Judge. 13

IN THE HIGH COURT FOR ZAMBIA **2015/HKC/TR015**

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)

BETWEEN:

ERIBE INVESTMENTS LIMITED **PLAINTIFF**

AND

EXPRESS AIR SERVICES LIMITED **1st DEFENDANT**

(Trading as Bid Air Cargo)

DIAMUSO CARGO LOGISTICS LIMITED **2nd DEFENDANT**

Before The Hon. Lady Justice Abha Patel, S.C.

For the Plaintiff: **Mr. H. Zulu & Ms. S. Banda**

Messrs. ECB Legal Practitioners

For the 1st Defendant: **Ms. M. Nachinga**

Messrs Corpus Legal Practitioners

JUDGEMENT

List of Authorities

1. Air Services Act Chapter 446 of the Laws of Zambia
2. Carriage by Air Act Chapter 447 of the Laws of Zambia
3. The Warsaw Convention 1929
4. The Hague Protocol 1955
5. General Conditions of carriage for cargo
6. The Convention for the Unification of certain rules relating to International Carriage by Air 1923
7. Chitty on Contracts volume 1 & 2 General Principles 28th Edition Sweet & Maxwell; London 1999
8. Commercial Law in Zambia: Cases and materials

Cases Referred to:

1. Air France vs Mwase Import and Export Company Limited (2000) ZR 66
2. Associated Chemicals Limited v Hill and Delamain Zambia Limited; (1999) Z.R 99.
3. AMI Zambia vs Chibuye (1999) ZR 50
4. Almaz Luiseged (Female) v British Airways Appeal No. 99/06
5. Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited (2001) ZR 73
6. Royal British Bank vs Turquand (1856) E & B 327
7. Salomon v Salomon (1897) AC 22
8. Mwamba v Ntenge, Kainga Chekwe SCZ Appeal No.174 of 2010
9. Huweiler CPD Properties and others 2015 ZMHC 109
10. York Farms Limited vs Cee Cee Freight and Suppliers Limited and Quest Cargo Management Limited SCZ No. 11 of 2013
11. Kennedy vs De Trafford (1897) AC 180
12. Hygrotech Zambia Limited vs Greenbelt Fertilizers Appeal No. 138 of 2015
13. Nuvo Electronics v London Assurance et al (2000) 49 O.R 3d 374 (Ont.SC)

14. **Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa Selected Judgment No. 21 of 2017**

15. **Mhango vs Ngulube (1983) ZR 61**

1. Introduction

1. The Plaintiff commenced this action by way of a Writ of Summons and Statement of Claim filed in Court on 20th November 2015, amended once without leave, on 25th January 2016, claiming the following:

1.1 Damages for breach of contract;
1.2 Damages for negligence for loss of goods;
1.3 Damages for loss of business;
1.4 An order for refund of the value of the laboratory equipment and for the handling and freight fee
1.5 Interest on all the monies due herein and;
1.6 Costs of and incidental to these proceedings.

2. Facts and Background

2.1 The Plaintiff, a private company incorporated in Zambia, was awarded a contract to supply Thermo Scientific Autostainer Laboratory Equipment (hereinafter referred to as the *lab equipment*) by Mopani Copper Mines Plc. The 1st Defendant, is a private company that conducts business at the Kenneth Kaunda Freight Village and is in the business of providing airport to airport line haul solutions in the area of cargo operations and service to the courier forwarding industries as well as a fleet of contracted freighter aircraft

with a hub and system in South Africa. The 1st Defendant states that it is a general agent for airlines and sells cargo space on behalf of the airlines.

2.2 It is not in dispute that the lab equipment, after it arrived into the country, was rejected as being unfit and had to be returned to the United States of America (USA), for the supplier to make a full refund to the Plaintiff.

2.3 The dispute arose from the relationship between the Plaintiff and the defendant in the transportation of the lab equipment back to the USA which apparently got lost and has not been recovered to date.

2.4 The Plaintiff's contention is that the transportation of the lab equipment constituted international carriage within the meaning of the Warsaw Convention and was delivered to the Defendant as carrier within the meaning of the Warsaw Convention. Subsequent to the contract of carriage, the lab equipment was lost, and the Plaintiff brings this action against the 1st defendant for the loss and damage caused due to its negligence and or of its employees and agents.

2.5 The Plaintiff relies on two witness statements, its amended witness statement of **Benny Nachiyunde** and that of **Wallet Standula,** both filed into Court on 20th June 2018. The Plaintiff equally relied on its Bundle of Documents, Supplementary Bundle of Documents and Further Supplementary Bundle of Documents filed into Court on 29 February 2016,

22 March 2016 and 20 June 2018 respectively, all of which were admitted into evidence by the Court at the trial of the matter.

