IN THE HIGH COURT FOR ZAMBIA **2015/HP/1293**
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

BETWEEN:

CNM HOLDING LIMITED **PLAINTIFF**

AND

LAFARGE ZAMBIA PLC. **DEFENDANT**

Before: ***The Hon. Mr. Justice Charles Zulu.***

For the Plaintiff: Mr. C. Siamutwa and Mrs. S. Sinkamba, Messrs Charles Siamutwa Legal Practitioners.

For the Defendant: Mrs. M. B. Mutuna, Mweshi Banda & Associates.

J U D G M E N T

Cases referred to:

1. ***Intermarket Banking Corporation Zambia Ltd v. Kasonde (SCZ Appeal No. 135/2009).***
2. ***Chishala Karabasis Nivel & Another v. Mwale (SCZ Appeal No.161/2015).***
3. ***Philip Mhango v. Dorothy Ngulube & Others (1983) Z.R. at page 62.***
4. ***Payzu v. Saunders [1919] 2 K. B. 581 (C.A).***
5. ***Lafarge Cement Plc v. African Brothers Corporation (SCZ Judgment No. 21 of 2016).***
6. ***Koni v. Attorney General (SCZ Judgment No. 19 of 1990).***

Legislation referred to:

1. ***The Competition and Consumer Protection Act No. 24 of 2010.***

2. ***The Rules of Supreme Court England & Wales, (White book 1999 Edition).***

INTRODUCTION/FACTS AS PLEADED

The Plaintiff took out a writ of summons accompanied by a statement of claim dated August 7, 2015, against the Defendant, Lafarge Zambia Plc seeking the following reliefs:

> ***(i) damages for loss of business in the sum of ZMW135,000.00 per week from 9 April, 2015 to date of full payment together with interest;***
> ***(ii) an order of delivery for 1 load of Superset and 2 loads of Mphamvu purchased by the PLiantiff or in the alternative for refund of the sum paid;***
> ***(iii) damages for negligence;***
> ***(iv) damages for loss of goodwill and reputation;***
> ***(v) damages for breach of contract;***
> ***(vi) punitive damages for abuse of market dominance;***
> ***(vii) interest on the amounts claimed at the prevailing Bank of Zambia policy rate;***
> ***(viii) costs of and incidental to these proceedings; and***
> ***(ix) any other relief that the Court may deem fit.***

The Defendant Company filed its defence and a counter-claim as amended dated February 28, 2018, wherein the reliefs sought against the Plaintiff were claimed as follows:

(i) payment of the sum of K844,000.00 being the outstanding balance on the Plaintiff's cement account with the Defendant for the cement that the Plaintiff received but did not pay for due to the zero invoices fraudulently issued on the said account;
(ii) interest on the sum due in (i) above;
(iii) Costs; and
(iv) any other relief that the court may deem fit.

Facts averred from the Plaintiff's pleading are that, the Plaintiff was a contracted distributor of the Defendant's cement supply

chain, and that the Defendant was at all material times a public company engaged in the business of manufacturing and distribution of cement products throughout Zambia.

It was alleged that in 2013, the Plaintiff and the Defendant entered into a distributorship agreement whereby the Plaintiff purchased cement from the Defendant at wholesale price with 4% discount, and resold the product to its customers at retail price. That the mode of operation was such that, the Plaintiff's customers paid cash and deposited the amount with the Defendant, and upon proof of such payments to the Defendant, the Plaintiff was either directly allowed to collect cement or the Defendant would deliver to the Plaintiff, or to the Plaintiff's customers.

It was alleged that on April 9, 2015, the Plaintiff made a deposit of K129, 642.00 for purchase of cement, but never collected cement in respect thereof, because the Defendant alleged that, the Plaintiff had a debit balance of K844, 975.08 for cement supplied to the Plaintiff, but not paid for by the Plaintiff. The Plaintiff averred that this was not possible because it was a cash customer. That despite making the said deposit, the Defendant refused to return the deposit to the Plaintiff, and the Plaintiff construed the refusal as an act of conspiracy to defraud the Plaintiff. As a result of the foregoing, it was alleged that, the Plaintiff was wrongfully deprived of its cement and had suffered financial loss of K135, 000.00 per week and loss of reputation.

