

IN THE HIGH COURT FOR ZAMBIA

2017/HP/1961

AT THE PRINCIPAL REGISTRY

HOLDEN AT LUSAKA

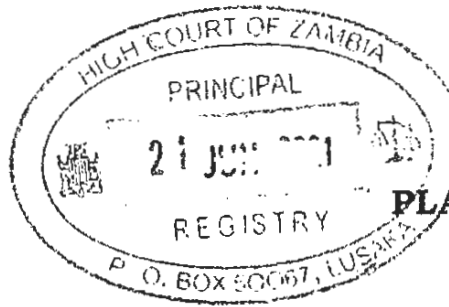
(Civil Jurisdiction)

BETWEEN:

WANG JIN CHENG

AND

ACKSON TEMBO



PLAINTIFF

DEFENDANT

**BEFORE THE HONOURABLE LADY JUSTICE P. K. YANGAILO,
IN OPEN COURT, ON 21ST JUNE, 2021, AT 12:30 HOURS.**

For the Plaintiff: Mr. L. Linyama – Messrs. Eric Silwamba,
Jalasi and Linyama Legal Practitioners.

For the Defendant: Mr. M. Nzonzo – Messrs. SLM Legal
Practitioners.

JUDGMENT

CASES REFERRED TO:

1. *A.J. Trading Company Limited v Chilembo* (1973) Z.R. 55;
2. *MTN Limited v Olympic Milling Company Limited* – 2009/HPC/651;
3. *Zega Limited v Zambezi Airlines and Another* – SCZ/8/006/2014;
4. *Khalid Mohammed v The Attorney General* (1982) Z.R. 49;
5. *Zambia Railways Limited v Pauline S Mundia, Brian Sialumba* (2008) vol. 1 Z.R. 287 (S.C);
6. *Philip Mhango v Dorothy Ngulube and Others* (1983) Z.R.61;
7. *Commonwealth Shipping Representatives v P & O Branch Services* (1923) A.C. 212;
8. *Frisbosa Spolka Akcyjna v Haibaim Lawson Combe Barbour Ltd* (1943) A.C. 32;
9. *JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited*-S.C.Z. Judgment No. 20 of 2002; and
10. *Sithole v The State Lotteries Board* (1975) Z.R. 106

LEGISLATION REFERRED TO:

1. *The Rules of the Supreme Court of England (White Book) 1999 Edition;*
2. *The Misrepresentation Act, Chapter 69 of the Laws of Zambia;*
3. *The Law Reform (Frustrated Contracts) Act, Cap 73 of the Laws of Zambia; and*
4. *The High Court Act, Chapter 27 of the Laws of Zambia.*

WORKS REFERRED TO:

1. *J. Chitty, Chitty on Contracts, 28th Edition (United Kingdom, Sweet and Maxwell, 1999);*
2. *G. Cheshire and C. Fifoot, Law of Contract 10th Edition (United Kingdom, Butterworth and Co Limited, 1981);*
3. *P. Matibini, Zambian Civil Procedure Commentary and cases (South Africa, Lexis Nexis, 2017;*
4. *Halsbury's Laws of England, 3rd Edition, Volume 24 (United Kingdom, LexisNexis Butterworths, 1964);*
5. *J. Chitty, Chitty on contracts 24th Edition, (United Kingdom, Sweet and Maxwell, 1977); and*
6. *A. Garner, Black's Law Dictionary 8th Edition (United States of America, Thompson West, 2007).*

1 INTRODUCTION

1.1 By Amended Writ of Summons dated 1st August, 2019, the Plaintiff seeks the following reliefs: -

- i) *The sum of USD907,900.00 on account of money had and received by the Defendant for use of the Plaintiff;*
- ii) *Damages for fraudulent misrepresentation;*
- iii) *Damages for loss of use of funds;*
- iv) *Interest on sums payable at the current Bank of Zambia lending rate; and*
- v) *Costs.*

2 PLEADINGS

- 2.1 By his Amended Statement of Claim filed on 1st August, 2019, the Plaintiff averred, *inter alia*, that he is a businessman and Chinese national engaged in the importation of timber from various jurisdictions into the Peoples Republic of China. The Plaintiff stated that the Defendant represented himself as duly registered to deal in raw timber including Mukula tree species, which he expressly represented that he was licensed to export.
- 2.2 According to the Plaintiff, he had previous dealings in Mukula tree logs with the Defendant prior to the transaction and the Defendant would deliver copies of Bills of lading as an incident of the completion. In April, 2017, the Plaintiff met the Defendant in Lusaka and it was agreed that the Defendant would secure and export Mukula tree logs to the Republic of China. The terms of the agreement included an obligation for the Defendant to procure Mukula logs; facilitate its shipment; and thereafter deliver Bills of lading to the Plaintiff.
- 2.3 The Plaintiff further averred that the Defendant fraudulently misrepresented himself to the Plaintiff that he had a valid license for the exportation of Mukula tree logs issued by the Ministry of Lands and Natural Resources and Environmental Protection and that he would purchase and deliver the Mukula tree logs to the Plaintiff through Durban in the Republic of South Africa for onward transmission to China. In complete reliance of the Defendant's misrepresentation which the Plaintiff

believed to be true and pursuant to the agreement, the Plaintiff issued the sum of United States Dollars US\$907,900.00, for purchasing of the Mukula logs to the Defendant, receipt of which was acknowledged by the Defendant in writing. The Plaintiff averred that the Defendant had not delivered any of the said Mukula tree logs to the Plaintiff and has adamantly refused, failed and/or neglected to deliver the timber or refund the Plaintiff his monies and the Defendant's total indebtedness now stands at US\$907,900.00, which remains unpaid.

- 2.4 He also averred that despite several reminders to the Defendant to settle the said outstanding amount, the Defendant has either failed or neglected to settle the said sum owed and consequently, the Plaintiff has suffered damage and loss.
- 2.5 By the Defendant's Defence filed on 14th November, 2019, the Defendant denied that he made representations to the Plaintiff that he was duly registered to deal in Mukula tree species and that he was licenced to export. The Defendant admitted that he had dealt in Mukula tree species and that his role was to facilitate the securing and exporting of the said Mukula tree logs that the Plaintiff sought to export to China. The Defendant further admitted that he delivered copies of Bills of lading to the Plaintiff in the

course of facilitating the Plaintiff's securing and exporting Mukula tree logs.

2.6 The Defendant averred that the terms of the verbal agreement between the Plaintiff and himself were that the Defendant was to facilitate the procuring of the Mukula tree logs and that the Plaintiff was to pay for their shipment to China. The Defendant stated that the Plaintiff had failed to make payment for seven containers which at the material time were ready for shipment and consequently, the said containers had to be returned to the Defendant's yard due to the Plaintiff's failure to pay and as a consequence, the Defendant incurred demurrage charges.

