

**IN THE HIGH COURT OF ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA**
(Civil Jurisdiction)



2018/HP/1117

BETWEEN:

FORESTCOL FERTILIZER ZAMBIA LIMITED**PLAINTIFF**

AND

JOSEPH MALAMA TAMBA**1st DEFENDANT***(T/A Lechikwata Agro Agent & General Dealers***ALEX MUKUKA CHAKA****2nd DEFENDANT**

**BEFORE HON MRS JUSTICE S. KAUNDA NEWA THIS 20th DAY OF
FEBRUARY, 2020**

For the Plaintiff : Mr M. Sinyangwe, Willa Mutofwe & Associates

*For the 1st Defendant : Mr O. Ngoma and Ms M. Mwape, Lungu Simwanza
and Company*

For the 2nd Defendant : no appearance

J U D G M E N T

CASES REFERRED TO:

1. ***Liberty Mercian v Cuddy Civil Engineering Limited EWHC 2688 (TCC)***
2. ***Bolton Partners v Lambert 1889 41 CHD 295***
3. ***Central London Property Trust Limited v High Trees House Limited 1947 1 KB 130***
4. ***Krige and another v Christian Council of Zambia 1975 ZR 152***
5. ***Khalid Mohammed v The Attorney General 1982 ZR 49***
6. ***Wilson Masauso Zulu v Avondale Housing Project Limited 1982 ZR 172***
7. ***Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited 1990-1992 ZR 170***

8. ***Galaunia Farms Limited v National Milling Company Limited 2002 ZR 135***
9. ***Rosemary Phiri Madaza v Awadh Karen Collen 2008 Vol 1 ZR 12***
10. ***Base Chemicals Zambia Limited & Mazzonites Limited v Zambia Air Force & The Attorney General SCZ No 9 of 2011***
11. ***Christine Malosa Banda v Copperbelt Energy Corporation and two others Appeal No 187/2013***
12. ***Hydrotech Zambia Limited v Greenbelt Fertilizers Limited SCZ No 138 of 2015***
13. ***Inutu Etambu Suba v Indo Zambia Bank Limited SCZ No 52 of 2017***
14. ***Kalumba Kashiwa Mwansa v Mpofo and another 2018 ZMSC 344***

LEGISLATION REFERRED TO:

1. ***The Rules of the Supreme Court of England, 1999 edition***

OTHER WORKS REFERRED TO:

1. ***Black's Law Dictionary, 8th Edition***
2. ***Commercial Law, by Roy Goode, 3rd Edition***
3. ***Halsbury's Laws of England, 4th edition (re-issue) Vol 1 (1)***
4. ***Phipson on Evidence, 17th Edition***

The plaintiff commenced this action on 22nd June, 2018 by writ of summons seeking the following reliefs;

1. *Payment of K2, 903, 000.00, being the amount outstanding for fertilizer that was supplied to the defendants by the plaintiff on diverse dates by virtue of an agreement that was entered into between the plaintiff and the defendants.*
2. *Interest.*
3. *Further or other relief that the court may deem fit.*
4. *Costs.*

The statement of claim reveals that at the defendant's instance and request, in or about November, 2017, the plaintiff supplied farming inputs to the defendant in the form of fertilizer. It is stated that it was a term and condition of the supply of the fertilizer that payment was to be made within fourteen (14) days after collection, and or receipt by the defendant.

The plaintiff further states that the defendant was invoiced a total amount of K3,453,000.00, and only paid K991, 000.00, leaving a balance of K2, 903, 000.00 unpaid. That despite several reminders to pay the outstanding sum of K2, 462, 000.00, the defendants have neglected and or refused to do so, with the 1st defendant stating that the 2nd defendant was not its agent, and therefore, he had no authority to act on the 1st defendant's behalf.

The plaintiff states that the fertilizer was delivered to the 1st defendant's premises, after being invoiced, and the 1st defendant instructed its bankers to transfer the money directly from its account in the sum of K250, 000.00, as part payment for the fertilizer that it was supplied.

The 1st defendant entered appearance and filed his defence on 22nd August 2018. In that defence, he denies that the 2nd defendant was his agent, as the 1st defendant did not transact any business with the plaintiff. The 1st defendant avers that the 2nd defendant transacted with the plaintiff to the exclusion of the 1st defendant.

It is also the 1st defendant's defence that he denies the plaintiff's assertion that at his instance and request in November, 2017, he was supplied fertilizer by the plaintiff, which was to be paid for within fourteen (14) days of delivery or collection. His defence is that he did not

give any instructions or requests to the plaintiff to supply him any farming inputs in the form of fertilizer or on the terms and conditions alleged.

The 1st defendant denies being indebted to the plaintiff in the amount of K2, 467, 000.00, and states that at no point did he accumulate a debt amounting to K3, 452, 000.00, and he paid K991, 000.00 to the plaintiff. The 1st defendant admits that he denies owing the plaintiff the money claimed, and he denies having instructed his bank to transfer the amount of K250, 000.00 from his account as payment towards the supply of fertilizer by the plaintiff.

He avers that if any payment was made through the 1st defendant's bank to the plaintiff, the said payment was made through fraud, as it was a standing instruction to the bank that no payment could be made from the 1st defendant's account, without the 1st defendant's signature, and endorsement.

The 2nd defendant did not enter appearance or file a defence. At the trial, the plaintiff called one witness, and the 1st defendant also testified, but he did not call any witnesses.

PW1 was Joel Muzala Chivunda, a Logistics Manager for the plaintiff. He testified that the plaintiff is a company that is based in Kabwe, and it manufactures D Compound fertilizer. He stated that the said fertilizer is supplied within Zambia and the SADC region.

With regard to his duties, PW1 told the court that they include running the company operations, that is loading and offloading stock, stock taking, supervision of line staff, and taking orders from the General Manager. PW1 testified that to his knowledge, the plaintiff had a running

relationship with Lechikwata Agro & General Dealers, the 1st defendant herein, wherein the plaintiff supplied the 1st defendant with D Compound and Urea fertilizer.

He stated that the plaintiff would receive purchase orders from the 1st defendant specifying the quantity of fertilizer needed at a time, and the 1st defendant would indicate the date when it would pay for the said fertilizer. With reference to page 1 of the plaintiff's bundle of documents, PW1 testified that it was a purchase order from the 1st defendant, which indicated the quantity of fertilizer sought to be ordered, as well as the payment period.

He told the court that on receipt of the purchase order, the plaintiff considered it, and on approving the order, the plaintiff issued an invoice. The 1st defendant was then informed that they could go and collect the stock. PW1 further in his evidence told the court that page 2 of the plaintiff's bundle of documents was a delivery note which indicated that 300 bags X 50kg or urea fertilizer was released.

