership US$10,000 being the full outstanding balance on 1 van and US$5,000.00 as deposit on the other van. The van that he paid for

in full was collected by Mr. Mashingo as he had been advised that Mr. Mashingo would be collecting the vans. That they processed the export documentation papers for the vans and he gave Mr. Mashingo ZAR3,500.00 for his fuel and ZAR4,000.00 as his ratio. DW1 further testified that Mr. Mashingo was meant to travel to Zambia, but he never left for Zambia. That the Plaintiff sent its manager Dean to come and collect that vehicle, but Mr. Mashingo told DW1 that he had problems hence he was not able to travel to Zambia. That Dean was in the company of Mr. Mashingo and it was agreed that Dean would drive the van to Zambia. That he believed that Dean had left for Zambia until he received a letter from the Plaintiff's lawyers demanding for the vehicles.

DW1 testified that the third vehicle had not been paid for in full within 30 days by the Plaintiff who had paid only ZAR5,000.00 as deposit. He referred to page 3 of the Defendant's Bundle of Documents which is a receipt for ZAR5,000.00 issued in the name of Tradex Limited. That there was a balance of ZAR110,000 and he was warned by the motor vehicle dealership that the Plaintiff would lose the money as they were charging penalties of ZAR2,750.00 each day that the balance was not paid for in full. He testified that a refund was eventually given to him in December 2014 by the motor dealership as he was advised that he could lose the whole amount paid as deposit and he informed the Plaintiff that the refund paid to him was less deductions for 9 months that they did not pay the outstanding balance. That he is ready and willing to pay this refund to the Plaintiff.

DW1 testified that he did not deliver the seventh truck and he informed the Plaintiff of this as he was having challenges at the border, which was causing him to lose customers. That he only delivered 6 trucks and he incurred bills for the two trucks hired from Lusaka to Livingstone and back to collect his customers' goods which amounted to K30,000.00. He further testified that the costs for the 2 vans should be deducted for fuel in the sum of ZAR3,500.00 and driver's ratio in the sum of ZAR4,000.00, as well as ZAR1,500.00 for documentation processed.

In cross-examination, DW1 denied that he lived with Mr. Mashingo in South Africa. He conceded that under the contract he was given the responsibility for delivery of the motor vehicles and that it would not make logical sense for the Plaintiff to engage another person to transport the motor vehicles when it had already engaged the Defendant. DW1 stated that the Plaintiff did not get any vans as it was only Tradex Limited that got the vans and as such he has never delivered any vans to the Plaintiff.

DW1 agreed that he delivered 6 trucks to the Plaintiff. When he was asked on the amount of US$15,000.00 that he had collected, he stated that he collected it from Tradex Limited for payment of the balance on the vans on behalf of Tradex Limited and that PW2 was the same as Tradex Limited even though he had not produced any document before Court to prove that PW2 and Tradex Limited were one and the same. He conceded that the 2 vans were not delivered to Zambia from South Africa.

In a turn around, DW1 conceded that the US$15,000.00 that he collected was based on the contract between the parties herein and that it would not make logical sense for the Plaintiff to instruct the Defendant to deliver the trucks as per the contract, but instruct another person to deliver the 2 vans that were included in the same contract. He further conceded that he was entrusted with the money to pay for the vans and that it does not make sense for the Plaintiff to entrust the delivery of the vans to someone else when the contract expressly entrusted the Defendant to do so.

DW1 reiterated that he had paid the motor dealership a further US$5,000.00 out of the US$15,000.00 that he had collected, towards deposit on 1 van and that the refund on the said van that he later received from the motor dealership was less penalties for 9 months, although he admitted that did not have any proof before Court to show that he had paid the motor dealership a deposit of US$5,000.00.

DW1 was referred to page 1 of the Defendant's Supplementary Bundle of Documents which shows that a deposit of ZAR5,000.00 was paid on 14th March, 2014. It is also hand written on the same document that the balance should be paid by 23rd May 2014 or else lay-by contract would be cancelled. When asked if it makes sense for the dealership to continue charging penalties if the lay-by contract was cancelled on 23rd May 2014, DW1 stated that the lay-by contract was not cancelled on 23rd May, 2014 as he kept talking to the dealership in the hope that he would get the money to pay

the balance from the Plaintiff, although he did not produce any document from the dealership to show how the penalties were computed.

DW1 conceded that he had not paid the Plaintiff the refund of US$5,000.00 that he collected from the motor dealership. He further conceded that according to the contract between the parties, each truck that was shipped by the Defendant was to be loaded with the Defendant's goods at a hire charge of ZAR22,000.00 and that after deductions of commission in the sum of ZAR2,000.00; driver's allowance of ZAR4,000.00; and ZAR7,000.00 for fuel, the net balance of ZAR9,000.00 was to be paid to the Plaintiff. He maintained that he delivered 6 trucks and further conceded that he has never paid the Plaintiff ZAR9,000.00 for each truck that he delivered. However, he stated that the reason he has never paid the Plaintiff ZAR9,000.00 per truck delivered was due to the fact that they were verbal agreements entered into by the parties. He further stated that he was not aware that the contract that he entered into had a clause expressly providing for any changes to the conditions of the contract to be communicated and put in writing as he had not read it due to being excited at having secured such a contract. When referred to the contract at page 1 of the Plaintiff's Bundle of Documents, he conceded that such a clause was in the contract.

DW1 testified that when the Plaintiff verbally changed the contents of the contract, he did not cancel the contract because he was assured that the Plaintiff was one and the same as Tradex Limited.

He stated that although he delivered the 6 trucks in accordance with the contract, when it came to the vans, it was not his responsibility to deliver the vans as that had been verbally changed. That all payments made towards the purchase of the vans were under Tradex Limited, although when he begun the process of buying and delivery of the vans, it was on the basis of the contract that the parties entered into. He conceded that he was fully aware of the terms and conditions of the contract that he signed with the Plaintiff.

DW1 conceded that the Plaintiff paid for taxes and duties for the trucks and vans as that was its obligation, but that he paid for the necessary legal documentation in the sum of ZAR1,500.00 although he had not produced before Court any documentation to show proof of payment as he did not keep any, since these were moved together with the vehicle. He stated that he was not aware that the first van that was brought into Zambia had nothing to do with the contract between the parties and was exclusively brought under a separate agreement involving Tradex Limited and the motor vehicle dealership in South Africa. When referred to page 5 of the Plaintiff's Bundle of Documents, which shows that Tradex Limited authorised Mr. Mashingo to drive its van to Zambia, DW1 conceded that the document related to one vehicle only and that it was signed by Mr. Chanda Mwiko, Tradex Limited's Director and not PW2. He further conceded that he did not bring any proof before Court to show that Mr. Mashingo had the mandate to deliver all the vans to the Plaintiff.