2.7 The Defendant denied receiving or acknowledging receipt of the sum of USD907,900.00, as all payments for the purchase and exporting of the logs were made by the Plaintiff to the Defendant as and when a container was to be secured and exported. The Defendant averred that he received smaller amounts on consideration that was wholly fulfilled on the part of the Defendant.

2.8 The Defendant further averred that at trial, he would show proof of delivery on many consignments agreed between the parties, save for 17 containers outstanding out of which 7 were not paid for as stated above. According to the Defendant, the seven containers are securely parked in Lusaka and the 10 containers are secured in Mansa.

2.9 The Defendant also averred that at trial, he would show that the outstanding 10 containers that were to be secured and exported befell the misfortune of the government ban on exportation of Mukula tree logs soon after their purchase at source. At that time the Defendant had already procured and secured the 17 containers. The Defendant averred that all the 17 containers are ready for collection by the Plaintiff to export once the ban on the export of Mukula logs is lifted.

2.10 The Defendant denied owing the Plaintiff the sum of US\$907,900.00 or any other amount or at all, save for the outstanding 17 containers that the Plaintiff had failed, neglected or refused to pay for shipment and or to collect following the ban on the export of Mukula logs. The Defendant alleged that the Plaintiff's suit against him was a gimmick to wash his hands off the 17 containers and reclaim the amounts paid for the purchase of the said containers on an arrangement that had been frustrated by the Government ban and not the Defendant.

3 EVIDENCE AT TRIAL

3.1 **PW1** was **Wang Jin Cheng**, the Plaintiff herein, who testified that he was dealing in the business of exporting of Mukula timber. According to PW1, he was cooperating with the Defendant whom he had met on several occasions and was helping him to export the

timber. PW1 stated that he would make a cash deposit and allow the Defendant to handle everything till export and upon receipt of the bill of lading, he would pay the rest in cash.

- 3.2 He further testified that upon receipt of the bill of lading, PW1 would send it to his clients in China so that they could confirm the commodity. The commodity would be received at Zhang Jia Gang City in China. PW1 made the first payment on the 9th of December, 2016, of K400,000.00 and let the Defendant take up the responsibility of transportation. According to PW1, by April, 2017, the Defendant had collected US\$1,700,000.00 from PW1 which was paid in instalments. On a number of occasions, PW1 requested his interpreter to deliver some monies to the Defendant who was supposed to give PW1 the bills of lading. The total sum that was paid to the Defendant by PW1 was over US\$1,700,000.00 and the total number of containers delivered were thirty-one (31) which did not correspond with the sum of US\$1,700,000.00 that PW1 gave the Defendant. He stated that the containers were supposed to be sixty-four (64) in total. Upon the Defendant's failure to deliver the bills of lading for the remaining containers, PW1 called him, but he did not answer his calls or allow him into his warehouse, which led to this matter being brought before this Court.

3.3 PW1 testified that the Amended Plaintiff's Bundle of documents before the Court consisted of the documents that the Defendant signed each time he collected the sums of money. On page 1 of the said Documents is contained a document that the Defendant signed when he collected a sum of money in the month of April, 2017. It was PW1's testimony that, though the said document is not dated, it was in the month of April, 2017 and has the signature of the Defendant. Page 2 of the said documents contained the first document that the Defendant signed the first time that the parties started doing business together in Zambia on the 9th of December, 2016.

3.4 PW1 testified that the document at page 3 of the Amended Plaintiff's Bundle of Documents, which is partially written in a foreign language and undated, is a record of the monies that the Defendant collected from PW1 between 9th December, 2016 to April 2017. The document on page 4 of the said documents is an explanation of the documents received by the client which were thirty-one (31) in total. PW1 further testified that each container is worth US\$25,000.00 and that the total was US\$600,000.00. Later, seven (7) containers were collected and at that time the prices had gone up and each container was US\$27,000.00 and the total was US\$189,000.00. The total sum for the said transactions was US\$789,000.00. PW1 also testified

that the said document was evidence that the Defendant collected the money and signed for it.

- 3.5 PW1 confirmed that he collected thirty-one (31) bills of lading and that he had already delivered them to his client. He stated that he would not collect the containers with Mukula logs in the Defendant's possession because the agreement was that the Defendant was to collect the said logs, export them and that PW1 was only supposed to collect the bills of lading and deliver them to his client. PW1 testified that he had never seen the bills of ladings produced by the Defendant before.
- 3.6 During cross-examination, PW1 stated that he would receive deposits from clients and that he would use his own money to pay the Defendant. He stated that ACK Suppliers Limited was the Defendant's company and that the bills of lading where received from the Defendant personally. The Plaintiff further stated that he sent the bills of lading as soon as he received them and the clients would confirm that the bills of lading had ACK company's name written on them.
- 3.7 When referred to page 1 of the Defendant's Bundle of Documents which contained copy of a bill of lading, PW1 stated that it was the type of document he would receive from the Defendant. He stated that he did not have any document before Court which set out the terms of the agreement between himself and the Defendant or the

number of containers to be shipped. Further, PW1 confirmed that the sum of US\$1,700,000.00 was paid to the Defendant in thirty-one instalments and not by lump sum. He stated that he only had the first two pages in the Amended Plaintiff's Bundle of Documents to show the payments that the Defendant collected for those transactions. It was his testimony that all the money that he is claiming from the Defendant had been paid to him by April, 2017.

3.8 PW1 testified that page 1 of the Amended Plaintiff's Bundle of Documents showing the Defendant acknowledging the debt of US\$907,900.00 was written in April, 2017, when he and the Defendant sat down together to reconcile the amount of money that the Defendant owed him. PW1 stated that he did not make the Defendant sign the document to enable him to procure more funds from his clients. PW1 further stated that he was not aware that there were seven (7) containers laden with Mukula logs that were in the Defendant's possession. PW1 also stated that the acknowledgment of debt was written after delivery of the thirty-one (31) containers.

3.9 When referred to pages 63 and 65 of the Defendant's bundle of documents, PW1 confirmed that the document on page 63 was dated 1st June, 2017 and that on the next page it was for 16th June, 2017. According to PW1, these dates were beyond the period when the

Defendant acknowledged that he owed the Plaintiff the sum of money.

3.10 PW1 testified that he was not aware that there was a ban on the harvesting of the Mukula logs and that it was why the Defendant was not able to complete the transaction of the 25 containers that he owes.

3.11 When referred to page 3 of the Amended Plaintiff's Bundle of Documents, PW1 confirmed that they were not dated. He further confirmed that the Defendant did not sign it and that it did not mention any quantities of mukula containers still owing. PW1 was also referred to page 4 of the Plaintiff's Amended Bundle of Documents and he confirmed that a portion of the said document was written in Chinese.

3.12 During re-examination, PW1 stated that page 1 of the Amended Plaintiff's Bundle of Documents was prepared by the Defendant and that he signed it. He testified that he was assured by the Defendant that he had all the documentation required to export mukula tree logs and that he proved it when he exported the 31 containers.