It was his testimony that the details of the truck that collected the fertilizer was indicated on the document, which were availed by the 1st defendant. Also indicated on the document was the invoice number, as well as the destination of the truck. PW1 also testified that page 3 of the plaintiff's bundle of documents was a delivery note that was sent to the 1st defendant, as per the purchase order of 600 X 50kg bags of urea fertilizer, and it had the truck details and the invoice number.

Page 4 was identified as an invoice that was issued to the 1st defendant for the 300 bags at page 2, while page 5 was the second purchase order that the plaintiff received for the amount of K1, 050, 000.00. His

testimony was that this order was also approved, and an invoice was issued to the 1st defendant.

PW1 identified page 6 of the plaintiff's bundle of documents as an invoice that was issued to the 1st defendant for fertilizer worth K450, 000.00 for the second purchase order, and his evidence was that the plaintiff did not approve the amount on the purchase order at page 5. He stated that a client is supposed to clear the balance before getting more stock, and that is why the quantity was reduced.

Still in his testimony, PW1 testified that page 7 was a gate pass for the fertilizer, and page 10, the delivery note. Page 11 was equally identified as a delivery note, and he stated that at page 14 was the third purchase order that the 1st defendant sent for a total amount of K882, 000.00. It was stated that the plaintiff approved this order, and an invoice, delivery note and pass were issued, as seen at pages 15-25 of the plaintiff's bundle of documents.

PW1 told the court that the invoice was at page 24 for K594, 000.00, and that a second invoice was issued for the remaining quantity, as per the purchase order at page 25, with the total number of bags being collected being 1200, at a cost of K288, 000.00, bringing the total to K882, 000.00. PW1 further testified that a fourth purchase order was received from the 1st defendant in the amount of K1, 041, 000.00, as seen at page 38 of the plaintiff's bundle of documents. That at page 39 was a gate pass, and at page 45, the tax invoice that was issued to the 1st defendant.

He continued testifying, stating that thereafter, the plaintiff issued fertilizer to the 1st defendant from a satellite depot on the Copperbelt, but

the order had no purchase order, but stock was released to the 1st defendant. PW1 explained that this was after an invoice was issued by the plaintiff, which was at page 31 of the plaintiff's bundle of documents, for 300 bags of Compound D fertilizer totaling K780, 000.00.

PW1's evidence was that a total of K3, 453, 000.00 was invoiced to the 1st defendant, and that K991, 000.00 was paid, leaving a balance of K2, 462, 000.00, as shown on the credit statement at page 62 of the plaintiff's bundle of documents. He also told the court that page 64 of the plaintiff's bundle of documents was a copy of a funds transfer from the 1st defendant's bank at FNB for K250, 000.00, which was paid to the plaintiff's account, which payment was reflected on the statement at page 62 in the paid column, as the last payment.

He further testified that to date, the amount of K2, 462, 000.00 is owing to the plaintiff, and that Joseph Malama Tamba and Alex Mukuka Chaka are Lechikwata Agro Agent & General Dealers, to the plaintiff's knowledge. With reference to the letter at page 6 of the 1st defendant's bundle of documents, PW1 testified that it is headed Lechikwata Agro and General Dealers, and it is addressed to the Bank Manager, FNB Manda Hill Branch.

His evidence was that it was signed by Joseph Malama Tamba as Board Chairman, and Alex Mukuka Chaka as Director/Secretary of Lechikwata Agro and General Dealers. PW1 still in his testimony stated that pages 1-5 of the 1st defendant's bundle of documents was a contract between Bilbao Industries Limited and Lechikwata Agro and General Dealers.

He stated that at page 4, Alex Mukuka Chaka had signed as Director of Lechikwata, and Nicholas Daka had signed as Director of Bilbao

Industries, while at page 5, on behalf of Bilbao, Luao Siwale had signed as businessman, and Joseph Malama Tamba as Managing Director of Lechikwata Agro and General Dealers.

PW1 told the court that the plaintiff had nothing to do with that document, and he explained that Nicholas Daka was the addressee on the purchase order at page 1 of the plaintiff's bundle of documents. It was explained that Nicholas Daka was employed by the plaintiff as a Sales Manager, and he dealt with the sale of fertilizer on behalf of the plaintiff.

Further, that Nicholas Daka did not avail the contract at pages 1-5 of the 1st defendant's bundle of documents to the plaintiff, despite having dealt directly with PW1 and the Managing Director on the sale of fertilizer. His evidence was also that as seen on the delivery note at page 16 of the plaintiff's bundle of documents, Joseph Tamba's name appears as the client, and that it is the name that they were given as the contact with his phone number, as he was the man on the ground dealing with the stock.

PW1 explained, that because of that, the destination of the stock, indicated Joseph Tamba's name, and that the contact for the payments was Alex Mukuka Chaka. PW1 with reference to the letter at pages 58-59 of the plaintiff's bundle of documents, which was written by the plaintiff's advocates then, Kabesha & Company, dated 29th March, 2018, to the 1st defendant's lawyers, stated that it was a letter informing the 1st defendant's advocates that the plaintiff had suspended the issuance of fertilizer to Alex Mukuka Chaka on behalf of the 1st defendant.

That at page 59, it was stated that the plaintiff did not believe the claim by Joseph Tamba that Alex Mukuka Chaka was purporting to sign on behalf of Lechikwata Agro and General Dealers. PW1 told the court that the printout from the Patents and Companies Registry (PACRA), at page 60 of the plaintiff's bundle of documents, shows that Lechikwata Agro Agent & General Dealers was incorporated on 17th February, 2006. Its' nature of business was hardware, paint and glass and mixed farming. The individual listed as the owner of the business is Joseph M. Tamba.

PW1 testified that it was therefore shocking that the 1st defendant could plead that the plaintiff did not supply it with fertilizer, and that it did not deal with Alex Mukuka Chaka. PW1 also testified that he had travelled with the General Manager to Kasama where they had met Joseph Tamba for purposes of verifying the stock, and also to request for payment.

His evidence was that Joseph Tamba had indicated that he would travel to Lusaka to come and sign, so that payment could be made to the plaintiff. Further, that Joseph Tamba directed the staff to take PW1 and the General Manager to where they were operating from, and they even reached Lunte. PW1 testified that Joseph Tamba only started denying having dealt with the plaintiff and the 2nd defendant when the demand notices were served on him.

PW1 concluded his testimony by asking the court to order the defendants to pay the plaintiff the amount of K2, 462, 000.00 for the fertilizer that it supplied the 1st defendant with interest and costs, as well as any other relief that the court may deem fit.

When cross examined, PW1 testified that the plaintiff entered into a contract with Joseph Malama Tamba as a representative of Lechikwata

Agro and General Dealers. He stated that he did not have a copy of the contract. He agreed that the purchase order at page 1 of the plaintiff's bundle of documents did not have Joseph Tamba's name, but that the authorizing signature on the document was for a representative of Lechikwata Agro and General Dealers.