DW1 stated that even though it was Tradex Limited that bought the vans, he was making a counter-claim against the Plaintiff because the Director of the Plaintiff company is the Director of Tradex Limited, although he did not bring any proof before Court to show that PW2 was a Director of Tradex Limited. He conceded that he had not brought any proof before Court to support the Defendant's counter-claim.

In re-examination, DW1 stated that the van had not been delivered to the Plaintiff because it was with the Plaintiff's agent, Mr. Mashingo in South Africa. That he had not paid the Plaintiff the refund received from the motor vehicle dealership because there are deductions that have to be made in relation to the Defendant's counter-claim and that the contract at page 1 - 2 of the Defendant's Bundle of Documents did not provide for the Defendant to be buying and paying for the vans.

That marked the close of the Defendant's defence.

At the close of the trial, I directed the parties to file written submissions within a specified period. Pursuant to the said directive, the Plaintiff timely filed its submissions, while the Defendant defaulted and filed its submissions outside the specified period. Although the Defendant did not apply for leave to file its submissions out of time, I have used my discretion under ***Order III Rule 2*** of ***The High Court Act***[4] to consider it as if its submissions were filed within the specified period.

In the Plaintiff's submissions, counsel for the Plaintiff, Ms. C. M. Mwansa began by restating the Plaintiff's claim and facts in dispute. She proceeded to highlight the evidence at trial with special emphasis on the fact that the parties had entered into a written contract. I will not reproduce the Plaintiff's submissions which are on record, suffice to state that the Plaintiff submits that it has proved its claims on the requisite standard of proof and invited the Court's attention to the case of ***Zambia Railways Limited vs. Pauline S. Mundia Sialumba***[1], where the Court stated as follows:-

> ***"...(the standard of proof) is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt in a criminal case. The old adage is true that he who assets a claim in a civil trial must prove on a balance of probability, that the other party is liable..."***

Counsel argued that the Defendant's counter-claim collapsed completely due to the Defendant's conflicting statements and lack of proof to support its claim. The Court's attention was drawn to the case of ***K. B. Davies and Company (Z) Limited vs. Musunu***[2], where the Supreme Court stated as follows: -

> ***"Where there is a lacuna in the evidence, the trite position of the law is that the lacuna should be resolved in favour of the party who is not responsible for that lacuna and in this case it is the defendant."***

Ms. Mwansa submits that on the evidence submitted before the Court, it cannot be denied that the Plaintiff is entitled to all the reliefs claimed by it and that critical in determining the rights of the Plaintiff is the contents of the contract that was executed by the parties, which contract is enforceable. The Court's attention was drawn to page 1 of ***Treitel: Law of Contract***[1], where the learned author stated the following: -

> ***"A contract is an agreement giving rise to obligations which are enforced or recognised by law. The factor which distinguishes contractual from other legal obligations is that they are based on agreement of contracting parties."*** (Plaintiff's emphasis)

Ms. Mwansa submits that the above position has been upheld by numerous decisions of the Supreme Court in Zambia and drew the Court's attention to the case of ***Colgate Palmolive (Z) Limited, Chuka and Others***[3], where the Supreme Court in quoting Sir George Jessel in the case of ***Printing Numerical Registering Company vs. Simpson***[4], stated as follows: -

> ***"If there is anything more than another which public policy requires, it is that men of full age and competent understanding shall have the utmost liberty in contracting and that, their contracts, when entered into freely and voluntarily shall be enforced by courts of justice."***

Ms. Mwansa argued further that where parties have signed a contract, they are bound by the terms of the said contract and that it was not open to the Defendant to unilaterally vary the terms of the contract to the detriment of the Plaintiff. It is submitted on

behalf of the Plaintiff that a contract is a document which discloses the intentions of the parties and where the parties have embodied their terms in a written document, extrinsic evidence is not admissible to contradict it. My attention was drawn to the cases of ***Attorney General vs. Moyo***[5] and ***Holes Limited vs. Buildwell Construction Company Limited***[6], where the Supreme Court stated as follows: -

> ***"where the parties have embodied the terms of their contract in a written document, extrinsic evidence is not generally admissible to add, vary, subtract from or contradict the terms of the written contract."***

It was further submitted by Ms. Mwansa that the Defendant was being untruthful and contradictory as the contract clearly stated that the Defendant was to ship and deliver to the Plaintiff the trucks and vans; and that any changes to the conditions should be communicated by either party; and acknowledged in writing by the other party. The Plaintiff's Counsel also submits that one van, which is not part of the contract between the parties, was purchased by Tradex Limited and that is why it is on record that there is a van under Tradex Limited that was delivered to Zambia. That it is also on record that there is a van that was fully paid for but to date has not been delivered to the Plaintiff by the Defendant and a van in which a deposit was made but later on refunded, but the refund has not been paid to the Plaintiff by the Defendant.

Ms. Mwansa also submits that the Defendant was breathing hot and cold at the same time and drew the Court's attention to the maxim expounded in ***Brooms Legal Maxims***[2] as follows: -

> ***"Allegans contrans non estaudiendus (He is not to be heard he who alleges things contrary to each other)"***

My attention was also drawn to the case of ***Phillip Mutantika and Another vs. Kenneth Chipungu***[7], where the Supreme Court quoted Lord Kenyon in stating as follows: -

> ***"A man shall not be permitted to blow hot and cold air with reference to the same transaction or insist at different times on the truth of each of two conflicting allegations, according to the promptings of his private interest."***

Ms. Mwansa urged the Court to award the Plaintiff's reliefs which it sought against the Defendant and any other reliefs that the Court shall deem just and equitable in the circumstances of the case. She also prayed that the Defendant be condemned to pay the costs herein.

I will not reproduce the Defendant's submissions, which are on record, suffice to say that the Defendant submits that the onus is on the Plaintiff and the Defendant to prove their respective cases against each other on a preponderance of probabilities, in keeping with the case of ***Khalid Mohamed vs. Attorney General***[8] and that *in casu*, the Plaintiff did not prove its case on a preponderance of probabilities, whilst the Defendant accordingly proved its case. It has been argued by Mr. Mwandenga, Counsel for the Defendant,

that the Plaintiff failed to prove that the Defendant breached the contract as alleged or at all.

He argues that the evidence on record shows that the Plaintiff only purchased 7 trucks which were to be delivered to Kafue Zambia, but did not buy any vans at all, as all the vans in issue were purchased by Tradex Limited as shown on pages 3, 4, 7 and 9 of the Plaintiff's Bundle of Documents; pages 3, 4 and 5 of the Defendant's Bundle of Documents; and the Defendant's Supplementary Bundle of Documents. Accordingly, it is his submission that there was no iota of evidence that the Defendant failed to deliver the vans as Tradex Limited which purchased the vans was not party to the shipping contract between the parties herein and cannot have the benefit of having recourse to the said contract. The Court's attention was drawn to ***Treitel: The Law of Contract***[1], where the learned author states as follows: -

> ***"The common law doctrine of privity means that a contract cannot, as a general rule, confer rights or impose obligations arising under it on any person except the parties to it..."***

It has been argued by Mr. Mwandenga that even if Tradex Limited was a sister company to the Plaintiff, elementary company law teaches us that upon incorporation, a limited liability company becomes a legal person in its own right and therefore Tradex Limited and the Plaintiff are two separate legal entities. That the vans purchased by Tradex Limited cannot be subject of this action and that the Plaintiff cannot successfully use Tradex Limited's vans

to champion a case for breach of contract by the Defendant, thus the Plaintiff's claim cannot be sustained.