The Defendant's counter-claim in the sum of K844, 000.00 was described as false, and that it was occasioned by malfunctioning of the Defendant's accounting system.

The Defendant filed its defence, denying liability and filed a counter-claim in the sum of K844, 000.00. The Defendant rejoined that at no time did it enter into a distributorship agreement with the Plaintiff, save to state that the Plaintiff was a mere customer of cement, who enjoyed 4% discount like any other retailer. It was alleged that the Plaintiff connived with the Defendant's employees, whereby the Defendant's accounting system was manipulated to enable the Plaintiff collect cement without payments, amounting to K844, 000.00.

It was averred that when the said deposit of K129, 620.00 was paid, part of it in the sum of K87, 096. 00 was channeled to partly liquidate the debt of K844, 000.00, and part of it covered the supply of cement to the Plaintiff to the value of K42, 546.00 delivered on April 16, 2015.

THE PLAINTIFF'S CASE (TESTIMONY OF THE WITNESS)

The only Plaintiff Witness (PW) was Collins Mulemwa Njekwa. He said he was the Managing Director for the Plaintiff Company, and that Company was now defunct due to events that gave rise to this action.

He said the nature of business the Plaintiff Company was engaged in was to distribute cement to its customers, which included Chinese companies in the construction industry. He said the Plaintiff had a distributor relationship with Lafarge Zambia Plc, and that the same was cash based.

He explained that, once the Plaintiff made payments into the Defendant's bank account, the Plaintiff used to forward a copy of the deposit slip via email to the Defendant for the attention of the

desk officer attached to the Plaintiff. He added that delivery of cement was done once payment was acknowledged by Defendant. He said deliveries to its clients were mainly done by the Defendant.

He said the source of the dispute between the parties involved a transaction that occurred in September 2014, whereby a sum of K81, 192.00 worth of cement was remitted to the Defendant, but the Defendant did not make the requisite deliveries. He said the sum covered truck loads of cement that was supposed to be delivered to Sikale Woods and Da Tong Construction respectively. He said the Defendant failed to deliver, because it was alleged that the Plaintiff was instead indebted to the Defendant. He said the allegation of being indebted was shocking to the Plaintiff. He said when they sought for an explanation; the Defendant first attributed the anomaly to system malfunction, and asked for time to reconcile their system. He said when a follow-up was made, the Defendant came up with another story that the Plaintiff was instead indebted to the Defendant.

He alleged that it was public knowledge that there were financial scandals at the Defendant, whereby employees of the Defendant used zero rated invoices on customers' accounts and obtained cement without the knowledge of the customer(s), and the Defendant lumped the financial burden on its customers. He made reference to his complaint via an email dated 5/7/2015, to the Defendant, reproduced here-below:

> ***Kindly sort out these zero invoices on our account as we have no knowledge of them, if they are zero invoices and our orders are made against our payments as CNM holdings has no credit facility with Lafarge and we pay***

upfront in advance for any orders we make, then if they are genuine, the money must be sitting on our Lafarge account but if the money is not on your system then where is it? If the money for the zero invoices is not sitting on our Lafarge account, its common sense that either your system malfunctioning or your staff have been using clients accounts without authority to steal cement from Lafarge where staff, unknown to us, have since been fired and a lot of clients accounts have been affected, if this is true I see no reason for Lafarge to put losses incurred through your internal scandal to clients accounts because it is Lafarge's responsibility to vet and scrutinize every will be staff during Lafarge's recruitment processes for trustworthy of their candidates. We are therefore, appealing to Lafarge to stop this imposition of zero invoices on our account based on the facts put forward to you, reason why we see no reason for any meeting with any junior officer on this issue as we feel Lafarge knowing what has happened of late following your internal scandal should normalize affected clients accounts unless the client had a credit facility.

However, am away on other duties to have been able to seek a meeting with the CEO of Lafarge on this.

Thanks Collins.

According to him, the Defendant had two types of clients, credit and cash clients. He said for the credit facility, each client was allocated an amount of tonnage on credit and they would pay later. He said for cash clients, the client had to pay upfront, and that the Plaintiff was in the latter category. He said it was totally false that the Defendant manipulated the Defendant's account system when the Plaintiff's staff were not employees of the Defendant.