PW1 further agreed that the PACRA print out at pages 60-61 of the plaintiff's bundle of documents is for the business name, Lechikwata Agro Agent & General Dealers, with the owner of the business being Joseph M. Tamba. PW1 also agreed that the purchase order at page 1 of the plaintiff's bundle of documents states the name of the business as Lechikwata Agro and General Dealers, and that the word 'Agent' is not included in the name.

It was further his evidence in cross examination that the purchase order at page 1 of the plaintiff's bundle of documents was for the attention of Nicholas Daka, who was the plaintiff's Sales Manager from October 2017 to August, 2018. PW1 did not know Nicholas Daka's whereabouts at the time of his testimony, although he stated that he was not sure if he was in prison at the instance of the plaintiff. He however agreed that the plaintiff lodged a complaint with the police against Nicholas Daka for failing to account for money, and for theft of fertilizer.

He told the court that when the purchase order at page 1 of the plaintiff's bundle of documents was presented to him, he did not deal with Joseph Tamba, and he did not know who delivered the purchase order. PW1 did not also know who signed on the purchase order, but he did not agree that it was forged. His evidence was that only Nicholas Daka would know who delivered the purchase order.

PW1 while agreeing that pages 2-3 of the plaintiff's bundle of documents were purchase orders, told the court that he did not deliver the fertilizer that was indicated on the documents. He agreed that the signatures on the two documents were different. That at page 3, the driver was indicated as Fitman Daka, and the names of the receiver on the document was C. Hamoya. PW1 agreed that Joseph Tamba was not indicated on the document.

He agreed that the tax invoice at page 4 of the plaintiff's bundle of documents was issued by the plaintiff's accountant, but that it had no name of the person who prepared the document, and it was not signed. Further, it had no signature for the person who received it.

PW1 further agreed that the purchase orders at pages 5, 14 and 38 of the plaintiff's bundle of documents were also for the attention of Nicholas Daka, and at page 5, the person that approved was Alex Mukuka Chaka. His evidence was that page 14 of the same bundle of documents, indicated the person who had approved the purchase order as AMC, and at page 38 it was A.M. Chaka, and not Joseph M. Tamba. It was agreed that PW1 was not present when the three (3) purchase orders were received, and that all three (3) did not have the word 'Agent', included in the name of the business.

PW1 still in cross examination, agreed that the gate passes at pages 15, 20, 21, 22, 23, 26, 39 and 40 of the plaintiff's bundle of documents indicated the business name as Lechikwata Agro and General Dealers, and not Lechikwata Agro Agent & General Dealers, although they were for the attention of Joseph M. Tamba. Further that at page 10, the name of the receiver was Zozi Boniface, while page 11 had a signature without a name, and the same went for pages 13, 16, 17, 18, 19, 28, 29 and 30.

PW1 agreed that the signatures on the documents were different, and that on the delivery note at page 35, the name of the person who delivered was indicated, and that A.M. Chaka signed. On the other delivery notes, PW1 testified that the ones at pages 46 and 49 had the name of the driver as Izukanzi Simumba, and at page 47 it was Pride Phiri, while the one at page 54 was for the attention of Siwale. He also testified that the ones at pages 55 and 56 were for the attention of Siwale, and were received by Pride Phiri.

PW1 could not confirm if Siwale worked for the plaintiff, but his evidence was that Luao Siwale used to work there, and that he was dismissed for absconding from work, as advised by Human Resources. He agreed that page 61 was not a bank statement, but a balance statement, and that the client was indicated as Lechikwata Agro & General Dealers, although the mode of payment was not indicated.

PW1's evidence was that page 63 of the plaintiff's bundle of documents was an e-mail that was written by Alex Mukuka Chaka on 2nd July, 2018 and it was copied to Nicholas Bilbao Daka, and Anthony Kays Chishimba, and not to Joseph M. Tamba. PW1 agreed that the e-mail was addressed to Kevin, the plaintiff's General Manager, and it was a letter of commitment by Alex Mukuka Chaka.

PW1 further agreed that Alex Mukuka Chaka was not the owner of Lechikwata Agro Agent & General Dealers, but that he was introduced as being part of it. He also stated that Lechikwata paid for the fertilizer that it started collecting from the plaintiff. He also told the court that he came across the contract between Bilbao and Lechikwata for the supply of fertilizer inputs after they pursued Lechikwata for payment.

When referred to the said contract at pages 1-5 of the defendant's bundle of documents, PW1 agreed that it states at page 1, that Bilbao was the seller, and Nicholas Daka signed on its behalf at page 4, while Luao Siwale who worked at the plaintiff signed as Nichola's witness. PW1 could not confirm if Nicholas Daka and Luao Siwale both worked for two companies.

He testified that on the same document, Alex Mukuka Chaka signed on behalf of Lechikwata, and his witness was Joseph Tamba as Managing Director of Lechikwata. It was his evidence that he did not know if Bilbao had sued Lechikwata, and he told the court that on the letter at page 6 of the defendant's bundle of documents, Joseph Malama Tamba signed as Board Chairman of Lechikwata Agro and General Dealers.

That by that letter, additional signatories to the account were introduced. He also agreed that according to that letter, the instructions were that any two (2) of the three (3) directors would sign with the main signatory, but that no one signed the letter as owner of the company. PW1 agreed that Joseph Tamba had indicated that he had sued FNB for refund of K250, 000.00, but that he did not tell PW1 that the matter was before Hon Mrs Justice Kombe.

In re-examination, PW1 testified that Joseph M. Tamba and Alex Mukuka Chaka at page 1 of the defendant's bundle of documents wrote on behalf of Lechikwata Agro and General Dealers, with Joseph Tamba signing as Board Chairman and Alex Mukuka Chaka as Director/Secretary. Further, that the date stamp on that document has the name Lechikwata Agro Agent & General Dealers, and there is a date stamp on the document for FNB Manda Hill.

That on the contract between Bilbao Industries Limited and Lechikwata Agro and General Dealers at pages 1-5 of the defendant's bundle of documents, Joseph Tamba signed as Managing Director. Thus, the company indicated on the PACRA printout at pages 60-61 of the plaintiffs bundle of documents, and the contract at pages 1-5 of the 1st defendant's bundle of documents, as well as on the purchase order at page 1 of the plaintiff's bundle of documents, and the other purchase orders, was one and the same.

He also stated that agents were allowed to collect the fertilizer, and they would sign, and that in this case, the plaintiff did not deliver the fertilizer to the 1st defendant, but that the 1st defendant sent transport to the plaintiff to collect it. It was also his testimony that the communication was done through the line manager, Nicholas Daka at the plaintiff, and the contact person at the 1st defendant, who gave the plaintiff the details of the trucks and their registration.