Counsel submitted that the Plaintiff did not dispute the fact that the Defendant refused to deliver the seventh truck because of the customs clearing problems it was facing over the importation of the subject trucks and therefore the fact of the matter is that the Defendant delivered 6 trucks to the Plaintiff in accordance with the provisions of the shipping contract, while the seventh truck was delivered by the Plaintiff's agent Mr. Mashingo. It is his argument that in the circumstances of the case, the shipping contract was verbally amended *vis* the delivery of the seventh truck and therefore the Plaintiff's claim that the seventh truck was not delivered by the Defendant, cannot be sustained.

Mr. Mwandenga submits that the clause in the contracts which states that *"Any changes to the above conditions shall be communicated by either party and acknowledged in writing by the other party"* was misunderstood by the Plaintiff to mean that any changes to the agreement were to be in writing, when in actual fact the clause did not proscribe the making of changes to the conditions of the contract but provided that the changes had to be communicated in writing to the other party. He argues that the mode of communication was not defined and what had to be in writing was the acknowledgment by the other party. That the delivery of the seventh truck was verbally agreed, which fact was not disputed by PW2 and in the circumstances, it is his submission

that the onus was on the Plaintiff to acknowledge the said change in writing. He further submits that it can be argued that the said clause was uncertain and meaningless. The Court's attention was drawn to page 134 of ***Making Commercial Contract***[8], where the learned author states that: -

> ***"...it is said that the Court may ignore a clause which is not one that has a number of possible meanings, but it is one that is completely meaningless - provided the meaningless words can be deleted from the agreement and still leave a perfectly valid and enforceable contract."***

The Court's attention was also drawn to the case of ***Nicolene Limited vs. Simmonds***[9], where Lord Denning, *inter alia*, stated as follows: -

> ***"A distinction must be drawn between a clause which is meaningless and a clause which is yet to be agreed...<u>a clause that in meaningless can be ignored, whilst still leaving the contract good</u>, whereas a clause which has yet to be agreed may mean there is no contract at all, because the parties had not agreed on the essential terms."*** (Defendant's emphasis)

Mr. Mwandenga submits that the subject clause, if it is meaningless, is best ignored and if ignored, the contract will still remain good in the most material respects. It is also submitted that from the evidence adduced it is abundantly clear that the *modus operandi* of the parties *vis* the implementation of the contract was that certain things were agreed to verbally and were not provided for in the shipping contract, such as issues concerning the

processing of export legal documentation for the trucks and/or vans and payment thereof; payment of custom duties; sourcing of vans to purchase; and payment thereof on behalf of Tradex Limited, hiring of trucks to transport goods marooned at the boarder etc.

He argues that the Plaintiff has failed to establish a case for damages as it made no attempt whatsoever to prove the loss it suffered because of the alleged breach. Further, the Defendant submits that the Plaintiff made no attempt whatsoever to plead a case of special damages as it did not provide any particulars to support its claim of special damages in the sum of K15,000.00 as contained in its pleadings. He also submits that both the Plaintiff's witnesses made no attempt whatsoever to adduce evidence touching or concerning the claim for special damages allegedly suffered by the Plaintiff and consequently, the Plaintiff's claim should therefore be dismissed.

It has been argued by Mr. Mwandenga that the Defendant delivered 6 trucks and not 7 trucks, therefore the starting point for the Plaintiff's claim in relation to its claim for payment of ZAR63,000.00 (K38.496.38), if sustainable should be on 6 trucks. He further argues that according to the contract, the Defendant was entitled to deduct the driver's ratio at ZAR2,000.00 and fuel at ZAR3,500.00, hence its counter-claim of ZAR15,000.00. He submits that pages 4 and 5 of the Plaintiff's Bundle of Documents is proof that the Defendant paid the fuel money for transport of Car Registration FYW 833 MP, which Stephen Mashingo had authority to drive, thus

the sums which were so provided for in the contract were and are deductible from the money due from the hire charges. It is his argument that the Plaintiff should refund this money, notwithstanding that the vans were bought by Tradex Limited, as PW2 the Director of the Plaintiff company is the one who caused the vans to be purchased in the name of Tradex Limited, a sister company of the Plaintiff. The Court's attention was drawn to the case of ***Associated Chemicals Limited vs. Delamain Zambia Limited and Ellis and Company***[10], in which the Supreme Court remarked to the effect that a company can only act through its human agents. My attention was also drawn to the case of ***B. P. Zambia Plc vs. Interland Motors Limited***[11], where this position was restated as follows: -

> ***"As a metaphysical entity or fiction of law which only has legal, but no physical existence, a company (though being a separate and distinct legal person members or shareholders), can only act through the humans charged with its management and conduct of its affairs."***

On the basis of the above cases, Mr. Mwandenga submits that the Defendant incurred a cost or expense because of the actions of PW2 who was and is an agent of the Plaintiff as its Director. That a Director is an agent of a company and as such the Defendant's counter-claim should be deducted from the agreed hire charges.

He also submits that the Defendant processed the legal documentation for the export of vehicles at a cost and as such, it is

entitled to deduct these expenses from the money due to the Plaintiff from the agreed hire charges.

It has further been submitted by Mr. Mwandenga that since the second set of 2 trucks was impounded at the Livingstone Border pending payment of duties by the Plaintiff, it was verbally agreed that the Defendant could request its customers who had goods in the impounded trucks to hire alternative transport to ferry the goods from Livingstone and the customers hired 2 trucks at a total cost of K30,000.00, thus the Defendant's case that it is entitled to deduct from the agreed hire charges. That the Defendant's counter-claim is sustainable as the Plaintiff does not dispute that this activity took place but its discomfort appears to be that the same is on the higher side and was not agreed in writing. He submits that if the Court finds the sum counter-claimed to be on the high side, it may refer the matter to the Deputy Registrar for assessment.

With regard to the Plaintiff's claim for the delivery of the van, Mr. Mwandenga submits that the Plaintiff did not adduce any iota of evidence to show that the Plaintiff purchased any van at all. That the vans (if any) were purchased by Tradex Limited at the behest of PW2 and therefore the Defendant cannot in these proceedings be made to deliver any van belonging to Tradex Limited to the Plaintiff as Tradex Limited is not a party to these proceedings nor the shipping contract. Further, that assuming the Plaintiff bought any van which the Defendant was supposed to deliver, which is denied, he submits that the van in question was taken possession of by Mr.