He said the Plaintiff's claim for undelivered cement was K81, 192.00. He added that the Defendant used to distribute ten (10) truckloads per week of cement and that each truck load would carry 600 pockets of cement, and the profit per truck was K3, 500.00. He also alleged that the Plaintiff was making profit of K135, 000.00 per week. He said the Defendant was entitled to damages for loss of goodwill, and abuse of market dominance by the Defendant. He stated that at the material time, the Defendant was enjoying business monopoly because there were no like businesses except Zambezi Portland Cement which was in liquidation.

In cross examination, he reiterated that when the Plaintiff's business relationship with the Defendant came to an end after the last transaction, the Plaintiff was unable to source alternative supplies because at the time, there were no other suppliers on the market.

He said the Plaintiff's claim was not for the sum of K129, 642.00 as alleged in the statement of claim, but for K81, 119.00 for undelivered cement. He relied on a receipt issued by the Defendant exhibited at page 14 of the Plaintiff's Bundle of Documents. The receipt was dated September 12, 2014, endorsed with the sum of K81, 192.00.00. And when referred to page 48 of the Plaintiff's Bundle of Documents, he acknowledged that the document was the Plaintiff's Statement of Account with the Defendant, issued by the Defendant, and noted that that the statement was showing delivery of cement in the sums of K40, 569.08 and K40, 596.08, against a deposit of K81, 119.00. He also stated that he was not

sure whether deliveries were made to the Plaintiff or not. And that he was not sure what the Plaintiff's claim should be between the sum of K87, 096.00 or K81, 192.00.

I wish to interpose here and state that although the Statement of Account was in the Plaintiff's Bundle of Document at page 48, the witness said it was his first time to see the statement. The Defendant's Counsel expressed curiosity as to the witness' expression of ignorance of the document; however, the Plaintiff's Counsel intervened and was categorical to affirm that the witness was unaware of the said document in the bundle, and that it was Counsel's duty to avail to the Court all relevant documents.

Reverting to his testimony, when asked concerning deliveries directly done by the Plaintiff otherwise, called "self-collect". The Plaintiff Witness said the procedure for self-collect meant that the Plaintiff secured its own truck (s) to collect cement from the Defendant subject to registration and vetting by the Defendant. He said the loading and off-loading logistics was done by drivers.

PW was shown a document exhibited at page 3 of the Defendant's Bundle of Documents, a compilation of invoices for cement, allegedly supplied to the Plaintiff called "CNM Holding Zero Value Invoices" with a total debit value of K689, 311.08. PW said the Plaintiff did not collect cement at zero value invoices (cement collected without payment).

The only Defence Witness (DW) was Clare Chongo Chibesakunda, an Accountant in the employ of the Defendant Company. She said she was in the employ of Defendant for a period of two years as

Treasury Manager and was in charge of credit and cash management. She said she was familiar with the facts of the case to the extent of the information provided to her based on the company system and records. And she was quick to point out that, she was not aware of a distributorship agreement between the Plaintiff and the Defendant. According to her, the nature of the relationship that existed between the Plaintiff and Defendant was cash based, that delivery of cement to the Plaintiff was based on proof of payment.

In reference to page 48, which is the Statement of Account of the Plaintiff with the Defendant exhibited in the Plaintiff's Bundle Document at page 48, DW said subsequent to the payment of K81, 192.00 by the Plaintiff on September 12, 2014, two truck loads of cement were dispatched to the Plaintiff on 18 and 23 September, respectively. She said for this reason the Defendant was not indebted to the Plaintiff, but the Plaintiff was the one indebted to the Defendant.

And as regards the Defendant's counter-claim against the Plaintiff, she said the loss to the Defendant was occasioned as a result of collusion between employees of the Plaintiff and the Defendant. She explained that zero rated invoices (products delivered without payment) were raised in the name of the Plaintiff and cement products were delivered to the Plaintiff without payment. She said the system was bypassed, whereby the system invoice did not generate the total value due, resulting in the issuance of zero value invoices. In support of deliveries made on zero rated invoices, she made reference to delivery notes and an invoice exhibited at page

5, 6 and 7 of the Defendant's Bundle of Documents dated November 13, 2014, for delivery of 600 X 2 pockets of cement to the Plaintiff destined for Serenje and Kalulushi. She said the cement was collected by the Plaintiff's drivers. She also made reference to a Police Report allegedly confirming the collusion.