3. **The 1st Defendant's contention**

3.1 The 1st Defendant has denied the existence or at all, of any agreement between the Plaintiff and the Defendant company. The Defendant has maintained that it was always understood that the defendant would engage airlines for the airline to transport the said lab equipment to the USA. The defendant also maintains that it informed the Plaintiff upon completion of the airway bills with DHL Airlines and Delta Airlines who were contracted on behalf of the Plaintiff and that its role was that of a general sales agent of the said airlines in the transportation of the lab equipment from Zambia to USA.

3.2 The 1st defendant has also maintained that its only relationship with the plaintiff was one of facilitating and putting the plaintiff in touch with the named airlines and that the Warsaw Convention did not apply to this relationship. Although the defendant admits having received the lab equipment, its role was simply to hand over the same to the stated airlines.

3.3 The Defendant relied on its amended witness statement of **Thabani Dube** filed into Court on 30th July 2018. He also produced the Defendants Bundle of Documents filed on 10 March 2016. His evidence explained the nature of the 1st defendant's business of selling cargo space for purposes of

international transportation of cargo as an agent of the airlines. It was his evidence that the 1st defendant does not manage a fleet of contracted freight lines. He went on to explain the transaction in *casu* and explained the role played by it, and by the 2nd defendant and maintained that the relevant Airway bills were sent to the Plaintiffs Officers and specifically to Mr. Wallet and Mr. Nachiyunde.

4. **The Evidence of the Plaintiff**

4.1 Under cross examination, PW1, **Mr. Benny Nachiyunde** confirmed that in accordance with *paragraph 10* of his amended witness statement, the Plaintiff did engage the 2nd defendant to return the lab equipment to the United States of America. He was further referred to *page 2 of the Plaintiffs Bundle of Documents* to confirm that the Invoice for handling charges was issued by Diamuso Cargo Logistics Limited, and not by the 1st Defendant. He was also referred to *page 2 of the defendants bundle of documents* to confirm that the 1st defendant's name did not appear on the document referred to as the Airway Bill. He read out the pertinent details on the Airway bill and was questioned on the limitation of liability as stated on the Airway bill. His response was that he had received the said Airway bill after the shipment had already left for the United States of America.

4.2 Under re-examination, it was his evidence that he went to the premises of the 1st defendant in Lusaka, and was attended to by a Mr. Nkula, the Sales Manager, who referred him to the next office to make payment for the

freight charges. He confirmed that upon paying the agreed freight charges, which were negotiated between himself and Mr. Nkula, he handed over the lab equipment to the 1st defendant. He did not take any issue with the receipt issued by the 2nd Defendant as he believed he was dealing with the 1st defendant and that they may have been related or sister companies. He also confirmed that he was sent the Airway bill by Mr. Nkula of the 1st defendant, and after the cargo had already left the Country. It was further his evidence that all the assistance that he received including up to the offer of compensation was through the 1st defendant and through the sales Manager Mr. Nkula.

4.3 The Plaintiff's second witness, **Mr Wallet Chitandula,** PW2, equally relied on his Witness Statement filed on 20th June 2018 and on the Plaintiffs' further supplementary bundle of documents filed on the same day. The only part of his evidence which was relevant in *casu*, is whether he assisted in clearing and preparing the cargo and who of the 1st and 2nd defendant he gave it to. His evidence under cross examination, was that he gave the cargo to the 2nd defendant and upon re-examination, he clarified his evidence, by stating that he dealt specifically with Mr. Nkula Kasanga, the Sales Manager of Bid Air Cargo.

4.4 The Plaintiff proceeded to call its subpoenaed witness, a **Mr Musa Temba,** who relied on his submission filed into Court on 23rd September 2020 and which was duly admitted into evidence. He explained that according to the company records of the 2nd defendant company, Diamuso Cargo Logistics

Limited, available at PACRA, he was a director of the said company. He explained further that the beneficial owners were Mr. Nkula Kasanga and Ms Mildred Musonda.

4.5 He narrated that at the time the transaction, the subject of the matter in Court occurred, Ms. Mildred Musonda, (who was his intimate partner at the time), and Mr. Nkula Kasanga, occupied the positions of sales assistant and country sales manager, respectively, for the 1st defendant.

4.6 His evidence clarified the role played by the 1st and 2nd defendant as far is relevant to the dispute before the court, and his evidence confirmed that the transaction was handled for the Plaintiff by Mr. Nkula Kasanga and Ms Mildred Musonda in their capacity as sales manager and sales assistant of the 2nd defendant company. He also confirmed his understanding that the two would appear to have been running and operating a side business while in the employ of the 1st defendant. He also clarified that the letter he had earlier issued on 22 September 2015 was based on information provided to him by the two named employees and which was not the position on the ground, from information now available to him.