3.13 **PW2** was **Albert Mwanza** a business man dealing in general trading. He testified that PW1 was his boss and that he would interpret Mandarin to English and vice versa. PW2 met PW1 in 2016 when he returned from China and he was aware that the Defendant was supplying Mukula tree logs to PW1. PW2 stated that he would accompany PW1 when he made payments to the

Defendant. He recalled that PW1 requested him to deliver a sum of K1,000,000.00 to the Defendant at Golden Peacock Hotel. He met the Defendant whom he delivered the sum of money to and informed PW1.

3.14 During cross-examination, PW2 testified that besides calling PW1, there was no written acknowledgment of receipt to confirm that the sum was delivered to the Defendant. PW2 further stated that he recalled taking a sum of money to the Defendant who was off Mumbwa Road and confirmed that the transaction was between PW1 and the Defendant.

3.15 During re-examination, PW2 confirmed that the second time he was sent by PW1 to deliver a sum of money to the Defendant off Mumbwa Road, the said money was in United States Dollars but that he could not recall the exact amount.

3.16 This marked the close of the Plaintiff's case.

3.17 **DW1** was the Defendant, **Ackson Tembo**, who testified that he was a business man and that he met the Plaintiff through a Chinese national named Junda. The Plaintiff decided to do business with DW1 and in 2016, the Plaintiff requested DW1 to meet him at Arcades in order for them to discuss how they would conduct their operations.

3.18 DW1 explained to the Plaintiff that at the time it was legal to cut and export Mukula tree logs. He told PW1

that he could only work for him if he made the following payments: -

- i) A down payment to procure the Mukula logs;
- ii) Another payment when the logs arrived in Lusaka; and
- iii) The final payment was to be made when the Bill of lading was given to PW1.

3.19 DW1 stated that he was given a K400,000.00 by the Plaintiff to buy the timber, which he signed for. He bought the timber; brought it to Lusaka; managed to ship the Mukula tree logs; and gave PW1 the Bill of lading. PW1 requested for more containers of Mukula tree logs and because of that, the parties agreed that PW1 would make several cash deposits as the supply was coming so that it did not cut off. DW1 had no problem with the request as he was able to source the Mukula tree logs and export them.

3.20 DW1 testified that his role was to source the timber, transport it to the Durban Port and ensure that it was shipped to China. He stated that it was only after the timber was shipped off that he could go to the shipping company and collect a Bill of lading which he would then send to the Plaintiff for clearing in China. He further stated that he could only do the foregoing when he was paid by the Plaintiff.

3.21 DW1 testified that he would request for a K1,000,000 to allow him to organize the Mukula timber from the bush.

He was supposed to bring the timber to Lusaka where PW1 was supposed to pay more money for the timber to be sent to the port. He recall that he did a number of shipments for the Plaintiff of about fifty (50) containers and bill of ladings were given to the Plaintiff. He stated that he kept a copy of 65 bills of lading, which he gave to the Plaintiff and that the said copies were before this Court in the Defendant's Bundle of Documents.

3.22 DW1 testified that with respect to his acknowledgment of debt on page 1 of the Amended Plaintiff's Bundle of Documents, the background was that it was signed at a time when the seven containers which were in Lusaka were supposed to be moved. He testified that the Plaintiff went to his office and explained that he had run out of money to facilitate further movements of the logs to the port and was looking for ways to get further funding from his financiers. The Plaintiff explained that he had engaged another financier who was willing to finance the movement of the seven containers which were already in Lusaka and those in the bush. The Plaintiff told DW1 that the only way he would get the money from the financier was if DW1 wrote to him and informed him that he had timber in Lusaka and in the bush; and that DW1 was the one to move it, as many Chinese nationals had trusted that DW1 was able to export the Mukula logs.

3.23 DW1 agreed to write the said acknowledgment as the seven containers in Lusaka were already accumulating demurrage charges in the shipping room. DW1 stated that there were 13 Bills of lading which were to be collected that week and therefore, he mentioned them in the acknowledgment of debt to better present the request for funding to the Plaintiff's Financiers.

3.24 DW1 stated that there was no money that he owed the Plaintiff and that the acknowledgment of debt was merely a gentleman's agreement aimed at assisting the Plaintiff to get money from his financiers. DW1 testified that PW1 wanted to portray a picture to his initial financiers that he had spent the money availed to him correctly and that it was left to DW1 to move the Mukula tree logs. He stated that after he signed the document acknowledging debt, the 13 bills of lading indicated on the said document were obtained and given to the Plaintiff but the seven containers had not been shipped to date. DW1 stated that these events transpired before the Minister announced the ban.

3.25 DW1 testified that the Mukula logs that had been purchased in Luapula had not been moved due to the ban that was imposed and therefore the logs were lying idle. He stated that he had 8 containers in Lusaka and more than 10 containers in Luapula. He further stated that the Plaintiff needed the Bills of lading which DW1

could not provide because of the ban which affected any agreement that he had with the Plaintiff.

3.26 It was DW1's testimony that Mr. Kaoma who is on record as holding a power of attorney to act on behalf of the Plaintiff herein, had been to the yard in Lusaka where the logs had been kept and he inspected them. According to DW1, Mr. Kaoma wanted to take possession of the Mukula logs which were remaining and they also agreed on dates when they would travel to Mansa. Before the dates of travel, Mr. Kaoma told DW1 that the Plaintiff had changed his mind and just wanted his money back. This left DW1 wondering as to how much money the Plaintiff could be demanding as DW1 had just purchased the Mukula tree logs from the bush.

3.27 In response to the Plaintiff's claim that DW1 was fraudulently misrepresenting himself, DW1 stated that he had all the necessary documents to buy and transport the timber. He stated that he did not say he could transport the timber without documentation.

3.28 During cross-examination, DW1 testified that a Bill of lading cannot be issued without the relevant documents and that therefore, a Bill of lading was proof that he had the relevant documents to export timber. DW1 stated that the licences and permits are relevant but that they were not before court.

3.29 DW1 further stated that paragraph 11 of his Defence was not contradicting what he had said earlier about the

number of containers being eight (8) despite his Defence stating seven (7), as what Mr. Kaoma saw were eight (8) containers and that DW1 was only to ship seven (7) containers. DW1 further stated that he started doing business with the Defendant in December, 2016.

3.30 DW1 conceded that the Bills of lading from 12th July, 2016 to 28th September, 2016, were not for the period he was doing business exclusively with PW1 and that he started working exclusively with the Plaintiff in December, 2016.

3.31 DW1 testified that the document on page 1 of the Amended Plaintiff's Bundle of Documents was written by him and that he acknowledged that he owed the Plaintiff the sum of US\$907,900.00. He further testified that he did not offer an explanation in his Amended Defence. DW1 also testified that he did not have any documents to show that he signed the said document on pretext as stated in the examination in chief.

3.32 It was DW1's testimony that he had no proof of the amount of money that he had received from the Plaintiff before Court, but that the same was at his office. He conceded that the Plaintiff's contention that he was only supposed to hand over the Bill of lading was correct. He further conceded that it was his duty to procure the timber and export it and that the Plaintiff's duty was to fund the transaction.