Mashingo who was an agent of the Plaintiff as can be seen from page 8 of the Defendant's Bundle of Documents. He argues that the Defendant cannot reasonably be expected to deliver a thing that is not in its possession and thus the Plaintiff's claim is unsustainable.

With regard to the Plaintiff's claim for the refund paid to the Defendant by the motor vehicle dealership, Mr. Mwandenga submits that the *bona fides* of this claim is suspect as it relates to a van which the Plaintiff did not purchase but was being purchased by Tradex Limited. The Court was referred to the Defendant's Supplementary Bundle of Documents, which show that the receipt for the money paid was in the name of Tradex Limited and not the Plaintiff. He argues that the Plaintiff is a separate legal entity from Tradex Limited and as such the Plaintiff is seeking a refund that does not belong to it, but Tradex Limited. The Court's attention was drawn to the document in the Plaintiff's Bundle of Document, which shows that the US$15,000.00 was paid by PW2 through Chabwera Phiri. It is thus his submission that since PW2 is not a party to these proceedings, there is no legal basis for the Plaintiff to claim a refund of money that it did not pay and in the circumstances the Plaintiff cannot claim for a refund of ZAR5,000.00 which was paid by Tradex Limited as this amount can only be claimed by Tradex Limited.

Counsel contends that the Plaintiff has failed to prove its claims and is thus not entitled to interest and costs, being the reliefs sought by the Plaintiff. It has been submitted by Counsel that the

Defendant's counter-claim is a set-off in extinction or diminution of the Plaintiff's claims and that based on the fact that the Defendant has established its counter-claims, the Defendant is entitled to be awarded interest due to it at the rates provided under ***Order XXXVII Rule 8*** of ***The High Court Act***[4] and ***Section 2*** of ***The Judgments Act***[5]. He also prays for further or other relief as the Court may deem just and costs.

I have considered the evidence adduced, the pleadings herein and arguments/submissions by Counsel for which I am grateful. It is not in dispute that the parties executed a shipping contract on 18th February, 2014. The contract entered into by the parties was drawn on the Plaintiff's letterhead and is reproduced *verbatim* below: -

> ***CONTRACT OF SHIPPING NKHOSI BREWERIES LTD DELIVERY TRUCKS AND VANS FROM JOHANNESBURG, SOUTH AFRICA TO KAFUE, ZAMBIA***
>
> *On this* ***18th*** *day of* ***February 2014****,* ***Nkhosi Breweries Ltd*** *(client) of above address has entered into an agreement to ship 7 x delivery trucks and 2 x 1MT vans from Johannesburg, South Africa to Kafue, Zambia by* ***Nsimbi Trucking*** *(transporter) of 144 Kerk Street, Johannesburg, South Africa on a date to be confirmed in February 2014 or early March 2014. The agreement comprises the following details:*
>
> - *Number of trucks to be shipped - 7*
> - *Number of vans to be shipped - 2*
> - *Each truck to be shipped with goods at a hire charge of R22,000 payable by the transporter*

- *Transporter to deduct a commission of R2,000 per truck from the total hire charge of R22,000/truck*
- *Transporter to deduct R4,000 per truck for driver allowance from the total hire charge of R22,000/truck*
- *Transporter to deduct R7,000 per truck for fuel from the total hire charge of R22,000/truck*
- *The net balance of R9,000 balance from R22,000 hire charge/truck to be paid to client*
- *Transporter to deduct R3,500/van for fuel from the net balance payable to the client*
- *Transporter to deduct R4,000/van for driver allowance from the net balance payable to the client*

Any changes to the above conditions shall be communicated by either part and acknowledged in writing by the other part.

On behalf of Nkhosi Breweries Ltd

Name ....

Title ....

Signature ....

On behalf of Nsimbi Trucking

Name ....

Title ....

Signature ....

Witnessed by ....
Name

Signature ....

The said contract was signed by Earnest Chikonye (PW1) on behalf of the Plaintiff and Jonnas Zulu (DW1) on behalf of Defendant. It was witnessed by Francis Madula Phiri.

The issues in contention in this matter can best be summed up as follows: -

1. *Who had the sole responsibility of delivering the vans purchased under the shipping contract;*
2. *Whose agent was Stephen Mashingo;*
3. *Is the Plaintiff entitled to the sum claimed of ZAR63,000.00;*
4. *Is the Plaintiff entitled to the delivery of the van purchased or alternatively the payment of US$13,000.00 being the full purchase price of the van;*
5. *Is the Plaintiff entitled to the sum of US$5,000.00 being the deposit that was paid to and refunded by the motor vehicle dealership in South Africa to the Defendant for the second van;*
6. *Is the Plaintiff entitled to damages for breach of contract and to special damages in the sum of K15,000.00 being the cost of accommodation and travel to and from Johannesburg, South Africa.*

The determination of the foregoing issues will lead to findings in respect of the claim and Defendant's counter-claim. I will consider the issues identified in the manner that they have been presented above.

The first issue for determination is who had the sole responsibility of delivering the vans purchased under the shipping contract? It has been argued by the Plaintiff that it was a contractual agreement that the Defendant had the sole responsibility of delivering the vans purchased to the Plaintiff and that if there was any variation to the agreement, that had to be communicated and acknowledged in writing by both parties. On the other hand, the Defendant argued that there was a verbal agreement in which the Plaintiff introduced its agent Mr. Mashingo, who was mandated by the Plaintiff to deliver the van to the Plaintiff. Further the Defendant has argued that the contractual agreement mandated the Defendant to deliver vans purchased by the Plaintiff and in the circumstances all the vans were purchased by Tradex Limited and not the Plaintiff, thus the Defendant was not obliged to deliver vans that were purchased by an entity that was not party to the contract.

In addressing this issue, it is important to peruse the contract between the parties. The said contract is at pages 1 to 2 of the Plaintiff's Bundle of Documents and is also reproduced above at J41 - J42. The first paragraph of the said contract, reads in part as follows: -

> ***"On this 18th day of February 2014, Nkhosi Breweries Ltd (client) of above address has entered into an agreement to ship 7 x delivery trucks and 2 x 1MT vans from Johannesburg, South Africa to Kafue, Zambia by Nsimbi Trucking (transporter) of 144 Kerk Street, Johannesburg, South Africa on a date to be confirmed in February 2014 or early March 2014."***

It is clear from the foregoing paragraph and it is my finding of fact that the Defendant had the sole responsibility of shipping the 7 trucks and 2 vans. The contract, as Counsel for the Plaintiff argued is signed by both parties, therefore binding and as a Court I am obliged to enforce it. My finding is fortified by the holding in the case of ***Printing and Numerical Registering Company vs. Simpson***[4], which is quoted in the case of **Colgate Palmolive (Z) Inc. vs. Able Shemu and 110 Others**[3] referred to me by Counsel for the Plaintiff and which states as follows: -

> ***"If there is one thing more than another which public policy requires it is that men of full age and competent understanding shall have the utmost liberty in contracting and that their contract when entered into freely and voluntarily shall be enforced by courts of justice."***

The Defendant has not alleged that it did not enter into the said contract freely and voluntarily. In fact, the evidence on record and arguments by Counsel for the Defendant indicate that the Defendant acknowledges the existence of the contract. It is therefore bound by it.