4.7 The witness was not cross examined or re-examined.

4.8 Counsel called its next subpoenaed witness, one **Ms Diana Musohoya** whose evidence was to confirm that her husband, Mr Nkula Kasanga and Ms Mildred Musonda was employed by the 1st Defendant at the time of this

transaction, but that he did not work there anymore. She confirmed that he was the Sales and Marketing Director of Bid Air Cargo and also confirmed that she did not handle the documentation for the transaction, the subject of the proceedings in Court.

4.9 During cross examination, she was shown certain documents relevant to the transaction and questioned as to who issued the tax invoice and who issued the receipt respectively.

This marked the close of the Plaintiff's case.

5. **Evidence of the 1st Defendant**

5.1 The Defendants first witness was **Thabani Dube** DW1. He produced his amended witness statement filed into Court on 30 July 218 and the 1st defendants bundle of documents, both of which were admitted into evidence and marked *First Defendants Witness Statement and bundle of documents* respectively.

5.2 Under cross examination, he confirmed that he had been with the 1st defendant company for a period of 8 years, and that he was the General Manager at the time the transaction, the subject of the proceedings took place. He confirmed that he did not personally handle the transaction, but that he was given a report by his manager, Mr Nkula Kasanga, who was the sales manager. He further confirmed that Mr Nkula Kasanga had since

resigned from the employ of the 1st defendant though he did not know the reasons that led to his resignation. He stated that he was not aware of Mr Nkula Kasanga's involvement with the 2nd Defendant company. He explained that the 2nd defendant company, Diamuso Cargo Logistics was a freight forwarding company that the 1st defendant used to sell cargo space to.

5.3 He explained the roles of the shipper, and that the Plaintiff had negotiated for the transportation of cargo with the 2nd defendant, and that the role of the 1st defendant was to provide a blank airway bill to the freight forwarder (the 2nd defendant) for the cargo to be exported. He could not recall the name of the person from the 2nd defendant who had approached his company for the airway bill. When questioned if the person he had dealt with was Mr Nkula Kasanga, the witness could not recall and further stated that he had not handled the transaction personally and that information known to him was by way of a report from his managers.

5.4 He was questioned as to the identity of the shipper, and to explain the role of an airway bill. He confirmed that an airway bill was a contract for the carriage of goods between the shipper and the airline and that a copy of the airway bill is given to the shipper. He was shown a copy of an airway bill on **page 1** of the defendants bundle of documents filed on 10 March 2016 and questioned on its contents.

5.5 He was also referred to **pages 2, 8** and **10** of the same bundle of documents being another airway bill and e-mail correspondence and questioned as to

details of the shipper and the dates on which the airway bill was raised and the date on which the shipper was given the airway bill.

5.6 He ended his evidence by explaining the role played by the 1st defendant in the transportation of the cargo, and the respective obligations incumbent on the parties to a shipping contract and denied liability of the 1st defendant and maintained that liability for any loss occasioned by the lost cargo rested with the 2nd defendant and or the plaintiff.

This marked the close of the case for the 1st Defendant.

The Parties having filed written submissions on 25th January 2021 and 5th February 2021 respectively. The Court remains grateful to Counsels respectively, for the industry employed in the documents presented, all of which have been considered carefully, alongside the respective submissions, and my decision is as set out below.

6. **Findings of fact**

At the end of the hearing, the Court makes the following findings of facts from the evidence of the witnesses and the record:

6.1 The Plaintiff was the owner of the Thermo Scientific Autostainer Laboratory Equipment, (lab equipment), and due to it not being of the required specification, it needed to be returned back to the supplier in the United States of America for the supplier to make a full refund to the Plaintiff.

6.2 The Plaintiff negotiated with Mr Nkula Kasanga, the Sales Manager of the 1st defendant for the transportation of the lab equipment to the United States of America.

6.3 The handling and freight fee was paid by the Plaintiff in the sum of K 6,746.93

6.4 The Tax Invoice and Receipt for the contract of transportation was issued by the 2nd Defendant.

6.5 The value of the lab equipment was USD10,160.00

6.6 The lab equipment was lost *en route* and never recovered.

6.7 DW1 Thabani Dube, the General Manager of the 1st defendant did not handle the transaction and it was handled by Mr Nkula Kasanga.

6.8 Nkula Kasanga and Mildred Musonda were the Sales Manager and Sales Assistant respectively in the employ of the 1st defendant.