In reference to page 3 of the Defendant's Bundle of Document, which is a compilation of alleged zero values invoices for goods delivered to the Plaintiff with a total debit value of K689, 311.08; she said this covered the total value of cement either collected by the Plaintiff from the Defendant or dispatched to the Plaintiff by the Defendant under zero value invoices.

In cross examination she reiterated that a cash customer could not get cement on credit. She refused to confirm that the Defendant's JDE System was prone to manipulation, and was unwilling to name the Defendant's employee who issued the zero value invoices, neither did she query the system to ascertain who issued the documents nor confirm whether employees of the Defendant were ever arrested for the said fraud. She said the term zero value invoice was a phrase used to mean that the system was bypassed as opposed to indicating the price and the value. She said the invoices could not be picked in the system because they were of zero value, and were not handed over to the customer except the delivery notes.

THE PLAINTIFF'S SUBMISSIONS

Both parties filed their written submissions. For the Plaintiff, it was submitted that the Plaintiff as a cash customer paid for the cement and that there was proof on the record to that effect for the

subject claim. It was thus contended that, the cement in respect of the said payment should be delivered to the Plaintiff. It was argued that the Defendant in its defence even admitted receiving the sum of K87, 096.00. And that the Defendant's failure to deliver the cement had exposed the Plaintiff's reputation and goodwill to disrepute. It was argued that it was the Plaintiff's reputation that gave confidence to its customers to pay in advance.

The issue of zero rated invoices was challenged and described as the: "internal workings of the Defendant and not the Plaintiff". And as regards the counter-claim of K844, 000.00, it was submitted that the Defendant failed to show how the Plaintiff came to be indebted to the Defendant in the alleged sum of K844, 000.00. And in the same vein, as to whether the Plaintiff's employees connived with the Defendant's employees to defraud the Defendant, it was contended that the alleged connivance was not proved. It was observed that the Defendant's witness failed to explain the alleged connivance.

According to Counsel, what was obvious was that, the Defendant's employees manipulated the system to defraud the Defendant by creating fake accounts, and the Defendant unfairly placed the blame on its clients for fraudulent acts perpetuated by its own employees.

And as to the required standard of proof for fraud, regard was had to case of ***Intermarket Banking Corporation Zambia Ltd v. Kasonde (Appeal No. 135/2009)*** wherein it was held:

> ...***the law is well settled on the need to plead fraud and the standard of proof required in such cases. The cases***

> ***cited by counsel for the appellant , such as*** *Davy v Garret, Sablehand Zambia Limited v Zambia Revenue Authority,* ***indeed, lays down the principle that where fraud is an issue in the proceedings, then the party wishing to rely on it must ensure that it is clearly and distinctly alleged and, at the trial, he must lead evidence, so that the allegation is clearly and distinctly proved.***

The Plaintiff's Counsel also made reference to the case of ***Chishala Karabasis Nivel and Another v. Mwale (SCZ Appeal No.161/2015)*** wherein it was stated as follows:

> ***...fraud must be pleaded specifically. The standard of proof is higher than a mere balance of probabilities. In*** *Sithole v. Zambia State Lotteries Board* ***we stated that if a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.***

In reference to the claims for negligence, loss of reputation, and abuse of market dominance, it was argued that, the Defendant's failure: to install a reliable accounting system that protected the Plaintiff's customer account; to rectify the false balances created by its employees; and to timely alert the Plaintiff, was an act of negligence and caused the Plaintiff to suffer economic loss.

It was argued that the Defendant having a dominant position in Zambia as a major cement supplier abused its dominance. This was anchored on the fact that, the Plaintiff was treated as a credit customer, and further by alleging that the Plaintiff was indebted to the Defendant when in fact the Plaintiff was a cash based customer. It was observed that the Plaintiff had no other alternative source of the products for its business. And reference

was made to section 16 of the ***Competition and Consumer Protection Act No. 24 of 2010*** which provides as follows:

> ***16(1) An enterprise shall refrain from any act or conduct if, through abuse or acquisition of a dominant position of market power, the act or conduct limits access to markets or otherwise unduly restrains competition, or has or is likely to have adverse effect on trade or the economy in general.***
>
> ***16(2)(d) Making the conclusion of contracts subject to acceptance by other parties of supplementary conditions which by nature or according to commercial usage have no connection with the subject matter of the contracts;***

Counsel added that the Defendant was liable to pay damages for breach of contract. It was argued that the Defendant breached the contract with impunity. And that the Defendant was liable to pay punitive damages because the Defendant had held the Plaintiff to ransom for years by refusing to carry out proper investigations, and by failing to release the Plaintiff's cement which act was alleged to have exposed the Plaintiff to several law suits.