PW1 further told the court that there was no letter introducing Alex Mukuka Tamba as an agent for Lechikwata, but that the plaintiff was in direct contact with Joseph Tamba and Alex Mukuka Chaka who represented Lechikwata. Further, that the e-mail at page 63 of the plaintiff's bundle of documents was written by Alex Mukuka Chaka to the plaintiff admitting that Lechikwata owes the plaintiff, and invited the plaintiff to follow up on stock monitoring. That marked the close of the plaintiff's case.

The 1st defendant, Joseph Malama Tamba, was DW1. He is the proprietor of Lechikwata Agro Agent & General Dealers. His testimony was that he buys and sells maize and fertilizer, and he registered Lechikwata Agro Agent and General Dealers as a business firm in 2006. He further

testified that in September 2017, he met Alex Chaka Mukuka who had asked him if he sold fertilizer, and when the 1st defendant agreed, Alex had told him that he owned a company that could supply the 1st defendant with fertilizer.

It was stated that the next day, the 1st defendant met Alex, and there were three (3) other men namely, Anthony Kays Chishimba, Luao Siwale and Nicholas Daka. The 1st defendant testified that Alex had explained that Nicholas Daka had the fertilizer, and thereafter, Nicholas Daka said that they should sign a contract, as he owned a company called Bilbao Industrial Limited.

It was the 1st defendant's evidence that an agreement was reached, and Alex and Anthony Kays Chishimba told the 1st defendant that they had brought the company to supply fertilizer, but they needed to know how the fertilizer would be moved. He further testified that he told Alex that he would be party to the agreement, and that is how Alex had signed the contract, which was at pages 1-5 of the defendant's bundle of documents.

The 1st defendant explained that he had told them that he needed to see how the fertilizer would be sold to the government, and he wrote a letter to his bank, FNB, informing it that Anthony Kays Chishimba, Alex Mukuka Chaka and Nicholas Daka be included as signatories to the account for Lechikwata Agro Agent & General Dealers, together with him.

The 1st defendant's testimony was that the instructions on the letter to the bank were further that, only when he signed with the other signatories, could money be paid out of the account. The said letter was identified as that at page 6 of the defendant's bundle of documents. He

stated that from there, that is how they started bringing the fertilizer, and the 1st defendant would pay them after seven days. Then one day, he went to the bank expecting to find K1, 309, 250.00 in the account, but found that money had been withdrawn.

On enquiry, he was informed by the bank that Alex Mukuka Chaka and Anthony Kays Chishimba had withdrawn the money. That is how the 1st defendant thought of engaging Counsel, and as he was on the way there, a police officer from Kabwe phoned him telling him that he wanted him, as Lechikwata Agro Agent & General Dealers had obtained fertilizer from the Copperbelt, and that Luao Siwale had been apprehended. The police officer further told the 1st defendant that Alex Mukuka Chaka had been getting fertilizer using Lechikwata Agro Agent & General Dealers.

When the 1st defendant called Alex Mukuka Chaka and told him about what the police officer had said, Alex had responded stating that the plaintiff was mistaken, as Bilbao was the entity that was getting the fertilizer. The 1st defendant testified that the lawyers that he engaged, wrote a letter which was taken to Kabwe, stating that he was not involved in the matter. He also commenced legal proceedings against the bank, which matter was before Judge Kombe.

The 1st defendant identified pages 7-12 of his bundle of documents as the bank statements for Lechikwata Agro and Agent General Dealers. His evidence that at pages 7, 8, 9 and 10, he had ticked the amounts that were withdrawn from the account without his knowledge. He denied ever having had any dealings with Forestcol, stating that this is why the documents did not have his names.

It was his evidence that he had an agreement with Bilbao, and that is how he wrote to the Bank. The 1st defendant asked the court to order that the K250, 000.00 that was paid to the plaintiff be paid back to him. On the letter head for the letter that the 1st defendant wrote to the bank, his evidence was that there was an error on the name, but that the date stamp at page 6 of his bundle of documents had the correct name.

He concluded his testimony by stating that when he appointed an agent, he wrote a letter to that effect, and there was no such letter in this case.

The 1st defendant in cross examination reiterated that he met Alex Mukuka Chaka in September, 2017, who said that they should work together at Lechikwata Agro Agent & General Dealers. He further stated that Alex Mukuka Chaka worked as Bilbao, and not as Lechikwata. The 1st defendant agreed that he wrote the letter at page 6 of his bundle of documents to FNB, and that the name on the letter head, and on the date stamp were different.

He however denied having received the fertilizer, although his phone number was reflected on the delivery notes at pages 28, 29, and 30 of the plaintiff's bundle of documents. It was also his evidence in cross examination that Lechikwata has shops in Kasama, Mporokoso, Kaputa, Lunte, Mungwi, Mpika, Mansa, Mkushi and Lwano.

He further agreed that on the delivery note at page 28 of the plaintiff's bundle of documents, the place of delivery indicated was Kasama, and that he had a point of sale in Kasama. He also stated that his phone number is 0977782551, but that it was not the same number at page 28 of the plaintiff's bundle of documents, as there it was indicated as

097782551. The 1st defendant however agreed that the phone number at page 41 of the same bundle of documents was his.

His evidence was that Lechikwata Agro and General Dealers indicated on the purchase order at page 1 of the plaintiff's bundle of documents is his company. The 1st defendant also agreed that he brought Alex Mukuka Chaka into his business. When referred to the letter that he wrote to FNB at page 6 of his bundle of documents, the 1st defendant agreed that according to that letter, he introduced some signatories.

His testimony was however that he was the main signatory to the only account that Lechikwata Agro Agent & General Dealers has, and that he had to sign as one of the signatories on each transaction. The 1st defendant agreed that at page 64 of the plaintiff's bundle of documents was the transfer of funds from the Lechikwata Agro Agent & General Dealers account at FNB to the plaintiff's account.

He also agreed that there was no document showing that he did not sanction the transaction, although he had sued the Bank over the matter. He agreed that contrary to his pleadings, he had not brought any evidence to prove the fraud that he alleged. It was his testimony that he had however reported the matter to the police, and that he bought fertilizer from Bilbao whom he paid in cash, but they would not give him any receipts.

The 1st defendant stated that he refused the claim by the plaintiff for payment, but they did not write him a demand letter. It was stated that his advocates Lungu Simwanza and Company did not respond to the letter at pages 58-59 of the 1st defendant's bundle of documents, which

was authored by Kabesha & Company, advocates, as he had no dealings with the plaintiff.