The second issue for determination is whose agent was Stephen Mashingo? The Plaintiff alleges that Mr. Mashingo was introduced to its Director PW2 by the Defendant and has never been an agent of the Plaintiff but had been engaged by Tradex Limited, independently of the Plaintiff, which is an entity separate from the Plaintiff. The Plaintiff denies that it has ever given mandate or permission to Mr. Mashingo to drive and deliver its vans. Further

that Mr. Mashingo has never been a party to the contract entered into by the parties herein. The Plaintiff contends that Mr. Mashingo is an agent of the Defendant as demonstrated by the fact that the Defendant, acting upon the proviso of the contract which expressly provided that the Defendant as transporter was expected to deduct the sum of ZAR3,500.00 and ZAR4,000.00 for fuel and driver allowance from the hire charge of the trucks, paid Mr. Mashingo accordingly.

On the other hand, the Defendant alleges that Mr. Mashingo was introduced to the Defendant by PW2, who advised him that Mr. Mashingo would be delivering the trucks and vans to the Defendant, who would then ship them Zambia. That Mr. Mashingo was an agent of the Plaintiff as demonstrated by the fact that he even delivered the seventh truck and one van to the Plaintiff. The Defendant contends that Mr. Mashingo is in fact holding onto the other van as he has unresolved issues with the Plaintiff. The Defendant also drew the Court's attention to page 8 of the Defendant's Bundle of Document, which is an Affidavit sworn by Stephen Mashingo in South Africa, in which he avers as follows: -

> ***"I was given mandate by Nkhosi Breweries to collect 7 (seven) trucks from 4 Ton Trucks in Boksburg where they were purchased and give them to Nsimbi Trucking of which they had a contract to get loads and deliver to Zambia. Nkhosi Breweries also bought (two) 2 LDV which was suppose to be delivered as well. Six trucks were delivered by Nsimbi Trucking. I took the seventh one and one***

van. I am still remaining with one van that I will deliver as soon as I resolve some issues around."

In determining whether Mr. Mashingo was an agent of the Plaintiff or Defendant, I find it imperative to first define who an agent is. The learned author of ***Halsbury's Laws of England***[6] at paragraph 1 define the term *"agent"* as follows: -

> ***"...in law the word "agency" is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person, called "the agent" has authority to act on behalf of another, called "the principal", and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationships, but on the true nature of the agreement or the circumstances of the relationship between the alleged principal and agent."***

At paragraph 19[6], the same author also describes the creation of the agency relationship as follows: -

> ***"The relation of agency is created by the express or implied agreement of principal and agent, or by ratification by the principal of the agent's act done on his behalf. Express agency is created where the principal or some person authorised by him, expressly appoints the agent whether by deed, by writing under hand, or orally. Implied agency arises from the conduct or situation of the parties."***

The learned author of ***Commercial Law***[7] at pages 162 and 163 states that in modern commercial transactions, agency is a vital tool in bringing goods and services to the market. It is often convenient for the business enterprise to appoint one or more agents whose business is to effect sales. Therefore, the question whether or not a person was an agent of the other depends on the facts of each case.

In casu, the evidence of the Plaintiff was that its associated company, Tradex Limited, engaged Stephen Mashingo to deliver 1 van from South Africa, which van is separate from the 2 vans referred to in the contract herein and that Stephen Mashingo's role ended with his delivering the said van for Tradex Limited and not to the Plaintiff company. The Plaintiff denied that Mr. Mashingo had ever been engaged by the Plaintiff for the movement of any of its vehicles. It was the evidence of the Plaintiff that the van that Mr. Mashingo delivered to Tradex Limited was not part of the arrangement between the Plaintiff and Defendant as can be seen from page 5 of the Plaintiff's Bundle of Document, which is a letter head bearing the name of Tradex, where Mr. Chanda Mwiko, the Director of Tradex and not the Plaintiff company, authorises Mr. Mashingo to drive its Nissan hard body.

On the other hand the evidence of the Defendant was that it had never known Mr. Mashingo until the Director of the Plaintiff company who is PW2, travelled to South Africa and went to the Defendant's warehouse with Stephen Mashingo, where he explained

to DW1 that the trucks had been secured and were with Mr. Mashingo. He further told him that when he had a load, he should phone Mr. Mashingo, give him a driver for the trucks and then he could load the truck. DW1 testified that after he collected money from PW2, he paid for one van in full and it was collected by Mr. Mashingo as he had been advised by the Plaintiff that Mr. Mashingo would be collecting the vans. That he had processed the export documentation papers for the vans and he gave Mr. Mashingo ZAR3,500.00 for his fuel and ZAR4,000.00 as his ratio. The Defendant had referred the Court to the Affidavit deposed to by Mr. Mashingo at page 8 of the Defendant's Bundle of Documents and submitted that it clearly demonstrates that Mr. Mashingo was the Plaintiff's agent.

I have carefully considered the evidence on record. From the above, it can be seen that the Defendant is the one who paid Mr. Mashingo ZAR3,500.00 for his fuel and ZAR4,000.00 as his ratio. According to the contract entered into by the parties herein, it was an express provision that the Defendant was the transporter in this transaction, who was responsible for shipping the vehicles from South Africa to Zambia and that the Defendant was mandated to deduct ZAR3,500.00 for fuel and ZAR4,000.00 as ratio for the driver that would transport each van. It is a reasonable presumption that, the Defendant, being a transporter and engaged in shipping vehicles, such entity would engage drivers to fulfil this responsibility.

From the above, I find that the Defendant's claim that it did not have any relationship with Mr. Mashingo untenable, as the evidence on record shows that the Defendant paid Mr. Mashingo what he was mandated to pay any driver that it engaged to transport the Plaintiff's vans, which is what is provided in the contract entered into by the parties. Therefore, although no formal written or express agreement was produced to support the Plaintiff's assertion that Mr. Mashingo was the Defendant's agent, the only reasonable inference that can be drawn from the conduct of the Defendant is that Mr. Mashingo acted as its agent. The act of paying Mr. Mashingo in accordance with the provisions of the contract demonstrates that the Defendant held Mr. Mashingo out as a person who had apparent authority to transport the vehicles, thus acting on its behalf. Consequently, I find that Mr. Mashingo was the Defendant's agent.

The third issue for determination is whether the Plaintiff is entitled to the sum claimed of ZAR63,000.00. The gist of Counsel for the Plaintiff's arguments was that by contractual agreement, the Defendant undertook to ship 7 trucks and 2 vans from Johannesburg, South Africa to Kafue, Zambia on condition that each truck was to be shipped with goods belonging to the Defendant's customers at a hire charge of ZAR22,000.00 payable by the Defendant to the Plaintiff, less commission of ZAR2,000.00 per truck; ZAR4,000.00 per truck for driver's allowance; and ZAR7,000.00 per truck for fuel, therefore leaving a total balance of ZAR9,000.00 per truck from the ZAR22,000.00 hire charge for each

truck, which sums of money still remains unpaid by the Defendant to the Plaintiff to date.