6.9 The beneficial owners of the 2nd defendant were Mr Nkula Kasanga and Ms Mildred Musonda.

7. The Issues for determination

The Parties having failed to file a list of agreed issues, the following are the pertinent issues that require determination by the Court:

7.1 What is the law governing the carriage of goods by air in Zambia?

7.2 What were the terms of the agreement made between the Plaintiff and the 2nd Defendant?

7.3 What was the nature of the relationship between the Plaintiff and the 1st defendant vis the 2nd defendant?

7.4 Whether the 1st defendant is entitled to the defences in Articles 20(1) and limitation of liability under Article 22(2) of the Warsaw Convention and Article 14(5) of the General Conditions of Carriage for Cargo?

7.5 Whether or not the 1st and 2nd defendant's employees and or agents acted negligently in handling the Plaintiff's equipment?

7.6 Whether or not the Plaintiff has proved its case on a balance of probabilities?

In addressing my mind to the issues identified above, I am of the considered opinion that the facts and testimony of the witnesses in this matter, reveal an interplay to an extent, that determination of issues in isolation, and

findings on each, may not be practical, and the Court may need to look at the transaction in a holistic manner in order to arrive at its findings.

8. Analysis and application of the facts to the law

8.1 In dealing with the first issue, it is trite that carriage of goods by air in Zambia is governed by the **Air Services Act** and **Carriage by Air Act** Chapters 446 and 447 of the Laws of Zambia respectively. I also accept the submission that the Warsaw Convention (*"the Convention"*) as amended by the Hague Protocol, together with the Guadalajara Convention, have both been domesticated in the two Acts stated above and applies to any carriage by air, irrespective of the airline performing the carriage.

8.2 The role of the Convention was aptly described in the words of the Hon. Ngulube, C.J. (as he then was), in the case of **Air France vs Mwase Import and Export Company Limited** wherein he said:

"The Warsaw Convention of 1929 was drafted in order to remove inconsistencies between the national laws of different countries and to strike a fairer balance that might otherwise have been the case between carriers and passengers and owners of cargo in respect of their mutual rights and liabilities."

The Court further noted that:

"The airway bill is evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage."

8.3 My attention has been drawn to **Article 18** of the Convention which provides:

"(1) The carrier is liable for damage sustained in the event of the destruction or loss of or damage to any registered baggage or any Cargo, if the occurrence which caused the damage so sustained took place during the carriage by air...

(2) The Carriage by air within the meaning of the preceding paragraph comprises the period during which the luggage or cargo are in charge of the carrier, whether in an aerodrome or on board an aircraft, or in the case of landing outside an aerodrome, in any place whatsoever.

(3) The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If however, such carriage takes place in the performance of contract for carriage by air for the purpose of loading, delivery or trans shipment, any damage is presumed, subject to the contrary, to have been the result of an event which took place during the carriage by air."

9.1 I move to the second issue to determine the terms of the agreement made between the Plaintiff and the 2nd defendant. It has been submitted and the Court has noted that the 2nd defendant did issue a Tax Invoice and Receipt, produced at **pages 2** and **3** of the Plaintiffs Bundle of documents filed on 29 February 2016.

9.2 The Plaintiff has testified, that it paid the 2nd defendant for a particular service, namely, to transport its laboratory equipment from Zambia to the

United States of America. The 2nd defendant avers that they were merely engaged to offer clearing services with Zambia Revenue Authority and therefore cannot be held liable for the loss of the equipment.

The Court has heard from **PW1, Mr. Nachiyunde,** that he went into what appeared to be the offices of the 1st defendant where he met and interacted with Mr. Nkula Kasanga, and discussed the issue of transportation of the equipment and asked for a quotation. It was his evidence that Mr. Nkula sent him to another office, to make payment after which he was handed the invoice and receipt, appearing at **pages 2-3** of the Plaintiffs Bundle of documents, issued in the 2nd defendants name.

Counsel has relied on the holding by the Supreme Court of Zambia in the case of **Mwamba vs Ntenge, Kainga Chekwe, w**here the Court held that:

"...no contract is made in a vacuum. In construing a document, the court may resolve the ambiguity by looking at its commercial purpose and the factual background against which it was made..."

9.3 In analysing the evidence of the Parties and the submissions of counsel, I am of the considered view that the Plaintiff company did engage the services of Freight World Limited to facilitate the proper packaging of the laboratory equipment and which company obtained the declaration and release order issued by Zambia Revenue Authority (ZRA) as seen on **pages 1-2** of the Plaintiffs further supplementary Bundle of documents. Any suggestion by the 2nd defendant that they were engaged for the purpose of obtaining ZRA clearance is dismissed, as not being supported by any evidence at all. To the

contrary, the receipt issued by the 2nd defendant and which appears at **pages 2-3** of the Plaintiffs Bundle of Documents, being a Tax Invoice No. 015 in respect of handling charges for AWB 7079970177, and receipt no. 062 in respect of Invoice No.015 respectively, dispels that suggestion completely.