In re-examination, the 1st defendant told the court that at page 6 of the 1st defendant's bundle of documents, Alex Mukuka Chaka was added as a signatory for Lechikwata Agro Agent & General Dealers. He also denied that as Lechikwata Agro Agent & General Dealers, he authorized Alex Mukuka Chaka to deal with the plaintiff as his agent.

The 1st defendant testified that while the delivery notes had his name and phone numbers, he was not the author of those documents. He further denied having issued the purchase orders.

I have considered the evidence in this matter. It is a fact that the plaintiff issued fertilizer to a company called Lechikwata Agro and General Dealers, and that the fertilizer issued was paid for in part. It is common cause that after there was default in payment, the plaintiff approached the 1st defendant for the payment, and the 1st defendant denied owing the plaintiff any money, stating that it was the 2nd defendant, Alex Mukuka Chaka, who got the fertilizer from the plaintiff.

It is also not in contention that the 1st defendant entered into a contract with a company called Bilbao Industries Limited, for the purchase of fertilizer, and that Nicholas Daka and Luao Siwale who were employees of the plaintiff signed the contract on behalf of Bilbao Industries Limited, and the 1st and 2nd defendants signed the contract on behalf of Lechikwata Agro Agent & General Dealers. The question is whether the plaintiff is entitled to the reliefs sought?

The plaintiff claims payment of the sum of K2, 903, 000.00, being the money outstanding for the supply of fertilizer to the defendants on

diverse dates, pursuant to an agreement between the parties. The evidence as given by PW1 was that the 1st defendant submitted purchase orders which are four (4) in total, as evidenced at pages 1, 5,14, and 38 of the plaintiff's bundle of documents, and was invoiced for fertilizer totaling K3, 453, 000.00. That out of this amount, K991, 000.00, was paid, leaving a balance of K2, 462, 000.00.

The evidence which is in dispute is that persons purporting to act on behalf of Lechikwata Agro Agent & General dealers collected the fertilizer that was invoiced, and that they provided details for the 1st defendant, Joseph Tamba as the recipient of the fertilizer. The 1st defendant denies having received the fertilizer from the plaintiff, stating that he had a contract with Bilbao Industries Limited which supplied him the fertilizer, and that he paid for the said fertilizer in cash.

In arguing that the plaintiff is entitled to be paid, and with reference to the burden of proof, the plaintiff in the submissions referred to ***Phipson on Evidence, 17th Edition***, which states that;

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

The cases of ***Wilson Masauso Zulu v Avondale Housing Project Limited*** ⁽⁶⁾ and ***Khalid Mohammed v The Attorney General*** ⁽⁵⁾ were relied on to submit that they elaborated the above principles. That in civil

cases, the standard of proof is on a balance of probabilities. The plaintiff submitted that there are five (5) legal issues that arise in this matter.

In this regard, the submission was that the first issue relates to the allegation by the 1st defendant that the amount of K250, 000.00 was fraudulently transferred from his account into the plaintiff's account, as pleaded in paragraph 9 of the defence and the counterclaim.

As to what constitutes fraud, the definition in ***Black's Law Dictionary, 8th Edition*** at page 685 was relied on. That it defines fraud as;

"A knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment".

The plaintiff submitted that there a number of authorities that have held that for an allegation of fraud to stand, it must be distinctly alleged and proved. In this regard, the cases of ***Christine Malosa Banda v Copperbelt Energy Corporation and two others*** ⁽¹¹⁾, ***Kalumba Kashiwa Mwansa v Mpofu and another*** ⁽¹⁴⁾ and ***Rosemary Phiri Madaza v Awadh Karen Collen*** ⁽⁹⁾ were relied on.

Further, that Order 18/12/18 of the Rules of the Supreme Court of England, 1999 edition states that;

"Fraudulent conduct must be distinctly alleged and...distinctly proved, and it is not allowable to leave fraud to be inferred from the facts".

That while the 1st defendant pleaded fraud in the defence and counterclaim, he had not pleaded the particularity of that fraud. Therefore, he had not met the requirements laid down in Order

18/12/18 of the Rules of the Supreme Court of England, 1999 edition to prove it. It was further submitted that in the case of **Base Chemicals Zambia Limited & Mazzonites Limited v Zambia Air Force & The Attorney General** ⁽¹⁰⁾, it was held inter alia that;

“In any event, there was no evidence establishing fraud or abuse of office. In the case of Sithole v State Lotteries Board, we pointed out that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities”.

The second legal issue relates to whether the parties entered into a contract for the supply of fertilizer. In arguing this issue, the plaintiff's submission was that there is undisputed evidence on the record that the plaintiff sold and delivered fertilizer to the 1st defendant, and that the 1st defendant did not dispute that fertilizer was delivered to him. That additionally, the purchase orders, delivery notes and tax invoices in the plaintiff's bundle of documents, show that the same were in Lechikwata Agro Agent & General Dealers name, and the same was not disputed at trial.

The plaintiff further argued that the 1st defendant did not adduce any documentary evidence to show that the 2nd defendant had no authority to act on his behalf, or that he had revoked the authority that he had given him. To this end, the case of **Central London Property Trust Limited v High Trees House Limited** ⁽³⁾ was relied on, stating that it was stated in that case that;

“There are cases in which a promise was made which was intended to create legal relations, and which, to the

knowledge of the person making the promise must be honoured. These are promises intended to be binding, intended to be acted upon, and the courts have refused to allow the party making it to act inconsistently with it. It is in that strict sense, and that sense only, that such a promise gives rise to stopped”.

The plaintiff also submitted that the 1st defendant made commitment towards his contractual obligations, and he paid K250, 000.00. The case of **Galaunia Farms Limited v National Milling Company Limited** ⁽⁸⁾ was relied on, stating that it was held in that case that;

“The basis of estoppel is when a man has so conducted himself that it would be unfair or unjust to allow him to depart from a particular state of affairs, another has taken to be settled or correct”.

That this position was reiterated in the case of **Krige and another v Christian Council of Zambia** ⁽⁴⁾. The plaintiff submitted that in order for a plea of estoppel to succeed, there must be a representation of fact intended to be acted upon by the person to whom it is made, and that the person to whom it is made, must actually act upon the representation, and by so acting, must act to his detriment. That in this case, the 1st defendant made a representation, the basis upon which the plaintiff supplied him various quantities of fertilizer.

The submission was further that the tax invoices on the record, show that the fertilizer was delivered to the 1st defendant, and on the basis of the authority of the case of **Inutu Etambuyu Suba v Indo Zambia Bank Limited** ⁽¹³⁾, where it was stated that;

“the appellant, as the trial Judge rightly observed, had the opportunity to object to the production and admission in evidence, which she is now belatedly challenging, both at discovery and at trial”,

argued that as no objection was raised to the invoices at trial, the 1st defendant admitted being indebted to the plaintiff.