I was urged to entirely allow the Plaintiff's claims.

THE DEFENDANT'S SUBMISSIONS

For the Defendant, Mrs. Mutuna, noted that the Plaintiff had changed position from prosecuting the claim of K129, 642.00 to claiming that the figure was actually K81, 192.00.

And concerning the assertion by the PW that he was not aware of the document in the Plaintiff's Bundle of Documents at page 48, relating the transaction of K81, 192.00, Mrs. Mutuna was quick to offer some insight as to the application of Order 24 rule 1 of the

Rules of the Supreme Court of England (White Book 1999 Edition). She noted that the Order deals with mutual discovery of documents, by which parties disclose documents in their possession. It was, therefore, argued that it was unheard of and not helpful to the Plaintiff's cause to argue that its Managing Director, PW was not aware of the document at page 48 of the Plaintiff's Bundle of Documents simply because it was at variance with the claim for K129, 642.00. It was submitted that the Defendant had in fact proved that the "new claim" of K81 192.00 was untenable because cement to that value was delivered to the Plaintiff on 18 and 23 September 2014 respectively.

As regard the claim for loss of profit pegged at K135, 000.00 per week, it was contended that apart from the PW's testimony, there was no independent evidence to confirm the allegation. A litany of authorities speaking to the general rule that: *he who invokes the aid of the law should be the first to prove his case,* were adverted to. Suffice to report that the memorable case of ***Philip Mhango v. Dorothy Ngulube & Others (1983) Z.R. 61 page 62*** was also vouched wherein the Supreme Court held:

> ***Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with fair amount of certainty.***

It was thus argued that, in order to prove the alleged special loss, the Plaintiff ought to have provided documents such as management or audited accounts showing weekly profits, supported by payments from various customers. It was observed that, it stood to reason that if the Plaintiff was making weekly profits of K135, 000.00, it would not have stopped trading, but

would have still sourced the product from retail dealers to deliver to its customers.

It was submitted that even if the Court accepted that the PW's testimony that the Plaintiff was making profit of K135, 000.00 per week, the Plaintiff was obliged to mitigate its losses. To support the above argument, regard was had to the case of ***Payzu v. Saunders [1919] 2 K. B. 581 (C.A)*** wherein it was held:

> ***...the Plaintiff should have mitigated his loss by accepting this offer and that, therefore, his damages were limited to what he would have suffered had he accepted it, which would have been have been only the loss of the useful period of credit. Similarly, in*** *Houndsditch Warehouse Co. v Waltex,* ***the seller, who was in breach of warranty of quality, offered to take back the goods and to pay the contract price for them. It was held that the buyer should have accepted this offer to mitigate his loss and that the damages must be reduced accordingly.***

According to Counsel, in the event that the claim for loss of business was granted, the period to cover the said damages should not be indefinite or not until full payment, but for a limited time.

And it was contended that the other claims: damages for negligence, loss of goodwill, breach of contract, and punitive damages for abuse of market dominance were not proved. And as regards alleged abuse of market dominance, it was argued that the Plaintiff failed to show the nexus between the Defendant's dominant position at the time and the alleged refusal to deliver cement worth K81 192.00.

In relation to the counter-claim it was submitted that the DW clarified that the amount due to the Defendant was K689, 311.08

based on the zero rated invoices delivered to the Plaintiff. Counsel argued that the Defendant had discharged its burden of proving its allegations that, the Plaintiff had received or collected cement which it did not pay for. The case of ***Lafarge Cement Plc v. African Brothers Corporation (SCZ Judgment No. 21 of 2016)*** was adverted to, wherein the Supreme Court had this to say:

> ***In contrast, the Appellant produced several invoices which all show that the Respondent provided its 'own - transport'. It is thus, only logical to conclude that the Respondent was responsible for making its own transportation arrangement to collect the cement from the Appellant's premises. Hence, our conclusion on this issue is that the Respondent was an "own-collect" customer and not a "delivered" customer. We are fortified in so holding as none of the invoice or delivery notes on record shows that delivery at Mwandi in Sesheke or Niko in Namwala. Further, it is on record that the Respondent failed to shows that the payments it made to the Appellant for the cement included transport charges from which an inference that the Respondent was a "delivered" customer could also have been drawn.***

It was thus argued that in the above case it was readily accepted by the Supreme Court that invoices and delivery notes were considered as proof of payment, and that the respondent in that case was a self-collect customer who had collected cement.