3.33 DW1 conceded that he did not bring anything before Court to show that there was a ban on the exportation of Mukula timber but stated that he was aware that the ban was effected before June, 2017. DW1 was referred to page 65 of the Defendant's Bundle of Documents containing a Bill of lading and he testified that it was dated 13th June, 2017. He stated that it was in respect of the Mukula tree logs that had moved from Zambia before the ban and were in the Republic of South Africa. DW1 stated that he gave a copy of this Bill of lading to the Plaintiff but that he did not have a written acknowledgment of receipt from the Plaintiff.

3.34 It was DW1's further testimony that he only had three Bills of lading post April, 2017. He acknowledged receipt of the sum of K400,000.00 from PW2 but stated that he did not have proof of acknowledging the exact amount that he had received from the Plaintiff in total. DW1 conceded that it was never the agreement that he could hand over the containers to the Plaintiff in Lusaka but in China with the Bills of lading. It was DW1's further testimony that he had not handed over to the Plaintiff any Bill of lading for what he was expecting.

3.35 In Re-examination, DW1 testified that he had not handed the outstanding Bills of lading because the Plaintiff did not fund the movement of the seven containers and secondly, it was due to the ban of the export of Mukula logs by the Government. It was DW1's

testimony that the discrepancy on the number of containers came about because the shipping line had requested them not to exceed 30 tonnes for the containers to be exported so he had to conform to the 30 tonnes allowed.

3.36 With respect to the Bills of lading on pages 63 to 65 of the Defendant's Bundle of Documents dated June, 2017, DW1 testified that the timber referred to therein had already been moved out of Zambia when the ban was imposed and was in a warehouse in the Republic of South Africa, awaiting funds to be shipped which the Plaintiff delayed to give him for further processing.

3.37 **DW2** was **Emack Kaoma**, aged 51 years old and an Agriculturalist by Profession who testified pursuant to a *Subpoena Ad Testificandum*. DW2 testified that in January, 2018, he met his friend Davy, who told him that the Plaintiff had a case in Court and needed someone to stand in for him. DW2 was given a Power of Attorney to act on behalf of the Plaintiff. When DW2 attended the Court session on behalf of the Plaintiff, he met the Defendant who told him that he had procured the Mukula logs. The Defendant further stated that he had eight (8) containers which were along Mumbwa road in Lusaka and 10 containers that were marooned in Mwense and Mansa.

3.38 DW2 stated that he went to visit the Defendant's yard, in the company of three colleagues who were conversant

with the Mukula tree logs to ascertain if the 8 containers were there and contained Mukula logs. DW2 saw eight 40-foot-long containers and when he opened them, his colleagues confirmed that indeed the logs were Mukula tree logs. DW2 did not go to Mansa or Mwense as the dates clashed with his official work duties. He told the Plaintiff of the new developments that had occurred, who guided him that there was no need to take that route and that what was required was to recover the money. DW2 stated that by the time he assumed the Power of Attorney, the ban on the export of Mukula logs was still in effect.

3.39 During cross examination, DW2 testified that the things that the events that he had just narrated happened whilst the case was still active in Court. He further stated that he remembered a portion in the diary where an individual stated that he owed some money to the Plaintiff. DW2 was referred to page 1 of the Amended Plaintiff's Bundle of Documents containing the acknowledgment of debt in the sum US\$907,900.00 and he confirmed that it was the entry that he saw in the diary.

3.40 There was no re-examination conducted and this marked the close of the Defendant's case.

4 SUBMISSIONS

4.1 By the Plaintiff's final submissions filed on 17th November, 2020, the Plaintiff's Counsel gave a detailed

account of the evidence adduced by the parties at trial. Counsel submitted that the Plaintiff and the Defendant entered into a verbal contract and that the terms agreed by the parties therein were binding on the parties.

4.2 Counsel contended that as the Defendant had acknowledged and admitted receipt of funds from the Plaintiff for the purchase of Mukula logs, he could not raise a defence that he did not owe the Plaintiff. It was further contended that the Defendant could not raise the defence that the Plaintiff had failed to provide funds for the transportation of the Mukula logs when the Defendant had expressly admitted at trial that he received the sum of US\$907,900.00 from the Plaintiff by way of instalments. It was therefore, Counsel's submission that the Plaintiff is entitled to recover the sums paid to the Defendant and claim for breach of contract for failure by the Defendant to procure and deliver the Mukula logs and bills of lading to the Plaintiff as agreed.

4.3 The Plaintiff's Counsel submitted that the Defendant did not produce any evidence to show that the parties entered into a conditional agreement. In support of the foregoing submission, this Court's attention was directed to the definition of Condition Precedent by the learned authors of **Chitty on Contracts**¹, which states as follows: -

“A condition is precedent if it provides that the contract is not binding until the specified event occurs. It is subsequent if it provides that a previously binding contract is to determine on the occurrence of the event.”

- 4.4 Counsel contended that the Defendant’s obligations in the agreement were to procure the Mukula tree logs, transport them to Lusaka for inspection enroute to the port in Durban, ensure that the logs were shipped to China and deliver the Bills of lading to the Plaintiff. He submitted that from the record it was clear that the Defendant opted to vary the terms of the agreement by simply asking the Plaintiff to collect the Mukula tree logs that were kept in his yard contrary to the agreement. Counsel cited the learned authors of ***Cheshire and Fifoot’s Law of Contract***² in support of the foregoing submission as follows: -

“If a person contracts to deliver or do one thing and he delivers or does another, he has failed to perform his contractual duty.”

- 4.5 It was Counsel’s contention that the Defendant having previously successfully delivered the Mukula logs and Bills of lading to the Plaintiff; and his statement that he had 17 containers of Mukula logs ready for collection by the Plaintiff once the ban on Mukula logs export was lifted, is in fact an unconditional acceptance of his indebtedness.

- 4.6 Counsel submitted that as the Defendant admitted to receiving monies from the Plaintiff in instalments and that he wrote and signed the undertaking exhibited at page 1 of the Plaintiff's Amended Bundle of Documents, there was an admission by the Defendant of the Plaintiff's allegations and therefore, there was no need to look for further evidence to prove that fact. It was further submitted that by the Defendant's Defence, the Defendant did not expressly dispute the Plaintiff's claim. He cited **Order 27 of The Rules of the Supreme Court**¹ in support of the foregoing submissions. He also cited the case of **A.J. Trading Company Limited v Chilembo**¹ for the following: -

"An admission by a Defendant of an allegation in the Plaintiff's Statement of Claim means that there is no issue between the parties on that point and no further evidence is admissible in reference to that point."