9.4 **PW1** further testified that at all material times, he dealt with Mr Nkula Kasanga. This fact was confirmed by **PW2** and indeed by **DW1,** who confirmed that although he was the General Manager of the 1st defendant company, the transaction between the Plaintiff and the 1st and 2nd defendant was handled solely by Mr Nkula Kasanga, who was the Sales Manager for the 1st Plaintiff.

9.5 The only conclusion that the Court can arrive at after analysing the evidence above, is that the payment made by the Plaintiff in the sum of K6,746.93 represented the handling charges for Airway Bill 7079970177 for the transportation of the lab equipment received by the 2nd defendant, from Zambia to the United States of America.

9.6 Plaintiff counsel has further submitted and urged the Court to find that the relationship that ensued between the Plaintiff and the 2nd defendant, who in turn instructed the 1st defendant, was that of "shipper" and "carrier". The Court has also been urged to consider the usage and custom normally applicable in international a carriage, there being no specific contract entered into between the Parties. On this, Counsel has relied on the

authority in the case of **Huweiler CPD Properties and others, Chitty on Contracts** and **Halsbury Laws of England 4th Edition.**

9.7 In support of the above submission, the Court is alive to the holding of the Supreme Court in the case of **York Farms Limited vs Cee Cee Freight and Suppliers Limited and Quest Cargo Management Limited** wherein it was held:

"We think this was a general public perception, which we take judicial notice of. That freight forwarders are normally assumed to take control of all or any incidents in cargo handling chains including carriage."

9.8 The Court has also been urged to have regard to the fact that the 2nd defendant was in the business of international carriage and as such a close inspection of the wording on the Invoice issued and the letterhead of the 2nd defendant confirms such a finding. I have scrutinised the documents and accept the submission of the Plaintiff and do find that words such as *"freight" "logistics"* and *"handling"* are notorious with respect to the international carriage industry, and leads itself to the conclusion that the 2nd defendant is and was offering services in transportation.

9.9 I therefore find and hold that the contract in *casu,* being one for carriage of goods was a contract entrusted to the 2nd defendant.

10. I turn now to consider the third issue to determine the nature of the relationship between the plaintiff and the 1st and 2nd defendant.

10.1 The 1st defendant has submitted and urged this Court to find that no agency relationship existed between the 1st defendant and the 2nd defendant. They have referred the Court to the learned authors of **Chitty on Contracts** on the issue and have submitted that in order for a principal and agent relationship to exist, there must be an express or implied agreement between the agent and the principal. They maintain that the 1st defendant did not in any way grant authority or give consent to the 2nd defendant to affect its legal relations.

10.2 They further submit that any attempt by the Plaintiff to assert that the 1st defendant was acting as an "agent" of the 2nd defendant should be rejected as a blatant abuse of the word "agent". They rely on the words of **Lord Herschel** in the case of **Kennedy vs De Trafford** to support their submission that the 1st defendant cannot be regarded as being an agent of the 2nd defendant by reason only of having sold cargo space on behalf of airlines.

10.3 Counsel for the 1st defendant has also relied on the holding by the Supreme Court in the case of **Hygrotech Zambia Limited vs Greenbelt Fertilizers** to further support its submission that the 1st defendant did not grant any authority to the 2nd defendant to affect its legal position. The Supreme Court in discussing the concept of agency, in the cited case held:

"In law, the word "agency" is used to connote the relationship which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relationship of agency arises whenever one person, called "the agent" has authority to act on behalf of another, called "the principal," and consents so to act. Whether that relationship 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. The relationship of agency is created by the express or implied agreement of principal ond 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 or the parties."***

(emphasis is by the Court)

10.4 The Plaintiff, on the other hand, has urged the Court to find that the consent of the principal, which is regarded as basic justification for the agent's power to affect his principal's legal relations, may well be implied from his conduct or from his position with regard to the agent or vice versa. The **Hygrotech** case relied on by the 1st defendant, equally confirms that implied agency arises from the conduct or situation of the parties.

10.5 I am further fortified in this matter by reliance on the celebrated cases of **Salomon v Salomon** and **Associated Chemicals vs Hill & Delamain Zambia Limited and another** on the aspect that a company being a metaphysical entity, has no physical existence and can only act through humans mandated with its management and control of affairs. The celebrated case of **Royal British Bank vs Turquand** has equally settled the position that persons transacting with companies are entitled to assume that internal company rules are complied with, even if they are not.