The third issue raised by the plaintiff relates to whether having established that there was a valid and enforceable contract between the plaintiff and the 1st defendant, does it bind the 1st defendant? In support of this issue, the plaintiff submitted that the 1st defendant engaged the 2nd defendant as his agent in the business of sourcing and distributing the fertilizer.

That the learned authors ***Commercial Law, by Roy Goode, 3rd Edition*** at page 132 with regard to the creation of the agency relationship states that;

“The relation of agency is created by express or implied agreement of the principal and the 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 authorized 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”.

Further, that the implied authority of an agent is where, although the principal has not specifically authorized the particular actions of an agent at issue, the agent can reasonably infer that authority for that action, has been delegated to him. The plaintiff relied on the case of

Hydrotech Zambia Limited v Greenbelt Fertilizers Limited ⁽¹²⁾ where the definition of the term agent, and whether an agency relationship exists was considered.

That in that case, the court stated that ***Halsbury's Laws of England, 4th edition (re-issue) Vol 1 (1)*** at paragraph 1 states that;

“Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship, but on the true nature of the agreement or the circumstances of the relationship between the alleged principal and agent”.

It was submitted that the court in that matter reiterated that express agency is created where the principal or some other person authorized by him expressly appoints an agent to act, whether by deed, by writing under hand or orally, and that implied agency arises from the conduct or situation of the parties. Further, the court took note of the learned authors ***Commercial Law by Roy Goode, 3rd edition*** at page 162, where it states that it is trite that a trading business, a commercial enterprise may employ a variety of techniques to ensure that its goods are sourced, and distributed to the intended market.

Therefore, whether an agency relationship exists, depends on the facts of the case. That from the facts of that case, it was clear that an agency relationship existed. The plaintiff submitted that this case is on all fours with the ***Hydrotech*** case, as the 2nd defendant was held out to be an agent of the 1st defendant, and he even signed all the necessary documents, as seen from the plaintiff's bundle of documents.

It was also submitted that at trial, the 1st defendant did not adduce any evidence to show that the 2nd defendant had no authority to act on his behalf, or that indeed he had revoked that authority. That from the defendant's actions, it is suggested that the 1st defendant gave him authority to act on his behalf, as he signed all the documents in his capacity as Director/Secretary in relation to the transactions that were made with the plaintiff.

Reliance was placed on the case of *Bolton Partners v Lambert* (2), submitting that in that case, the managing director of a company purporting to act as an agent on the company's behalf, but without its' authority, accepted an offer by the defendant for the purchase of some sugar works belonging to them. The defendant then withdrew his offer, but the company ratified the manager's acceptance.

That it was held in that case, that the defendant was bound, the ratification relating back to the time of the agent's acceptance, and so prevented the defendant's subsequent revocation. It was the plaintiff's submission that it is clear from that case, that where the principal ratifies the acts of an agent, the principal will be bound from that moment, as if they had entered into the contract with the third party themselves.

That the fourth legal issue is after having determined that there was a valid contract between the parties, and that the 2nd defendant was acting on behalf of the 1st defendant at all times, the question is whether the 1st defendant is justly indebted to the extent claimed by the plaintiff.

In submitting that this is the position, the plaintiff stated that the undisputed evidence at trial shows that there was an agreement under

which the plaintiff supplied the 1st defendant with fertilizer, and invoices were issued to show that the plaintiff delivered the fertilizer to the 1st defendant. Reliance was placed on the case of **Zambia Electricity Supply Corporation Limited v Redlines Haulage Limited** ⁽⁷⁾, stating that it was held in that case that;

“This evidence was in no way challenged by the defence. The only inference that could reasonably be drawn from the defence failure to do so was that the defence accepted the plaintiffs' estimate of the loss and in the circumstances this court is reluctant to interfere”.

The last legal issue relates to the business name that was quoted on the purchase orders. In this regard, reliance was placed on the case of **Liberty Mercian v Cuddy Civil Engineering Limited** ⁽¹⁾ submitting that in relation to a wrong party being named in a contract, it was stated that;

“Where there is a mistake in the use of a name, it can either be a misnomer or a demotion. It is a misnomer if there is a wrong or inaccurate use of a name or a term which can be corrected using the principle of contractual construction. It is usually often a simple typographical or clerical error”.

That the court in that matter went on to further state that;

“If in all the circumstances of the case, looking at the documents as a whole, the intended contracting party would say, of course, it must mean me, but they have got it wrong, there is a case of a misnomer. If on the other hand, he would say to himself; I cannot tell from the document itself whether

they mean me or not, and I shall have to make inquiries, then that one is getting out of the realm of misnomer”.

It was submitted that in this case, the word ‘Agent’ had been omitted from the 1st defendant’s trading name, and this amounted to a misnomer, as it was just a typographical error, usually made by the 1st defendant, as evidenced at page 6 of his bundle of documents, which is a letter that he wrote to the Bank, which had omitted the word ‘Agent’ from his business name.

In deciding whether the defendants are truly indebted to the plaintiff for the amount claimed, I will consider all the five (5) legal issues that have been raised by the plaintiff together.

The evidence as given by PW1 was that the plaintiff had an agreement with the 1st defendant for the supply of fertilizer. As to whether there was a valid contract between the plaintiff and the 1st defendant, the plaintiff argued that the 1st defendant through Lechikwata Agro Agent & General Dealers purchased fertilizer from it. When PW1 was cross examined, he agreed that the contract that the plaintiff entered into with Lechikwata Agro Agent & General Dealers was not before the court.

In disputing that the 1st defendant, trading as Lechikwata Agro Agent & General Dealers had a contract with the plaintiff, the 1st defendant produced before this court, the contract that Lechikwata Agro Agent & General Dealers had with Bilbao Industries Limited which is at pages 1-5 of his bundle of documents.

This agreement which was signed on 14th November, 2017 was for the delivery of fertilizer to Lechikwata Agro and General Dealers as a buyer from Bilbao Industries Limited as the seller. At page 4, Nicholas Daka

signed on behalf of the seller, as Director, and Alex Mukuka Chaka signed as director on behalf of the buyer, Lechikwata Agro and General Dealers. The witness for the seller was Luao Siwale a businessman, and Joseph M. Tamba, the 1st defendant as witness for Lechikwata Agro and General Dealers, as managing director.

The 1st defendant was not discredited on his evidence that this contract was the basis upon which he had transacted in his fertilizer business, and he had involved the 2nd defendant. The onus was upon the plaintiff to prove on a balance of probabilities that it did not deal with the 1st defendant on the basis of the contract that he had with Bilbao Industries Limited, but rather under his business name Lechikwata Agro Agent & General Dealers.