- 4.7 On the strength of the forgoing submissions Counsel submitted that this Court enters Judgment on behalf of the Plaintiff on the basis of the express admissions by the Defendant.
- 4.8 With respect to the Plaintiff's claim that the Defendant misrepresented himself during negotiations when he stated that he had permits to export Mukula logs, when in fact not, Counsel contended that at trial, the Defendant did not produce any evidence or documents to prove that he had the permits to export Mukula logs

and as such, it was submitted that the Defendant misrepresented himself. Counsel further submitted that the Defendant defaulted on his contractual obligations before the government issued the ban on the exportation of Mukula logs and that the Defendant having made false statements to the Plaintiff intended to defraud the Plaintiff. The definition of misrepresentation under **Section 3 (1) of The Misrepresentation Act²** and the case of **MTN Limited v Olympic Milling Company Limited²** were cited in support of the foregoing submissions.

- 4.9 Counsel submitted that the Plaintiff is entitled to damages for loss of use of funds as a consequence of the Defendant's breach of contract and therefore deserves to be compensated for the loss. He cited the learned authors of **Chitty on Contracts¹** at **page 1273** in support of the foregoing submission for the following: -

"It is also possible that, in addition to a claim for a debt, there may be a claim for damages in respect of consequential loss caused by the failure to pay such a debt at a due date."

- 4.10 Counsel further contended that it was too late for the Defendant to claim that his acknowledgment of the debt was a pretext to persuade the Plaintiff's financiers as the Defendant ought to have raised this defence in his pleadings and during cross examination of the Plaintiff.

4.11 With respect to the burden of proof, Counsel contended that the Plaintiff had proved that he had given the Defendant the money and that during cross-examination, the Defendant expressly admitted that he received the money from the Plaintiff in instalments. Further, it was contended that the Defendant's testimony during examination in chief and cross-examination with respect to the number of containers that he had was an indication that the Defendant was not telling the truth. Furthermore, Counsel contended that the fact that the Defendant elected to add documents which were not subject of the transaction to his Bundle of Documents is evidence enough that the Defendant was economical with the truth and had failed to raise a proper defence to the Plaintiff's claims.

4.12 Counsel also contended that the Defendant during cross examination failed to prove his defence of illegality when he stated that he could not remember when the government imposed the ban on the export of Mukula logs. It was additionally contended that by April, 2020, the Defendant had been in default of the contractual obligations to the Plaintiff but that in June, 2020, the Defendant managed to supply Mukula logs to other clients as shown in the Defendant's Bundle of Documents on pages 63 and 65 and that therefore, the default by the Defendant was deliberate.

4.13 Finally, it was submitted that the Plaintiff had satisfied the ambit of a claim for money had and received and had proved the claim for misrepresentation, as such is entitled to the reliefs sought.

4.14 By the Defendant's submissions filed on 17th December, 2020, Counsel for the Defendant gave a brief background of the facts of this case and gave a summary of the evidence adduced by the parties. It was Counsel's contention that the main issue for this Court's determination was whether or not on the balance of probabilities, the Plaintiff had proved the claim of US\$907,900.00. It was Counsel's further contention that the burden of proof was on the Plaintiff to prove that the document acknowledging the debt could be relied upon to prove his case and that it was not for the Defendant to prove his defence.

4.15 Counsel contended that the alleged admission by the Defendant was unclear, equivocal and qualified in that the Defendant admitted to signing the document and gave justifiable reasons for doing so. Counsel cited the case of ***Zega Limited v Zambezi Airlines and Another***³ in support of the submission that for a Judgment on Admission to be made, the admission contained in a document must be clear, unequivocal and unqualified. Counsel contended that the Defendant's alleged admission was not clear and does not close the question of his indebtedness.

4.16 Counsel contended that from the Plaintiff's submission it was clear that the Plaintiff sought to have Judgment in his favour on the basis of the defence having failed. The case of ***Khalid Mohammed v The Attorney General***⁴ was cited in support of the foregoing as follows: -

"A Plaintiff must prove his case and if he fails to do so the mere failure of the opponents defence does not entitle him to judgment."

4.17 It was Counsel's further contention that the Plaintiff had failed to adduce a greater weight of evidence to prove the claim of US\$907,900.00 and how it was arrived at. He argued that there was no corroborative evidence on record to demonstrate that the Defendant owed the sum of US\$907,900.00, which currency the parties never transacted in.

4.18 Counsel submitted that a judgment on the unproved sum of US\$907,900.00 would amount to an unjust enrichment of the Plaintiff who acknowledged that the Defendant was still holding to some containers with harvested Mukula logs but had opted not to proceed with the transaction following the ban on the export of Mukula logs.

4.19 Counsel urged this Court to take judicial notice of commercial transactions based on invoicing and contended that the Plaintiff ought to have produced cogent evidence over and above the alleged admission

by the Defendant of the sum of US\$907,900.00 to prove when and how much was collected in Kwacha and how the Plaintiff's arrived at the said amount.

4.20 Finally, Counsel urged this Court to perceive the Plaintiff's case for what it was and contended that without proof of the actual amounts the Plaintiff paid leading up to the computation of US\$907,900.00, the claim before this Court remained suspicious and unproved on a balance of probabilities. On the foregoing, Counsel prayed for this Court to dismiss the Plaintiff's claims with costs to the Defendant.

5 DECISION OF THE COURT

5.1 I have considered the Pleadings, evidence adduced, as well as the submissions of the parties hereto, for which I am grateful to Learned Counsel. The Plaintiff's claim is for the sum of US\$907,900.00; damages for loss of use of funds; and damages for fraudulent misrepresentation.

5.2 I warn myself from the onset that the burden of proof in civil matters rests upon the Plaintiff to prove his claim on a preponderance of probability. The Supreme Court in ***Zambia Railways Limited v Pauline S Mundia, Brian Sialumba***⁵ held that: -

“The standard of proof in a civil case is not as rigorous as the one obtaining in a criminal case. Simply stated, the proof required is on a balance of probability as opposed to beyond all reasonable doubt

in a criminal case. The old adage is true that he who asserts a claim in a civil trial must prove on a balance of probability that the other party is liable...”

5.3 The undisputed facts of the case are that in December, 2016, the Plaintiff and the Defendant entered into an oral contract for the supply and purchase of Mukula tree logs. The Plaintiff's obligation under the said contract was to provide funds for the sourcing and export of the Mukula tree logs, while the Defendant's obligations were to source the Mukula logs and export them to China. Following the shipment, the Defendant was also required to deliver Bills of Lading with respect to the exported logs to the Plaintiff.

5.4 The Plaintiff contends that by April, 2016, he had made several cash deposits to the Defendant amounting to over US\$1,700,000.00 for the supply of 64 containers of Mukula logs. According to the Plaintiff, the Defendant only delivered 31 containers and had failed to deliver the remaining containers. The Plaintiff alleged that the Defendant refused to refund the Defendant the sum of US\$907,000.00 for the undelivered containers of Mukula logs despite expressly acknowledging that he owed the Plaintiff the said sum. The Plaintiff further contended that the Defendant fraudulently misrepresented that he had a valid license to export Mukula tree logs from Zambia to China when in fact not.