Furthermore, it was submitted that the allegation of fraud by way of connivance between the Plaintiff and the Defendant's employees was proved. And the evidence relied on were delivery notes, and the Police Report exhibited at page 72 and 73 of the Defendant's Bundle of Documents. According to Counsel, a person who receives valuable trade goods for which he has not paid is said to act in a manner that is dishonest and morally wrong. It was

contended that there was documentary proof that cement was delivered to the Plaintiff after an employee of the Defendant had raised zero rated invoice, which had no value attached, meaning that the Plaintiff received cement without paying for it. Counsel added that if the Plaintiff did not intend to defraud the Defendant, the Plaintiff would have alerted the Defendant. And it was observed that if the fraud was solely done by the Defendant's employees for their benefit, the cement would not have been delivered to the Plaintiff and its customers.

Finally, I was urged to dismiss the Plaintiff's claims for lack of proof, and allow the counter-claim to the sum of K689, 311.00.

In reply the Plaintiff's Counsel conceded that the PW may have forgotten certain facts at trial due to long passage of time, and that the same did not take away the fact that, the Plaintiff made the said payment of K81, 192.00. It was also submitted that there was no way that delivery could have been done directly to the Plaintiff's customers by the Defendant as the said customers were not party to the contract between the Plaintiff and the Defendant.

And as regards the counter-claim, Counsel argued that the invoice exhibited by the Defendant at page 6 of the Defendant's Bundle of Documents for 600 pockets of cement, allegedly for a zero rated invoice did not contain a signature of a person from the Plaintiff. According to Counsel, the same was generated by the Defendant from its system that was manipulated by its own employees. And that the delivery notes could have been prepared by the Defendant's rogue employees.

DETERMINATION OF THE CASE

I have carefully considered the evidence adduced and I am indebted to Counsel's respective submissions. I am mindful that regardless of the Defendant's defence, the Plaintiff has an obligation to prove its claims on a balance of probabilities, conversely the Defendant has the same obligation in respect of the counter-claim, and since there is fraud alleged, the balance of proof in that regard is higher than simply on a balance of probabilities.

Where a claim is for special loss, the case of ***Philip Mhango v. Dorothy Ngulube & Others*** (supra) and many other are instructive as to what ought to be proved. In the case of ***Koni v. Attorney General SCZ Judgment No. 19 1990*** the Supreme Court went further to re-affirm that:-

> ***This Court has on several occasions indicated that claims for special damages should be supported by documents or independent evidence.***

It is, therefore, certain that a special loss must be proved with certainty and particularity.

The assertion that the relationship between the Plaintiff and the Defendant was governed by a distributorship agreement is not true, the Plaintiff failed to produce a copy of this alleged agreement. It follows the claim for breach of contract is unsuccessful. What I find probable is that the Plaintiff like any other cash based retailer used to buy cement on cash from the Defendant at 4% discount and resale to its customers at a profit or buy on behalf of its clients

in its name and deduct its commission from the money paid by its clients.

While it is plain that the Plaintiff made a claim of K129, 642.00 allegedly for undelivered cement, the PW in his testimony said the Plaintiff was abandoning the claim of K129, 642.00 and was instead settling for K81, 192.00. The adjusted claim is still untenable because there is documentary proof that cement to the value of K81, 192.00 was actually delivered to the Plaintiff. The document exhibited by the Plaintiff at page 48 in its bundle of document attest to this fact. The Plaintiff's denial that he was not aware of the document, which narration was supported by his Counsel is in my considered opinion paradoxical and unbelievable. I agree with Mrs. Mutuna that PW conveniently chose to distance the Plaintiff from the said document after realizing that it was not in favour of the Plaintiff or was at variance with the claim for K129, 642.00. Similarly, the intervention by the Plaintiff's Counsel that PW was not aware of the document is unhelpful.