10.6 I have noted from the evidence at trial, and this was not challenged, that the Plaintiff dealt with Mr Nkula Kasanga and negotiated the terms of the contract of carriage with him. Mr Kasanga was the Sales Manager of the 1st defendant company. He then referred **PW1** to an office next door, where the paper work in the form of the Tax Invoice and Receipt (which have been discussed at **paragraph 9** above), was issued. Whilst I take no exception with the authorities cited and the principles advanced by the 1st defendant on the issue of "agency", I note that in the circumstances of the case in *casu,* the conduct of Mr Nkula Kasanga, coupled with the confirmation that he was the beneficial owner of the 2nd defendant, and coupled with the fact that all e-mails and correspondence that ensued after the lab equipment went missing were from the 1st defendant, leads me to make a finding that the 1st defendant did act an agent for the 2nd defendant in the carriage of the lab equipment. The witness for the 1st defendant, Mr Thabani Dube equally confirmed that Mr Nkula Kasanga dealt with the Plaintiff and that he, Mr Dube was only given a report on the transaction and subsequent events by Mr Nkula Kasanga.

10.7 The subpoenaed witnesses from the 2nd defendant equally testified that although they appeared as directors of the 2nd defendant, Mr Nkula Kasanga and Ms Mildred were the beneficial owners of the 2nd defendant company and that Mr Nkula Kasanga had acted for both the 1st and 2nd defendant in this transaction. It is also noted that this evidence and these facts were not challenged or rebutted. I therefore form the considered view that that the 1st defendant was acting as agent of the 2nd defendant in the facts of this

transaction. Any other finding would be akin to allowing the 1st defendant to have its cake, and eat it too.

11. I now escalate my enquiry into the issues of limitation of liability as set out in the respective Airway Bills, and as pleaded by the 1st defendant.

Section 8 of the Convention provides as follows:

11.1 "An airway bill **shall** contain the following particulars:

(a) An indication of the places of departure and destination;

(b) If the places of departure and destination are within the territory of a single Gigh contracting party, one or more agreed stopping places being within the territory of another state, an indication of at least one such stopping place.

(c) **A notice to the consignor to the effect that**, if the carriage involves an ultimate destination or stop in a country other than the country of departure, **the Warsaw Convention may be applicable** and that the Convention governs, **and in most cases,** limits the liability of carriers in respect of loss or damage to cargo."

Article 9 of the Convention provides as follows:

"if with the consent of the carrier, cargo is loaded on board an aircraft without any airway bill having been made out, or if the airway bill does not include the notice required by **Article 8 paragraph c**, the carrier shall not be entitled to avail himself of the provisions of **Article 22 paragraph 2.**"

Article 22 (2) of the Convention provides that:

(a) "in a carriage of registered baggage and of cargo, the liability of the carrier is limited to a sum of two hundred and fifty francs per kilogram, unless the passenger or consignor has made, at the time the package was handed over to the carrier a special declaration of interest in delivery at destination and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves that the sum is greater than the passengers or consignors' actual interest in delivery at destination.

(b) In the case of loss, damage, or delay of part of registered baggage or cargo, or of any object contained therein, the weight to be taken into consideration in determining the amount to which carriers' liability is limited shall be only the total weight of the package or packages concerned. Nevertheless, when the loss, damage, or delay of a part of the registered baggage or cargo, or of an object contained therein, affects the value of other packages covered by the same airway bill, the said total weight of such package or packages shall also be taken into consideration in determining the limit of liability." *(emphasis is by the Court).*

11.2 The above statutory provisions are instructive on how an airway bill is to be issued so as to entitle a carrier to invoke the limitation clause. It is trite that the airway bill ought to contain a notice to the effect that if the carriage involves an ultimate destination or stop in a country other than the country of departure, the Warsaw Convention may be applicable which convention governs and limits liability in respect of loss or damage to cargo. The law is

equally clear from the provisions above, that if the airway bill is not issued or does not contain the said notice on liability in accordance with **Article 8 (c)**of the Convention, then the carrier cannot invoke **Article 22** of the convention on limitation.

11.3 It has been argued for the 1st defendant, that having contracted third parties, namely Delta Airlines and DHL to transport the equipment, and who all issued airway bills exhibited on **pages 1 to 7** of the 1st Defendants bundle of documents, that liability had been limited. However, and what the Plaintiff has attempted to prove and submit to the Court, is that firstly there was no privity of contract between the Plaintiff and the third parties, and more fundamentally, that the Plaintiff was not provided with the first airway bill issued by DHL and which appears on **page 1** of the 1st defendants bundle of documents.