5.5 The Defendant on the other hand contends that his failure to deliver the said consignment of logs and bills of lading was due to the Plaintiff's failure to provide funding and the Government ban on the export of Mukula tree logs. With regards to the acknowledgment of debt, the Defendant stated that he did not owe the Plaintiff the sum of money indicated therein and that the said acknowledgment was meant to be a pretext to enable the Plaintiff to get funding from his financiers.

5.6 From my analysis of the pleadings and the evidence before me, I find that the issues for determination are as follows: -

1. Whether the acknowledgment of debt amounted to an admission by the Defendant of debt being claimed by the Plaintiff;
2. Whether the Plaintiff is entitled to the sum of US\$907,900.00 and damages for loss of use of funds; and
3. Whether the Plaintiff is entitled to damages for fraudulent misrepresentation.

5.7 I will begin by considering the issue of whether the acknowledgment of debt that was executed by the Defendant was an admission of debt. By the Plaintiff's final submissions, it was contended that the said acknowledgment of debt was an admission by the Defendant that he owed the Plaintiff the sum of

US\$907,900.00. The Defendant on the other hand denied that the said document amounted to an admission as the reason that he drafted and executed it was to assist the Plaintiff to secure funds from his Financers.

5.8 According to the learned author of ***Zambian Civil Procedure Commentary and cases***³, the essential conditions that must be satisfied before a Court pronounces judgment on admission are as follows: -

- “1. The Admission must have been made in the pleadings or otherwise;*
- 2. The admission must have been made orally or in writing;*
- 3. The admission must be clear and unequivocal; and*
- 4. The admission must be taken as a whole and it is not permissible to rely on a part of the admission, ignoring the other part.”*

5.9 On my analysis of the Defendant's acknowledgment of debt and the authority cited above, I find that that the Defendant's acknowledgment of debt above does not amount to an admission, as although it is clear, it is equivocal as the Defendant has raised a defence to it. It follows therefore, that the Plaintiff's claim that the said acknowledgment of debt was an admission is dismissed.

5.10 I now turn to consider the second legal issue outlined above of whether the Plaintiff is entitled to the sum of US\$907,900.00 and damages for loss of use of funds. It

is not in dispute that the terms of the agreement between the Plaintiff and the Defendant were that the Defendant was to source and export Mukula tree logs to China and deliver bills of lading to the Plaintiff as proof of completion, whilst the Plaintiff's role was to provide funding for the transaction.

5.11 At trial the Plaintiff asserted that he made various payments to the Defendant and produced a copy of the Defendant's acknowledgment of receipt of the sum of K400,000.00, dated 9th December, 2016 for the export of Mukula tree logs to China. The Plaintiff further alleged that between December, 2016 to April, 2017, he had made several cash deposits to the Defendant amounting to US\$1,700,000.00, for the purchase and export of 64 containers of Mukula tree logs but that of the said sum, the Defendant only delivered 31 containers of Mukula logs. The Plaintiff alleges that the Defendant had failed to deliver containers of Mukula logs worth US\$907,900.00, which amount the Plaintiff is now claiming from the Defendant.

5.12 At trial, the Defendant admitted receiving cash deposits from the Plaintiff but stated that he did not owe the Plaintiff any money. The Defendant further asserted that the Plaintiff's role under the contract was to provide funds for the export of Mukula tree logs, which the Plaintiff had not done with respect to the seven containers of Mukula tree logs, which were already in

Lusaka. Further, the Defendant stated that he had 10 other containers of Mukula tree logs that were in Luapula province that could not be exported due the Government ban on the export of Mukula tree logs.

5.13 Regarding the acknowledgment of debt, the Defendant stated that he executed the said document in order to assist the Plaintiff to secure funding from his Financers and that the said document was meant to provide assurance to the Plaintiff's previous Financer's that the Plaintiff had used the funds that were availed to him correctly.

5.14 The Supreme Court in the case of ***Philip Mhango v Dorothy Ngulube and others***⁶ held that: -

"It is of course, for any party claiming special losses to prove that loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty. As a general rule, therefore any shortcomings in the proof of special loss should react against the claimant."

5.15 Additionally, the Supreme Court in the case of ***Khalid Mohammed v Attorney General***⁴ held as follows: -

"A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to Judgment."

5.16 On the strength of the foregoing authorities and my analysis of the Plaintiff's evidence before me, I find that aside from the Defendant's acknowledgment of receipt

of the sum of K400,000.00 and PW2's testimony that he delivered the sum of K1,000,000.00 to the Defendant on the Plaintiff's behalf, the Plaintiff has not produced other acknowledgments of receipt or other evidence to demonstrate to this Court the amounts of money that he paid to the Defendant and the frequency with which he made the payments to enable this court to determine how the sum of US\$907,900.00, being claimed accumulated.

5.17 The Plaintiff produced a document on page 3 of his Amended Bundle of Documents consisting of a series of numbers and foreign characters and stated that the said document showed how the amount of US\$907,900.00 was calculated. However, the Plaintiff did not offer further explanation as to the interpretation of the entries or the translation of the foreign entries into English. Consequently, the said document provided no evidential value in support of the Plaintiff's claim.

5.18 I now turn to consider the acknowledgment of debt produced at page 1 of the Amended Plaintiff's Bundle of Documents to determine whether it has sufficient evidential value to prove on a balance of probability that the Defendant owed the Plaintiff the sum of US\$907,900.00. For convenience, I shall reproduce acknowledgment of debt as it appears on record as follows: -

"I Ackson Tembo owe Mr. Wang \$907,900.00. 13 Bill of Laden will be given this week. 7 containers are loaded in the yard waiting to export but no money for export"

5.19 From my analysis of the acknowledgment of debt and the evidence on record, I find that at trial the Defendant did not dispute drafting and executing the document nor challenge the Plaintiff's testimony that it was drafted and executed in April, 2017. Further, the said acknowledgment of debt alluded to the Defendant having no money to export 7 containers of Mukula tree logs. The Defendant however, has denied owing the sum being claimed and at trial, he stated that he signed the acknowledgment of debt as a pretext to show the Plaintiff's financiers that the Plaintiff had used the money availed to him correctly.

5.20 On further analysis of the pleadings and the evidence on record and as rightly observed by the Plaintiff's Counsel in the Plaintiff's final submissions, I note that the Defendant did not raise the issue regarding the acknowledgment of debt being a pretext to assist the Plaintiff to secure funds from his Financers in his pleadings.

5.21 I noted further, that the evidence on record does not reveal the existence of circumstances that suggests that the Plaintiff requested for assistance from the Defendant to raise funds. In my view therefore, the

Defendant's explanation regarding the circumstances leading to the drafting and execution of the acknowledgment of debt appears to be an afterthought and as such, it cannot be relied upon.

5.22 I noted further that the Defendant's testimony consisted of various inconsistencies such as his contradiction between his pleadings and testimony with regard to the number of containers of Mukula logs in his possession. Further, during examination in chief, the Defendant stated that his Bundle of Documents included copies of bills of lading that he allegedly delivered to the Plaintiff but my perusal of the said documents, reveals that the said documents included bills of lading from 12th May, 2016, which dates were before the Plaintiff and Defendant started doing business. The foregoing inconsistencies in my view, are an indication that the Defendant was not a credible witness and therefore his testimony could not be relied upon.