The Defendant did not dispute the fact that he was engaged to ship trucks in the manner aforesaid and conceded that according to the contract between the parties, each truck that was shipped by the Defendant was to be loaded with the Defendant's goods at a hire charge of ZAR22,000.00 and that after deductions of commission in the sum of ZAR2,000.00; driver's allowance of ZAR4,000.00; and ZAR7,000.00 for fuel, the net balance of ZAR9,000.00 was to be paid by the Defendant to the Plaintiff. It was the Defendant's evidence that it delivered 6 trucks and not 7 trucks as agreed in the contract due to the challenges that the Defendant encountered at the Livingstone Border with ZRA, which fact was not disputed by the Plaintiff. It was further the evidence of the Defendant that it has never paid the Plaintiff the said ZAR9,000.00 per truck delivered and that the reason it has never paid the Plaintiff ZAR9,000.00 per truck delivered was due to the fact that it had incurred expenses pursuant to verbal agreements entered into by the parties.

From the above, it is not disputed that the parties entered into a contractual agreement, whereby the Defendant was under an obligation to pay the Plaintiff ZAR9,000.00 per truck delivered and that the Defendant delivered 6 trucks. Further, it is not disputed that the Defendant has never paid the Plaintiff the said sum per truck delivered. The question to be considered is whether the

Plaintiff is entitled to ZAR63,000.00 for the 7 trucks as contractually agreed.

The evidence shows that the Defendant withheld the sum of ZAR54,000.00 for the 6 trucks that were delivered. This sum is the net balance of the hire charge after the Defendant deducted the agreed expenses. The Defendant acknowledges not having paid the Plaintiff that which it ought to have paid. Although in its pleadings, the Plaintiff provided the Zambia Kwacha equivalent at the time, in the contract, the payment was in South African Rand and not Zambian Kwacha. From the above evidence, it can be inferred that the payment of the balance for the hire charge was to be in South African Rand, hence the accepted or agreed mode of payment of the money should be in South African Rand. Since it is not disputed that the Defendant partially fulfilled the contractual agreement by delivering 6 trucks, I find that the Plaintiff is entitled to ZAR54,000.00, which the Defendant must pay forthwith.

I will now consider whether the Plaintiff is entitled to ZAR9,000.00 for the seventh truck that was not delivered by the Defendant. It is not in dispute that the seventh truck was not delivered by the Defendant as agreed in the contract, but had been delivered by someone else to the Plaintiff. The evidence on record is that the Defendant informed the Plaintiff that he would not deliver the seventh truck as he was having challenges at the border as a result of the trucks being impounded at the border by ZRA, which in turn caused its customers, whose goods had been loaded on the trucks

by the Defendant, to complain about delays in transporting their goods. DW1 testified that it was verbally agreed that the Plaintiff could make alternative arrangements for the delivery of the seventh truck, which truck was ultimately delivered by Stephen Mashingo. Counsel for the Defendant submits that in the circumstances, the shipping contract was verbally amended *vis* the delivery of the seventh truck, while Counsel for the Plaintiff maintains that there was no such agreement and that the Defendant breached the contract by not delivering the seventh truck, which was delivered by someone else. The issue that must be determined by this Court is whether the Plaintiff is entitled to ZAR9,000.00 on the seventh truck that was delivered by Mr. Mashingo and not the Defendant as per contractual agreement.

Paragraph 904 of ***Halsbury's Laws of England***, on a contract becoming burdensome states that: -

> ***"Whatever the alleged source of frustration, a contract is not discharged under the doctrine of subsequent impossibility and frustration merely because it turns out difficult to perform or onerous. Thus the parties will not generally be released from their bargain on account of ordinary risks of business, such as rises and falls in prices, depreciation of currency or unexpected obstacles to the execution of the contract. In particular, a party's insolvency or inability to get finance will not discharge him, unless of course the parties have agreed otherwise."***

The Supreme Court also held in ***Match Corporation Limited vs. Development of Zambia***[14] that: -

"In the vein that we take, it was inappropriate to invoke the doctrine of frustration in this case where it could not properly be alleged the contract had become impossible of performance and the parties therefore discharged from performance."

The Defendant cannot in the light of the above authorities and the circumstances of this case, plead that it became difficult to perform the contract due to the challenges faced at the Livingstone Border from ZRA, hence the verbal agreement. The Defendant's argument is therefore not valid. Accordingly the Plaintiff is entitled to ZAR9,000.00 from the Defendant in accordance with the agreement, irrespective of whether the seventh truck was delivered by the Defendant or not and whether it was loaded with the Defendant's clients' goods or not. For avoidance of doubt, I find that the Plaintiff is entitled to be paid the full sum of ZAR63,000.00 by the Defendant.

The fourth issue for determination is whether the Plaintiff is entitled to the delivery of the van purchased or alternatively the payment of US$13,000.00 being the full purchase price of the van. The gist of Plaintiff's evidence on record is that the Plaintiff paid for one van in full and yet the Defendant failed to deliver it. It was also PW1's testimony that the purchasing of the vans was being done on behalf of the Plaintiff by the Defendant, who through its Director Jonas Zulu (DW1) collected a sum of US$15,000.00. PW1 referred the Court to page 6 of the Plaintiff's Bundle of Documents, which *verbatim* reads as follows: -

ACKNOWLEDGMENT

I Jonnas Tyson Zulu have this 16th day of April 2014 collected US$15,000.00 (Fifteen Thousand United States Dollars) from Mr. Chabwera Phiri on behalf of Mr. Patrick D. Banda. This is for a payment towards two Nissan Hard Body vans that Mr. Patrick D. Banda has purchased in South Africa.

The document shows that the Defendant's Director (DW1) Jonas Zulu acknowledged receipt of the said sum being payment towards two Nissan Hard Body vans that the Director of the Plaintiff company (PW2) had purchased in South Africa. According to PW2 who testified on behalf of the Plaintiff, these are the 2 vans that have not been delivered by the Defendant as agreed in the contract.