The 1st defendant in his testimony stated that he deals in fertilizer. He further testified that Alex Mukuka Chaka approached him in September, 2017, and they entered into a contract for the supply of fertilizer on 14th November, 2017. The first purchase order that Lechikwata Agro Agent & General Dealers made with the plaintiff at page 1 of the plaintiff's bundle of documents is dated 22nd November, 2017, while the one at page 5 is dated 27th December, 2017. The one at page 14 is dated 9th January, 2018, and the last one at page 38 is dated 17th January, 2018.

All these purchase orders were made after the 1st defendant trading as Lechikwata Agro Agent & General Dealers had signed an agreement with Bilbao Industries Limited for the supply of fertilizer. The evidence on record which was not disputed, is that PW1 testified that Nicholas Daka who was an employee of the plaintiff, as Sales Manager, dealt with the sale of fertilizer, and he received the purchase orders.

This Nicholas Daka apart from being an employee of the plaintiff and dealt with fertilizer on its behalf, was director of Bilbao Industries Limited, which had a contract with Lechikwata Agro Agent & General Dealers for the supply of fertilizer. The contract that was signed by Lechikwata Agro Agent & General Dealers with Bilbao Industries Limited was witnessed on behalf of Bilbao Industries Limited by Luao Siwale who also worked for the plaintiff at the time.

The 1st defendant agreed that he resolved to bring Alex Mukuka Chaka into the business, as Alex Mukuka Chaka had told him that he had brought a company to supply the 1st defendant with fertilizer. That is how Alex Mukuka Chaka signed on the contract with Bilbao Industries Limited. In furtherance of that business, the 1st defendant had introduced Alex Mukuka Chaka, Anthony Kays Chishimba and Nicholas Daka as other signatories to the Lechikwata Agro Agent & General Dealers account.

PW1 in cross examination agreed that he had never dealt with the 1st defendant under the contract, and his evidence was also that the plaintiff did not deliver the fertilizer to the 1st defendant, but rather, that the fertilizer was collected from the plaintiff, and the details for the recipient, being the 1st defendant, were availed to the plaintiff.

While agreements may be made orally or in writing, in this case there is a dispute as to whether the 1st defendant contracted with the plaintiff for the supply of fertilizer. It would therefore have been prudent to have evidence of who the contracting party was in this matter, especially that it is on record that the 1st defendant had no contact with the plaintiff under the agreement, and he had a contract with Bilbao Industries Limited, whose director was Nicholas Daka, an employee of the plaintiff.

As already seen, the 1st defendant testified that he introduced Anthony Kays Chishimba, Nicholas Daka and Alex Mukuka Chaka as bank signatories to the account for Lechikwata Agro Agent & General Dealers to the bank on 17th November, 2017. His position was that this was done pursuant to the contract that he had with Bilbao Industries Limited for the supply of fertilizer.

All this evidence was not discredited in any way by the plaintiff. Apart from providing the contract that the plaintiff had with Lechikwata Agro Agent & General Dealers to prove that indeed the 1st defendant had an agreement with the plaintiff for the supply of fertilizer, even proof of who paid for the fertilizer, would have shed light on who the plaintiff was dealing with.

A contract is entered into when there is agreement between one or more persons. The evidence as it is, establishes that the 1st defendant did not agree with the plaintiff, but entered into a contract with Bilbao Industries Limited for the supply of fertilizer. That being the position, there was need for the plaintiff to prove that even though the 1st defendant had a contract for the supply of fertilizer with Bilbao Industries Limited, he was aware that the fertilizer that he was being supplied as Lechikwata Agro Agent & General dealers was being sourced from the plaintiff through the 2nd defendant.

PW1 in his quest to prove this, testified that when Lechikwata Agro Agent & General Dealers defaulted in paying, he and the managing director of the plaintiff went to Kasama where the 1st defendant was at one of his outlets for the fertilizer, and the 1st defendant even instructed his workers to show PW1 and the managing director where they were operating from. PW1 told the court that they even reached as far as

Lunte. Further, that the 1st defendant even promised to come to Lusaka to pay the outstanding amount.

When PW1 was cross examined, this evidence was not discredited. It is therefore credible evidence that establishes that the 1st defendant was aware that fertilizer was being sourced from the plaintiff. However, the 1st defendant in his testimony told the court that after the police had called him, and informed him that Lechikwata Agro Agent & General Dealers had obtained fertilizer from the plaintiff and Luao Siwale had been apprehended, he had enquired from the 2nd defendant about the plaintiff.

The 2nd defendant had told him that the plaintiff was mistaken, as it was Bilbao Industries that had been getting the fertilizer from the plaintiff. The 1st defendant was not challenged on this evidence in cross examination, and it also remains very credible evidence. In light of this testimony, and while the 1st defendant did not challenge PW1's evidence that he and the plaintiff's managing director went to Kasama where they found the 1st defendant, who even instructed his workers to show them their other outlets, and he promised to pay the outstanding sums, there is need to establish which of the two versions of the stories is more credible.

The 1st defendant denied that the plaintiff served him with a demand letter to pay the money. He referred to the letter at page 58 of the plaintiff's bundle of documents which the advocates for the plaintiff then, Kabesha & Company, wrote to the 1st defendant's advocates, Lungu Simwanza & Company. That letter which is dated 29th March, 2018, makes reference to a letter dated 20th March, 2018 which the 1st defendant's advocates wrote to the plaintiff, and the plaintiff had passed it on to the advocates so that they could reply.

In that letter, the plaintiff's advocates noted that the 1st defendant was denying that fertilizer was delivered to him by the plaintiff. However, the advocates referred to the invoices for the fertilizer supplied to the 1st defendant. The advocates for the plaintiff also acknowledged having had sight of the contract between Bilbao Industries Limited and Lechikwata Agro and General Dealers.

However, they were not convinced that the 1st defendant could claim that the 2nd defendant was not acting on his behalf. It can therefore be seen from that letter, that the 1st defendant denied being indebted to the plaintiff, his argument being that he had no dealings with the plaintiff, but rather, with Bilabao Industries Limited. This denial is supported by PW1's evidence when he testified that the plaintiff did not have any direct dealings with the 1st defendant.

From the totality of the evidence, an inference can be drawn that Nicholas Daka whilst acting in concert with Alex Mukuka Chaka raised the purchase orders which Nicholas Daka presented to the plaintiff, as PW1 had no knowledge of who took the said purchase orders to the plaintiff.

On the strength of the purchase orders that purported that Lechikwata Agro Agent & General Dealers was ordering the fertilizer, Nicholas Daka and Alex Mukuka Chaka obtained the fertilizer which they supplied to the 1st defendant as Bilbao Industries Limited. Again, PW1's testimony that the plaintiff did not deliver the fertilizer to the 1st defendant, but that transport was sent to collect it, supports the 1st defendant's defence that he had no dealings with the plaintiff, as he has not been connected to the transactions.