5.23 Having determined that the Defendant's testimony was not reliable, it follows therefore, that I must make a determination based on the available evidence of whether the said acknowledgment of debt was a sufficient acknowledgment to demonstrate that the Defendant owed the Plaintiff the sum of US\$907,900.00 in question. I am persuaded by the learned authors of ***Halsbury Laws of England***⁴ who guide as follows regarding an acknowledgment: -

“In judging whether a document is a sufficient acknowledgment, the court will look at the circumstances in which it was written, and it will construe it in the way in which the writer intended it to be construed by the person who it is addressed.”

5.24 Based on the foregoing authority and my analysis of the acknowledgment of debt on record, as there are no circumstances on record to suggest that the acknowledgment of debt executed by the Defendant was made as a pretext to secure funding for the Plaintiff, I find that the Defendant herein intended for this document to be an acknowledgment of the debt of US\$9,700,900.00, that he owed to the Plaintiff. My decision is further fortified by the terms of the agreement which reveal that it was only when the Plaintiff made a payment to the Defendant that the Defendant would proceed to procure and export Mukula tree logs. Therefore, the Defendant's admission that he had 7 containers of Mukula tree logs awaiting exportation which was corroborated by the testimony of DW2, proves on a balance of probability that the Defendant was availed an amount of money to source and export the Mukula tree logs, but that he had not done so. Accordingly, I find that the Defendant owed the Plaintiff the sum of US\$907,900.00 as at April, 2017.

5.25 Having determined that the Defendant owed the Plaintiff the sum of US\$907,900.00 for the procurement and

export of Mukula tree logs, I now turn to consider the Defendant's defence that he could not export the logs that he had procured due to the Government ban on the export of Mukula tree logs. At trial, the Defendant stated the ban on the export of mukula tree logs was issued before June, 2017. However, the Defendant did not produce any documentary evidence such as a gazette notice that would support his assertion as to whether or not his obligations under the contract were affected by the ban. By the Defendant's final submissions, this Court was urged to take Judicial Notice of the Government's ban on the export of Mukula tree logs. In the case of ***Commonwealth Shipping Representatives v P & O Branch Services***⁸, Lord Summer held as follows regarding Judicial Notice: -

“Judicial Notice refers to facts which a Judge can be called upon to receive and to act upon either from general knowledge of them or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.”

5.26 Fortified by the foregoing authority, I take Judicial Notice of the existence of the ban on the export of Mukula tree logs which was issued on 31st January, 2017, according to the Ministerial Statement presented to Parliament by the Minister of Lands on 16th June, 2017.

5.27 On my analysis of the evidence on record and the fact that the ban on the export of Mukula tree logs was

issued on 31st January, 2017, I find that the Defendant who had received sums of money from the Plaintiff between 9th December, 2016 and April, 2017, for the purchase and export of the Mukula tree logs, could not proceed with the export of Mukula tree logs after 31st January, 2017, due to the ban, which created an environment that made it impossible for the Defendant to legally perform his obligations under the agreement. Accordingly, the agreement between the Plaintiff and the Defendant was frustrated. My finding above is fortified by the learned authors of ***Chitty on contracts***⁵ who state as follows under ***paragraph 1418***: -

“A subsequent change in the law or in the legal position affecting a contract is a well-recognised head of frustration.”

5.28 In my view, the introduction of the ban on the export of Mukula tree logs affected the Defendant's obligations under the contract and was therefore a frustrating event with the effect of putting to an end to the contract between the parties. In the case of ***Frisbosa Spolka Akoyjina v Faibairm Lawson Combe Barbour Ltd***⁹ Lord Wright stated as follows regarding the effect of frustration on a contract: -

“In my opinion the contract is automatically terminated as to the future because at that date its further performance becomes impossible in fact in circumstances which involve no liability for damages for the failures on either party.”

5.29 On the strength of the foregoing authority, I hold that the contract between the Plaintiff and Defendant ceased to be binding on the parties following the implementation of the ban on the export of Mukula tree logs. Therefore, the Defendant in the circumstances cannot be held liable for his failure to procure and export Mukula tree logs after the 31st of January, 2017.

5.30 **Section 3 (2) of The Law Reform (Frustrated Contracts) Act³** provides as follows, regarding the effect, rights and liabilities of parties to frustrated contracts: -

“All sums paid or payable to any party in pursuance of the contract before the time when the parties were so discharged (in this Act referred to as “the time of discharge”) shall, in the case of sums so paid, be recoverable from him as money received by him for use of the party to whom the sums were paid, and, in the case of sums so payable cease to be so payable:

Provided that, if the party to whom the sums were so paid or payable incurred expenses before the time of discharge in, or for the purpose of, the performance of the contract, the court may, if it considers it just to do so having regard to all the circumstances of the case, allow him to retain or, as the case may be, recover the whole or any part of the sums so paid or payable, not being an amount in excess of the expenses so incurred.”

5.31 The import of the foregoing provision is that a party may recover money paid to another party before the frustrating event and the parties are relieved of any obligation to pay money which was payable before the frustrating event but which had not yet been paid. Further the foregoing provision entails that a party who has incurred expenses in part performance of a contract may be permitted by the Court to keep an amount from the other party up to the value of the expenses incurred, either out of money paid before frustration or from money due and payable that had not yet been paid.

5.32 At trial, the Defendant stated that by the time the ban was effected, some of the Mukula tree logs had been sourced and stored in a warehouse in Lusaka; and some were already in transit to China. This testimony is supported by the bills of lading produced in the Defendant's Bundle of Documents on record, which reveal that some bills of lading were issued in February, 2017; March, 2017; and June, 2017, which dates are beyond the date on which the ban was effected. Further, the Defendant's acknowledgment of debt, drafted in April, 2017, indicates that the Defendant was to avail 13 bills of lading to the Plaintiff within a week and that the Defendant had 7 containers of Mukula tree logs in his possession awaiting export. The foregoing in my view, are an indication that by the time the ban was effected and the Defendant acknowledged the debt, the Defendant had already

incurred expenses in an attempt to meet his obligations under the contract which may or may not have been considered when the Plaintiff was calculating the Defendant's indebtedness, as the Plaintiff's evidence is not clear on how the amount being claimed was calculated. Additionally, neither the Plaintiff or the Defendant led evidence that could reveal how many containers the Defendant had managed to source and export to China under the agreement before the ban was effected, thereby failing to demonstrate to this Court how much of the sum of US\$907,900.00 that he owed the Plaintiff was used to meet his obligations under the contract.