On the other hand, the Defendant's evidence on record is that the Director of the Plaintiff company (PW2) informed him that he had not purchased the vans and asked him to show him where he could get cheaper durable vans. That he showed PW2 a place called *"4 x 4"*, where vehicles which are involved in accidents are repaired and that PW2 paid cash above ZAR100,000.00 for one vehicle, which was collected a week later and delivered to Zambia by Mr. Mashingo. He also left a deposit on two vehicles at ZAR5,000.00 for each. That PW2 informed him that the vehicles will not be in the Plaintiff's name, but will be in the name of his other company Tradex Limited. DW1 also testified that he phoned PW2 to ask him about the balance on the other two vehicles, who told him to go and collect the balance of US$15,000.00, which is the sum reflected in the acknowledgment reproduced above. That DW1 collected the said sum and went back to South Africa where he paid US$10,000

being the full balance on 1 van and US$5,000.00 on the other van. It was also the testimony of DW1 that the motor vehicle that he paid for in full was collected by Mr. Mashingo as he had been advised that Mr. Mashingo would be collecting the vans. That, together with Mr. Mashingo, they processed the export documentation papers for the vans and he gave Mr. Mashingo ZAR3,500.00 for his fuel and ZAR4,000.00 as his ratio. DW2 further testified that Mr. Mashingo was meant to travel to Zambia, but he never left for Zambia and that to date Mr. Mashingo is still holding on to the said van pending resolution of issues that he has with the Plaintiff.

Under cross-examination, DW1 contradicted himself and stated that the Plaintiff did not purchase any vans and all the 3 vans were purchased by Tradex Limited. He also contradicted himself by stating that the US$15,000.00 that he collected was from Tradex Limited and meant for payment of the outstanding balance on the two vans purchased by Tradex Limited. When referred to page 6 of the Plaintiff's Bundle of Document, which is reproduced above, DW1 stated that Mr. Patrick Banda (PW2) was the same as Tradex Limited, but conceded that he had not brought any proof before Court to fortify his assertion that PW2 was Tradex Limited. He also contradicted his earlier testimony when he agreed that the deposit that he paid from the US$15,000.00 that he collected from the Plaintiff was based on the contract between the Plaintiff and Defendant. DW1 also conceded that it would not make logical sense for the Plaintiff to instruct the Defendant to deliver the trucks as per contractual agreement and then instruct another person to

deliver the two vans included in the same contract as to be delivered by the Defendant. DW1 further conceded that he was entrusted by the Plaintiff with money to pay for the vans. Not only did I find his whole testimony with regard to the vans to be contradictory, but was also contradictory of the Defendant's Defence.

I have carefully perused the contract entered into by the parties and it is not disputed that under the said contract, the Defendant was entrusted to deliver two vans for the Plaintiff. Looking at the evidence above, sufficient evidence has been adduced by the Plaintiff to demonstrate that the Defendant through its Director (DW1) received money in the sum of US$15,000.00, which he paid to the motor dealership company, as can be seen from the acknowledgment reproduced above and from the testimony of DW1 when he stated that the said sum was received on the basis of the contract that the Plaintiff and Defendant entered into. Counsel for the Defendant, in his submissions tried to downplay this fact by contending that the money received by DW1 was from PW2 in his personal capacity and not from the Plaintiff. Further, he also contradicted himself when he later stated that the Plaintiff never paid for any van. If that were the case, and which it is not, DW1 would not have testified that he received the said sum in pursuance of the contract that the parties entered into.

It is clear from the evidence on record that the Defendant, through its Director DW1 collected money from the Plaintiff, which he paid

for 1 van in full on behalf of the Plaintiff and that it was Defendant's responsibility to deliver the said van that had been paid for in full, as such the Defendant cannot now allege that, through verbal agreements, Mr. Mashingo was given the mandate to bring the said vehicle.

I refer to the learned author of ***Chitty on Contracts***[8], where it was stated as follows: -

> ***"Parties to a contract may effect a variation by modifying or altering its terms by mutual agreement. A mere unilateral notification by one party to the other in the absence of any agreement does not constitute a variation of contract."***

The said learned author went on to state at ***paragraph 772***[8] that: -

> ***"where the agreement of the parties has been reduced into writing and the document containing the agreement has been signed by one or both of them, it is well established that the parties signing will be bound by the terms of the written agreement whether or not he has read them or whether or not he is ignorant of their precise legal meaning."***

I further refer to the case of ***Robson Sikombe vs. Access Bank (Z) Limited***[12], where the Supreme Court stated that: -

> ***"...the law is trite that a party is bound by the terms of an agreement that he voluntarily enters into. We do not wish to undertake the difficult task of explaining very elementary principles of the law of contract in this regard..."***

Looking at the cited authorities, it is trite that parties to a contract are primarily bound by the express terms. *In casu*, the express

terms provided that the Defendant delivers the vans to the Plaintiff and not Mr. Mashingo to deliver the vans. It can also be seen from the evidence on record, that the Defendant through DW1 collected a van that he had paid for in full on behalf of the Plaintiff, using part of the money from the US$15,000.00 that he collected from the Plaintiff through its Director PW2. If the money came from Tradex Limited, as the Defendant alleged, the same would have been stated in the acknowledgement. Consequently, I find that the Plaintiff is entitled to the delivery of the van purchased or alternatively the payment of US$13,000.00 being the full purchase price of the van from the Defendant.

The fifth issue for determination is whether the Plaintiff is entitled to the sum of US$5,000.00 being the deposit that was paid to and refunded by the motor vehicle dealership in South Africa to the Defendant for the second van. In summary, the Plaintiff's evidence on record is that the Defendant through its Director DW1, had paid a deposit of US$5,000.00 to a motor dealership, on behalf of the Plaintiff, towards the purchase of Nissan Hard Body van, which is one of the two vans that the Defendant was mandated under the contract to deliver to the Plaintiff in Zambia. That the outstanding balance was not paid within the time given by the motor dealership and as such the motor dealership refunded the deposit paid to the Defendant for non-payment of the balance on the purchase price, which deposit was meant to be paid to the Plaintiff by the Defendant and which the Defendant has not delivered to the Plaintiff.

The Defendant does not dispute that it was given the sum of US$5,000.00 by the Plaintiff to pay as deposit on a van on behalf of the Plaintiff and that a refund of the said sum was paid to it by the motor dealership due to non-payment of the outstanding balance within the time frame given, but alleges that the amount paid to it was less the penalties that the motor dealership charged from March to December 2014, a period of nine months. The Defendant conceded that it did not bring before Court any proof to show that it had paid the said deposit of US$5,000.00 to the motor dealership or that it had been refunded the said sum of money less the alleged penalties. However, he referred the Court to page 1 of the Defendant's Supplementary Bundle of Documents, which is a receipt for payment of ZAR5,000.00 issued by the motor dealership company in the name of Tradex Limited and dated 14th March, 2014. It is hand written on the said receipt that if the balance is not paid by 23rd May, the agreement would be cancelled. It is was the testimony of DW1 under cross-examination that the said ZAR5,000.00 was paid by PW2 to the motor dealership on 14th March 2014, when PW2 travelled to South Africa. That he does not recall when he paid US$15,000.00 received from PW2 on 16th April 2014, to the motor dealership, of which the sum of US$5,000.00 went towards the outstanding balance on the van. According to the evidence of DW1, a month had passed from the time the initial deposit of ZAR5,000.00 was paid on 14th March 2014 by PW2 to the time that he paid the US$5,000.00 that he collected on 16th April 2014. DW1 failed to explain how the motor vehicle dealership could

have charged penalties for 9 months from March to December 2014, when it had indicated on the receipt that DW1 referred this Court to, that the if the full payment was not paid on 23rd May 2014, then it would cancel the agreement.