Where a party is represented, bundles of documents are invariably compiled by an advocate based on documents provided by the client. It is, therefore, unacceptable that counsel can introduce a document in a bundle without the client's knowledge. In the unlikely event that that was the case, it is intolerable and undesirable; it has the potential to seriously undermine counsel's professional independence and objectivity. The obligation imposed on parties to produce all relevant documents in their custody cannot be used as a shield for counsel to introduce documents in

his/her possession in a client's bundle of document without the knowledge of the client.

As earlier noted a special loss or special damages must be proved with certainty and particularity based on documentary proof or/and independent evidence. The PW was at some point uncertain as to whether the correct claim was for K81, 192.00 or K87, 096. 00; the indecision reacts against the Plaintiff. And it is unacceptable to expect the Court to compromise the standard of proof or ignore the indecision simply because the length of time from the time the dispute arose to date of trial may have affected the quality of the PW's memory.

The PW alleged that the Defendant's apparent decision to blacklist the Plaintiff, as it were, exposed the Plaintiff to loss of K135, 000.00 per week. This claim is baseless. It was purely speculative. With domino effect the claim for damages for abuse of market dominance and goodwill and reputation is baseless. There is no evidence that the Defendant abused its position in the industry to unlawfully disadvantage or abuse the Plaintiff.

The Plaintiff alleged that the Defendant graded the Plaintiff as a credit client, but the reality is that the Defendant never took the Plaintiff as a credit client. Hence I am unable to fathom what loss was caused thereof, and further I am unable to appreciate its alleged nexus to a claim for damages arising from alleged abuse of market dominance. If indeed the Defendant chose to "blacklist" the Plaintiff, I reasonably believe the decision was well founded and justified to protect its financial interest. It is clear the Plaintiff's account with the Defendant was fraudulently used to upload zero

rated invoices with a view to defraud the Defendant using the Plaintiff's company, and the Defendant was in fact defrauded. There is evidence to this effect in particular reference to delivery notes and an invoice exhibited at page 5, 6 and 7 of the Defendant's Bundle of Documents dated November 13, 2014, for delivery of 600 X 2 pockets of cement.

And as to whether the PW was aware or not of the said fraud, it is an issue that is material to the determination of the counter-claim. The Defendant's counter-claim as pleaded was K844, 000.00, but during the DW's testimony it was adjusted to K689, 311.00. The loss was said to have been occasioned by fraud jointly executed by the Defendant and the Plaintiff's employees. Given the circumstances of the case, for the counter-claim to succeed it must be proved with evidence higher than the balance of probabilities that the Plaintiff's Managing Director, (PW) or one of its Directors or its employees were involved in the fraud. If not so proved the Plaintiff cannot take the burden to underwrite the Defendant's losses whatsoever, committed by a syndicate of its rogue employees.

I agree with the Plaintiff's Counsel that fraud was initiated by the Defendant's employee (s) and abused the Plaintiff's account without the knowledge of PW. Additionally, there was no proof that the drivers that collected the alleged cement under zero rated invoices were in fact employees of the Plaintiff. The way the Defendant was not in the know when the offences were committed is the same way PW was in the dark as well. The Police Report provides no evidence that PW was an accomplice to the fraud.

Finally, while it is acceptable that the fraud was championed by the Defendant's employees, and measurably affected the Plaintiff's relationship with the Defendant, however, I am unable to apportion negligence to the Defendant as alleged by the Plaintiff. Even though it appeared strange that the Defendant was averse to disclose the identity of its rogue employee (s), the Defendant cannot be said to have been negligent. The Defendant could not have allowed the fraud when it stood to lose a great deal, neither was the Defendant's desire to deliberately lose the Plaintiff. The fraud was initially undetected, because the accounting system was bypassed to avoid detection. Certainly, there is no way the Defendant could have acted negligently when it was being defrauded.

In view of the foregoing, I come to the conclusion that the Plaintiff's claims fails, similarly the counter-claim cannot succeed, and I respectively make no order as to costs.

Leave to appeal granted.

DATED THIS 1st DAY OF SEPTEMBER, 2020.

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THE HON. MR. JUSTICE CHARLES ZULU