5.33 From the foregoing, I find that the Plaintiff has proved on a balance of probability that by April, 2017, the Defendant owed him the sum of US\$907,900.00. However, of the said sum, I find that the Defendant incurred some expenses in trying to meet his obligations of sourcing and exporting Mukula logs, which may or may not have been considered in the Plaintiff's calculation of the sum of money owed to him. Therefore, in order to avoid unjust enrichment of the Plaintiff, I order that the sum of money owed to the Plaintiff by the Defendant be assessed and determined by the Deputy Registrar. The sum determined shall be paid to the Plaintiff with interest from the date of originating process to date of Judgment at the short term Bank of

Zambia deposit rate and thereafter at the current Commercial Banks lending rates.

5.34 With regard to the Plaintiff's claim for damages for loss of use of funds, it is my considered view that the Plaintiff's claim in respect of the said damages should have been accompanied by detailed evidence to support such damages. The Plaintiff did not place before this Court detailed evidence in support of his claim for damages under this head. The view that I take is fortified by the case of **JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited**¹⁰ where it was stated in this respect as follows: -

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

5.35 Accordingly, the claim for damages for loss of use of funds fails and is hereby dismissed.

5.36 I shall now turn to consider the third issue of whether the Plaintiff is entitled to damages for fraudulent misrepresentation. To address this issue, it is necessary to provide context as to what amounts to fraudulent misrepresentation. According to **Black's Law Dictionary**⁶, misrepresentation is defined as follows: -

"The act of making a false or misleading assertion about something with the intent to deceive. The word denotes not just written or spoken words but also any conduct that amounts to a false assertion."

5.37 Additionally, ***Black's Law Dictionary***⁶ defines a fraudulent misrepresentation as follows: -

"A false statement that is known to be false or is made recklessly without knowing or caring whether it is true or false and that is intended to induce a party to detrimentally rely on it."

5.38 From the foregoing authorities, the two elements that have to be satisfied for a representation to be termed as fraudulent misrepresentation are a false statement and recklessness, which includes any conduct that amounts to a false assertion.

5.39 Further, in the case of ***Sithole v The State Lotteries Board***¹¹, the Supreme Court stated as follows: -

"If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities."

5.40 From the foregoing authority, it is clear that the standard of proof prescribed in cases alleging fraud is higher than the usual balance of probabilities prescribed in a civil matter.

5.41 At trial, the Plaintiff alleged that the Defendant fraudulently misrepresented himself to the Plaintiff when he stated that he had a valid license to export Mukula tree logs and that the Defendant proved that he was able to do so when he delivered the 31 containers of Mukula log trees. On the other hand, the Defendant in response to this allegation stated that he was able to

export Mukula tree logs as evidenced by the bills of lading that he presented to the Plaintiff. The Defendant further asserted that he did not have copies of his license to export the Mukula tree logs before Court as it was at his office.

5.42 On my analysis of the evidence on record and my application of the facts to the elements required to satisfy the claim of fraudulent misrepresentation, I find that the element of the alleged representation being false has not been proved to the standard set out in the case of ***Sithole v The State Lotteries Board***¹¹, cited above. The Plaintiff did not provide any proof to show that the Defendant was being deceitful when he made the said representation that he had a valid license to export Mukula tree logs. I find further, that the element of recklessness on the part of the Defendant has also not been proved.

5.43 Additionally, the Plaintiff by his testimony admitted that he had received 31 containers of Mukula tree logs, which were exported to China by the Defendant. This admission by the Plaintiff directly contradicted his claim that the Defendant fraudulently misrepresented himself when he stated that he had a valid license to export Mukula tree logs. In my view, the foregoing proved on a balance of probability that the Defendant was able to legally export the Mukula tree logs to China despite his failure to produce his export licence at trial.

5.44 I note however, that despite the ban on the export of Mukula logs being effected on 31st January, 2017, the Defendant did not dispute the Plaintiff's allegation that he made cash deposits to the Defendant between December, 2016 and April, 2017, which in my view, is an indication that the Defendant continued to receive money from the Plaintiff for the procurement and export of the Mukula tree logs even after he became aware of the ban on the export of Mukula tree logs. I note further that at trial, the Plaintiff stated that he was not aware of the existence of the ban on the export of Mukula logs, which fact was not challenged by the Defendant.

5.45 Though, the foregoing issues were not addressed by the parties in their pleadings or at trial, in the exercise of the discretion conferred on me by virtue of **Section 13** of **The High Court Act**⁴, I shall proceed to consider the aforesaid issues in order to ensure that all matters in controversy between the parties may be completely and finally determined. The said Section provides as follows:-

"In every civil cause or matter which shall come in dependence in the Court, law and equity shall be administered concurrently, and the Court, in the exercise of the jurisdiction vested in it, shall have the power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever, interlocutory or final, to which any of the parties thereto may appear to be entitled in respect of any and

every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter, so that, as far as possible, all matters in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided...”

5.46 On the strength of the foregoing authority and my analysis of the issues noted above, I am of the view that the Defendant either withheld the information about the existence of the ban from the Plaintiff, who is a foreign national or made a representation to the Plaintiff that he was able to export Mukula tree logs despite the ban. Both of the foregoing instances amount to deception within the meaning of fraudulent misrepresentation. Accordingly, I find that the Plaintiff has proved on a balance of probability that the Defendant fraudulently misrepresented to the Plaintiff that he was able to continue exporting Mukula tree logs despite the ban.

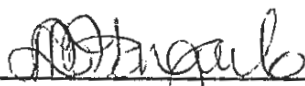
5.47 The Plaintiff however, has not led evidence to show that he suffered damages as a result of the said misrepresentation as guided in the case of **JZ Car Hire Limited vs. Malvin Chala and Scirocco Enterprises Limited**¹⁰. Accordingly, the claim for damages for fraudulent misrepresentation fails and is hereby dismissed.

6 CONCLUSION

- 6.1 The Plaintiff has partially succeeded in that he is only entitled to the sum of money to be assessed and determined by the Deputy Registrar upon his consideration of the expenses that the Defendant may have incurred prior to the ban on the export of Mukula tree logs. The sum determined shall be paid to the Plaintiff with interest from the date of originating process to date of Judgment at the short term Bank of Zambia deposit rate and thereafter at the current Commercial Banks lending rates.
- 6.2 With regard to the Plaintiff's claim for damages for loss of use of funds, as the Plaintiff did not place before this Court detailed evidence in support of his claim for damages under this head, the claim for damages for loss of use of funds fails and is hereby dismissed.
- 6.3 With regards to the Plaintiff's claim for damages for fraudulent misrepresentation, though the Plaintiff proved that the Defendant fraudulently misrepresented himself, the Plaintiff did not lead evidence in support of his claim for damages. Accordingly, the claim for damages for fraudulent misrepresentation is hereby dismissed.
- 6.4 The Plaintiff having partially succeeded in his claims, costs are awarded to the Plaintiff to be taxed in default of agreement.

6.5 Leave to Appeal is granted.

**Signed, Sealed and Delivered at Lusaka, this 21st day of
June, 2021.**



**P. K. YANGAILO
HIGH COURT JUDGE**