From the evidence on record, I find that the said receipt at page 1 of the Defendant's Supplementary Bundle of Documents, which the Defendant alleges was issued to the Plaintiff upon payment of ZAR5,000.00 clearly indicates that if the balance is not paid by 23rd May, the agreement with the motor vehicle dealership would be cancelled. Had it been the intention of the motor vehicle dealership to charge penalties for late payment, it would have clearly been specified on the receipt. Further, DW1 conceded that he received a refund of the said deposit from the motor vehicle dealership. Accordingly, I find that the Plaintiff is entitled to the full refund of US$5,000.00 from the Defendant, which must be paid by the Defendant forthwith.

I will now consider the sixth issue, which is whether the Plaintiff is entitled to damages for breach of contract and special damages in the sum of K15,000.00 being the cost of accommodation and travel to and from Johannesburg, South Africa in an attempt to ensure that the Defendant fully honoured its part of the contractual agreement. The Defendant admitted that it did not deliver the seventh truck to the Plaintiff as per contractual agreement due to challenges at the Livingstone Border. The Plaintiff conceded that there had been challenges at the border and that it was its duty to

clear the trucks at the border. The Plaintiff also conceded that the seventh truck was eventually delivered, although not by the Defendant but by someone else. The Defendant testified that the seventh truck was delivered by Mr. Mashingo. I have already found that Mr. Mashingo was the agent for the Defendant. The Plaintiff's witness PW2 was not clear on when exactly the seventh truck was delivered and in his testimony, he was not even sure how many trucks had been delivered by the Defendant and when they were delivered. No documentary evidence was brought to substantiate this claim by the Plaintiff and accordingly, the claim in respect of these damages is dismissed.

With respect to the delivery of the van, I have found that the Defendant is in breach of the contractual agreement for non-delivery of the van that was fully paid for. In the normal course of events, the Plaintiff's claim in respect of these damages on the van should have been accompanied by detailed evidence to support such damages. However, I have found that the Defendant has to date not delivered the van and in equity, the Plaintiff should not be deprived of such damages as can be assessed from the evidence, which has been given and not discredited. There is no reason to disbelieve the Plaintiff when it said that it had purchased a van for its business, which was to be delivered by the Defendant, but has not been delivered to date. Accordingly, I find that the Plaintiff is entitled to damages for breach of contract in relation to the van that has not been delivered, which is referred to the District Registrar for assessment after hearing further evidence.

With regard to special damages, the Plaintiff did not provide detailed evidence in support of such special damages on which any Court could ascertain whether or not the Plaintiff did anything to mitigate his damages under this head. I also find that, even assuming that the Plaintiff expended the money that it claims, it still would have had to prove the damages in order for the Court to award them. The case of ***JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited***[13], states in this respect as follows: -

"It is the party claiming any damages to prove the damages"

Accordingly, the claim for special damages fails and is dismissed.

I will now consider the Defendant's counter-claims. I have already found that Mr. Mashingo was the agent for the Defendant and as such it was the Defendant's responsibility to pay drivers that shipped the motor vehicles on its behalf, in accordance with the contractual agreement. Accordingly, the Defendant's claim for ZAR15,000.00 being driver's ratio and fuel is dismissed.

With regard to the claim of ZAR3,000.00 for documentation, I have found that no vans have been delivered to the Plaintiff to date, for which money was expended on documentation. Further, no proof was laid before this Court to show that any documentation were processed and as such this claim is also dismissed.

The Defendant's third claim is for K30,000.00 being money that it allegedly paid on behalf of the Plaintiff to refund customers for hiring two trucks from Lusaka to transport goods from the

Livingstone border. It is not in dispute that the Defendant had challenges at the Livingstone Border as the Plaintiff had not cleared the trucks that had goods loaded on them for the Defendant's customers in accordance with the contractual agreement, which resulted in delays in delivering the goods to the Defendant's customers. What is in dispute is whether or not the Defendant is entitled to claim as a result of the said delay. A reading of the contract indicates that the Defendant was to hire the trucks that it would deliver to the Plaintiff and would load its customers' goods on these trucks at a hire charge of ZAR22,000.00 payable by the Defendant to the Plaintiff, less agreed expenses per truck. There is nowhere in the agreement where the Plaintiff was obligated to promptly notify the Defendant if there are any delays occasioned at the border. The agreement provides that any changes to the conditions would be communicated by either party and acknowledged in writing by the other party. The Defendant has not provided any evidence to show that the Plaintiff had agreed to it hiring two trucks from Lusaka to Livingstone to collect its clients' goods which were loaded on the trucks that had challenges at the border. The Defendant, despite the delay, did not indicate or intimate in writing of such a change to the conditions. I therefore find that the Defendant is not entitled to this claim as it did not invoke its right to notify the Plaintiff in writing following such delay as was expected under the contract. The claim fails and is dismissed.

The evidence on record shows that the payment was in South

African Rand and United States Dollars, which was the accepted or agreed mode of payment. In the case of ***Zambia Exports and Imports Bank Limited vs. Mkuyu Farms Limited, Elias Andrew Spyron & Mary Ann Langley Spyron***[15], the Court guided on the rate of exchange applicable in foreign currency judgment that the rate of exchange applicable is the one ruling at the time of enforcement of the Judgment. It is a fact as the evidence on record will show that the Defendant did not deposit or pay the money into Court or the Plaintiff's account at any time during these proceedings, which money is owing to the Plaintiff to date. Guided by the above cited case, my considered view is that the applicable exchange rate is the ruling rate at the time of payment that the Defendant will pay the Judgment sum.

In conclusion, I accordingly enter judgment in favour of the Plaintiff against the Defendant for the following: -

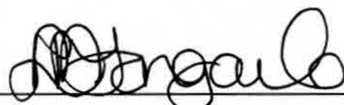
1. *ZAR63,000.00 being the total balance left outstanding for the hire of the seven (7) trucks;*
2. *Delivery of the Van the Plaintiff purchased or alternatively the payment of USD13,000.00 being the full purchase of the Van;*
3. *The sum of USD5,000.00 being the refund of the deposit paid on the purchase of the second Van; and*
4. *Damages for breach of contract in relation to the van that has not been delivered, which is referred to the District Registrar for assessment.*

I also award the Plaintiff interest on the above sums at 10% above LIBOR from the date of Writ, being 17th September, 2015 to the date of payment. The claim for damages for breach of contract, made by

the Plaintiff therefore succeeds to that extent only. The Defendant's counter-claim fails and I accordingly dismiss it.

I also award the Plaintiff costs, to be taxed in default of agreement.

Delivered at Lusaka on 29th day of March, 2018.



P. K. YANGAILO
HIGH COURT JUDGE