While the 1st defendant's name and phone numbers appear on the delivery notes, this does not support the allegation that the 1st defendant was aware of the dealings with the plaintiff, as he took Nicholas Daka and Alex Mukuka Chaka into his business. They were thus privy to his contact and personal information, and they used it.

The plaintiff argued that the 1st defendant apart from pleading fraud in paragraph 9 of the defence and counterclaim did not particularize it, and indeed prove it at trial. Therefore, the requirements under Order 18/12/18 of the Rules of the Supreme Court of England, 1999 edition have not been satisfied. I agree with the provisions of Order 18/12/18 of the rules of the Supreme Court of England, 1999 edition, and the authorities cited by the plaintiff on how fraud should be pleaded and proved.

However, in this case, while the 1st defendant may not have pleaded the fraud as required by the law, the evidence, especially that given by PW1 supports the 1st defendant's defence that the 1st defendant did not enter into an agreement with the plaintiff for the supply of fertilizer. It is therefore my finding that the 1st defendant was truthful when he said that he had no dealings with the plaintiff.

On that basis, he could not be said to have appointed the 2nd defendant as his agent in the transactions that the 2nd defendant had with the plaintiff. Further, it cannot be implied that the 1st defendant appointed the 2nd defendant as his agent. The issue of estoppel, cannot also arise, as it has been seen that the 1st defendant did not make any representation to the plaintiff to order fertilizer, and the plaintiff acted on the same to its detriment.

The 1st defendant denied owing the plaintiff the money as he dealt only with Bilbao Industries Limited. In trying to establish that his business firm, Lechikwata Agro Agent & General Dealers did not transact with the plaintiff, the 1st defendant argued that the business name that he registered at PACRA, as seen at pages 60-61 of the plaintiff's bundle of documents is Lechikwata Agro Agent & General Dealers.

Indeed, that is the position. However, as already seen, the purchase orders at pages 1, 5, 14 and 38 of the said bundle of documents, have the name indicated on them as Lechikwata Agro & General Dealers, with 'Agent' having been omitted from the name. When the 1st defendant was referred to the introductory letter that he wrote to his bank FNB at Manda Hill, he agreed that it is headed Lechikwata Agro and General Dealers, thus also having omitted the word 'Agent' from the name.

The 1st defendant however agreed that the date stamp on the same introductory letter had the name indicated as Lechikwata Agro Agent & General Dealers. It can therefore be seen that the omission of the word 'Agent' in the 1st defendant's business name was just a typographical error, or a misnomer as submitted by the plaintiff, as the 1st defendant admitted having authored the letter to his bank, which is at page 6 of his bundle of documents, and which omitted the word 'Agent' from the business name.

Therefore, the business name for the 1st defendant was used to raise the purchase orders for fertilizer with the plaintiff. However, having found that the 1st defendant had nothing to with the fertilizer that Alex Mukuka Chaka got from the plaintiff using purchase orders under the 1st defendant's business name, Lechikwata Agro Agent & General Dealers, he is not liable to pay the outstanding sum for the fertilizer.

The person liable is the 2nd defendant. The 1st defendant testified that K250, 000.00 was paid from the Lechikwata Agro Agent & General Dealers account to the plaintiff, by the 2nd defendant and Anthony Kays Chishimba, without his authorization. He told the court that the letter of instruction that he wrote to the bank, which is at page 6 of his bundle of documents, which added Anthony Kays Chishimba, Nicholas Daka and Alex Mukuka Chaka as signatories to the account, further instructed that any of the two who had been added as signatories, could sign any transaction with him as a main signatory.

At pages 7-12 of the 1st defendant's bundle of documents is the bank statement for Lechikwata Agro Agent & General Dealers. It starts from 1st January, 2018 and goes up to 31st January, 2018. The 1st defendant in his testimony, and with reference to pages 7, 8, and 9 of the said bundle of documents, testified that the amounts ticked on those pages were withdrawn without his knowledge.

At page 7, it shows that Alex Chaka withdrew cash from a teller in the amount of K54, 000.00 on 10th January, 2018, and K22, 500.00 on 12th January, 2018, again through a teller. He further withdrew K68, 500.00 on 16th January, 2018, again through a teller. At page 8, Alex Chaka withdrew the amounts of K86, 250.00 and K80, 000.00 on 17th January, 2018, while K500, 000.00 was withdrawn as a debit adjustment on the same date.

Further, on 19th January, 2018, Alex Chaka withdrew the amount of K265, 000.00 in cash through a teller, and again through the same method on 22nd January, 2018, in the amount of K10, 000.00. On page 9 it shows that Alex Chaka withdrew K121, 140.00 cash on 24th January, 2018 through a teller, and K27, 500.00, again through a teller on 25th

January, 2018. He also withdrew K35, 000.00 through a teller on 27th January, 2018. At page 10, it shows that on 30th January, 2018, Alex Chaka withdrew K10, 000.00 as a debit adjustment.

When these amounts are added, they exceed the K250, 000.00 that the 1st defendant claims Alex Chaka withdrew without his consent. However, at page 64 of the plaintiff's bundle of documents is a funds transfer which shows that Lechikwata Agro Agent & General Dealers transferred K250, 000.00 to the plaintiff on 29th January, 2018. This transaction appears at page 9 of the 1st defendant's bundle of documents as the second last transaction.

This is the transaction that relates to the payment to the plaintiff, and not the other amounts that the defendant referred to, as it is the only amount that has been linked directly to the plaintiff. Having found that the 1st defendant had no agreement with the plaintiff for the supply of fertilizer, the transfer of K250, 000.00 to the plaintiff from the Lechikwata Agro Agent & General Dealers was wrongful, and the counterclaim succeeds.

The 1st defendant shall be refunded the amount forthwith. However, as the plaintiff was not the party in the wrong, the amount shall not carry interest. As the 2nd defendant is the person that is liable to the plaintiff, and having found that the K250, 000.00 was wrongly paid to the plaintiff, I find that the 2nd defendant is indebted to the plaintiff in the amount of K2, 712, 000.00, after having added the K250, 000.00 that is to be refunded to the plaintiff, to the outstanding balance of K2, 462, 000.00.

I accordingly enter judgment in favour of the plaintiff for the sum of K2, 712, 000.00 against the 2nd defendant, which amount shall carry interest at the average short term deposit rate from the date of issue of the writ until judgment, and thereafter at the Bank of Zambia lending rate until payment.

Costs of the action go to the plaintiff and the 1st defendant, against the 2nd defendant, which shall be taxed in default of agreement. Leave to appeal is granted.

DATED AT LUSAKA THIS 20th DAY OF FEBRUARY, 2020

S. Kaunda

**S. KAUNDA NEWA
HIGH COURT JUDGE**