11.4 The Plaintiff has invited the Court to scrutinise the Airway bill for DHL and has pointed to the many defects in the said airway bill and has submitted that the only reasonable inference is that the Plaintiff not having participated in the airway bill and not having had any knowledge of its existence, had no notice on the limitation of liability in accordance with **Article 8(c)** of the Convention.

11.5 It has further been submitted on the issue of liability, that the 1st defendant sent the Airway bill issued by Delta Airlines to the Plaintiff on 19th September 2014, and that although this airway bill was duly completed with the correct

details of the parties and did contain a notice concerning carriers limitation of liability, no further details nor any attached conditions of contract, was prima facie proof that the alleged notice was not in conformity with the requirements of **Article 8 (c).** I have scrutinised this document as appearing on **page 2** of the Defendants bundle of documents.

11.6 I have also had the opportunity to examine the authority in the case of **Nuvo Electronics v London Assurance et al.** I note that the Court in that case found that the airway bill was not inconformity with Article 8 of the convention, in that it did not contain the name of the airport of departure, the name of the first carrier, whether the weight was in pounds or kilograms and the nature and quantity of the goods. Relying upon American case law, the Court held that if an air carrier fails to include the particulars required by **Article 8** of the Convention, then pursuant to **Article 9,** the carrier is not entitled to limit its liability.

11.7 The 1st defendant in relying on the cited authority of the Supreme Court in the case of **Air France vs Mwase** attempted to persuade this Court to accept the opinion of the Court when it held:

"The airway bill is evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage -see Article 11. It is clear that the carrier was on firm ground below ond here in resisting attempts by the consignor to infer terms into the contract to suggest what may or may not have been intimated verbally – as suggested by the learned trial judge."

I have also noted that the Supreme Court in the cited case held it to be the **untransferreable duty of a consignor to make out the airway bill** and it is up to the consignor to enter into the airway bill the time fixed for completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon. (emphasis by the Court)

11.8 I have examined at length the first airway bill as it appears on **page 1** of the defendant's bundle of documents. This is marked HAWB: 707-9970177. I note that this is the Airway bill which corresponds to the Tax Invoice **on page 1** of the Plaintiff's bundle of documents marked Handling charges for AWB 7079970177.

Following on to questions posed under cross examination by the Plaintiff, I have noted several defects in the airway bill as follows:

"Shippers name and address" was filled in as *"Bid Air Cargo* Lusaka Zambia, instead of the Plaintiff's name;

"Consignee's name and address" was filled in as *"Bid Air Cargo* Johannesburg", instead of *"Industrial Merchants LLC"* of the United States of America where it was destined.

11.9 The 1st defendant's witness was evasive and denied in is evidence that Bid Air Cargo is described as the consignor/shipper, when the document clearly reflected the name. His evidence in chief was totally discredited under cross examination as he struggled to sustain his answers to conform to what should have been on the documents as opposed to what actually appeared on the document.

I further form the considered view, that the evidence of the Plaintiff was credible and consistent with the finding that he had not been availed with a copy of the airway bill at the time of its issuance. This fact was further confirmed when **DW1** confirmed that the 2nd Airway bill No. 006 45514980 dated 15 September 2014 was only sent to the Plaintiff, the purported shipper, undercover of an email on 19th September 2014.

The Plaintiff confirmed that it was in the Plaintiffs interest to have insured the lab equipment if he had been made aware of the issue of limitation of liability. And if he had been made aware that the cargo was not going directly from Zambia to its destination. He was not made aware that the cargo was going to South Africa and then on to its destination.

The evidence of the 1st defendant, was perceived by the Court to be rehearsed, stage-managed and was at best, hypothetical as he spoke to what can only be described as "best practices" in the industry. He confirmed that he was not person who had dealt with the Plaintiff and was only able to give hypothetical evidence on what the 1st defendant usually does as opposed to what the 1st defendant did or did not do in this transaction, the subject of the proceedings before Court.

11.10 I therefore have no hesitation in finding that the 1st defendant is not entitled to the defences in limitation of liability. I also find that in the circumstances of the facts in *casu*, and the particular facts of the case in the **Air France vs Mwase** authority, the same is not applicable herein.

12. On the issue of negligence, the 1st defendant avers that none of its agents or employees having caused the loss either intentionally or recklessly, it is entitled to claim the statutory limitation of liability. The Plaintiff on the other hand, has urged the Court to make its determination as to whether the 1st defendant and its employees and or its agents acted with reasonable care in the transportation of the lab equipment to its destination.

12.1 It is clear from an examination of the Convention that **Article 20** shifts the burden of proof on the carriers to prove on a balance of probabilities that he or his servants/agents had taken necessary measures to avoid damage of the cargo and that it was not possible for him or them to take any other measures towards the damage or loss.

12.2 Having examined the facts in *casu,* and having already found that the 1st defendant did not provide the airway bills to the Plaintiff, and that if at all the first airway bill was provided, it was defective and contrary to the provisions of the law. I have also noted from the correspondence between the parties that neither the 1st defendant, nor any of the third parties, namely, Delta Airlines and or DHL have attempted to offer any explanation as to what exactly transpired to the lab equipment, the property of the Plaintiff.

12.3 The Plaintiff has relied on the case of **Almaz Luiseged (Female) vs British Airways Limited** where in the Supreme Court held as follows:

"Given this scenario, we agree with Mr. Wright that in line with the case of ***Cannaught Laboratories vs British Airways*** *(2002) O.J No. 3421 and Article 20, failure by the Respondents to explain what actually happened to the missing bag lead irresistibly to an adverse inference that more probable than not, this missing suitcase was stolen by an employee/agent of the Respondent or with the complicity of an employee of the Respondent. This inference would lead to another irresistible inference that more probable than not the employee/agent of the Respondent stole this missing suitcase of the Appellant in the course of or under the scope of his employment. this would lead to the conclusion that, such conduct meets the Article 25 test."*

12.4 In support of the argument of reckless and negligent conduct of the 1st defendant, I am alive to the holding of the Supreme Court in the case of **AMI Zambia vs Chibuye** in which it was held:

"if on the facts the Respondent would not have been exempted from their wrong doing by the misconduct of their staff, then they cannot plead the limitation clause"

12.5 From the totality of the evidence placed before the Court, and from the demeanour of the 1st defendant, I am inclined to agree with the submissions of the Plaintiff, that the reckless conduct by the 1st defendant and the third parties leads irresistibly to an adverse inference of theft of the equipment by the employees of the 1st defendant and or its agents. And further, if at all the equipment was lost, the same was due to the negligence and reckless conduct of the 1st defendant. It is noted that the said carelessness or reckless conduct was done in the course of or under the scope of their employment and therefore comes under the ambit of **Article 25** of the Convention.

12.6 On the findings above, I have been urged to note the latin maxim *"equity will not suffer a wrong to be without a remedy"* and consequently I find for the Plaintiff and now make the following orders.

13.1 **Orders**

Having found for the Plaintiff, I now turn to the specific claims made by the Plaintiff and which are captured by **paragraph 1** above. These are:

i. Damages for breach of contract;

ii. Damages for negligence for loss of goods;

iii. Damages for loss of business;

iv. An order for refund of the value of the laboratory equipment and for the handling and freight fee

v. Interest on all the monies due herein and;

vi. Costs of and incidental to these proceedings.

13.2 I order that the 1st and 2nd defendant do refund the value of the laboratory equipment in the sum of USD 10,160

13.3 I also order that the 1st and 2nd defendant do refund to the Plaintiff the sum of ZMK 6,746.93 being the sum paid in respect of handling and freight fee;

13.4 I now turn to consider the Plaintiff's claims under **paragraph 13.1 (i) to (iii),** and turn my attention to question what the consequences of the alleged breach of contract and damages for loss of business are. I am alive to the guidance of the Supreme Court in the case of **Finance Bank Zambia Limited and Rajan Mahtani vs Simataa Simataa** and note that unless an infringed

right is vindicated by a remedy, it is hallow and devoid of all practical force and content. Where a party alleges breach, it is incumbent on the party to prove its actual loss so as to recover the said loss. I am minded that where a party claims damages for breach of contract, such as that claimed by the Plaintiff in *casu,* it is normally the function of the Court to assess the money value of the loss suffered and to award that sum as damages. Damages in this form, are a compensatory remedy and not punishment of the contract breaker.

I note that no proof having been placed before the Court, save as an averment in the pleadings, I am guided by the Supreme Court in the case of **Mhango vs Ngulube,** that it is not the duty of the Judge to establish for parties what their loss is. I am further guided by the Supreme Court in the cited case of **Finance Bank,** that although the Court may refer the assessment proceedings to the learned Honourable Registrar, in this case, that approach may be patently flawed as the onus to conduct a trial to establish loss should not fall on the Learned Registrar. To the contrary, such finding is the responsibility of the trial judge. As noted, in the present case, no evidence was availed to ground such a finding.

Consequently, I decline to make any orders for damages for breach of contract or for loss of business.

13.5 I award the Plaintiff interest on all the monies due herein on the average of the short-term deposit rate from the date of the Writ to the date of Judgment, and thereafter at the rate prescribed by the Judgment Act to the date of payment.

13.6 I also award the Plaintiff costs of and incidental to these proceedings.

Delivered in Open Court, the 28th day of May, 2021.

Lady Justice Abha Patel, S.C.