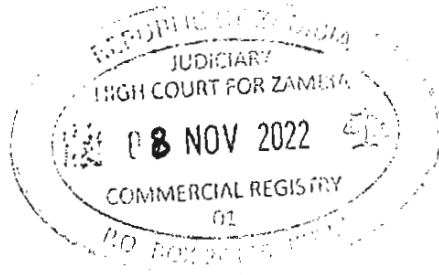


IN THE HIGH COURT FOR ZAMBIA  
AT THE DISTRICT REGISTRY  
HOLDEN AT KITWE  
(Commercial Division)

2021/HKC/018



Between:

INDE CREDIT COMPANY LIMITED

PLAINTIFF

And

GREEN PARK TRANSPORT AND CONTRACTORS LIMITED

1<sup>ST</sup> DEFENDANT

REJI ANTHONY

2<sup>ND</sup> DEFENDANT

PRAJAM RESY MANNEMPLAVAN

3<sup>RD</sup> DEFENDANT

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

For the Plaintiff: Mr. Y. S. Simukonda  
Messrs Noel Simwanza L.P.

For the Defendant: Mr. Mwalichenga  
Messrs James & Doris L.P.



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**JUDGMENT**

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List of Authorities

1. Patrick Matibini, *Zambian Civil Procedure, Commentary and Cases* Lexis Nexis.

2. Chitty on Contract, The Law of Contracts, Specific Contracts 30<sup>th</sup> Edition Volume II London, Sweet & Maxwell, 2008.
3. Chitty on Contract, The Law of Contracts, General Principles, 29<sup>th</sup> Edition Volume I, London, Sweet & Maxwell, 2004.
4. Phipson on Evidence, 17<sup>th</sup> Edition Page 151.
5. The High Court Act Chapter 27 of the Laws of Zambia.
6. The Rules of The Supreme Court Practice 1999 Edition.
7. Sale of Goods Act 1893.

**Cases Referred to:**

1. BJ Poultry Farms Limited vs Nutri Feeds Zambia Limited SCZ Judgment No. 3 of 2016.
2. Colgate Palmolive Zambia Limited vs Able Shemu Chuka SCZ 181 of 2005.
3. Tijem Enterprises Limited vs Children International Zambia Limited 2010/HPC/0121.
4. Zambia Railways vs Pauline S. Mundia and Another (2008) Z.R 287 Vol. 1.
5. Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R 172 (SC).
6. National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo Appeal No. 79/2001;
7. Rosemary Ngorima and 10 others vs Zambia Consolidated Copper Mines Appeal No. 97 of 2000;
8. Clement Chuuya and Hilda Chuuya vs J.J. Hankwenda SCZ Judgment No. 3 of 2002
9. Printing and Numerical Registering Company vs Simpson (1875) LR 19 EQ 462
10. Sylvester Musonda Shipolo vs Shadreck Maipambe Appeal No. 1/2016 (SCZ)

## 1. Introduction and Background

1. The Applicant commenced this action on 5<sup>th</sup> May 2020 by way of Originating Summons typically filed under the provisions of **Order 30 rule 14** of the Rules of the High Court Chapter 27 of the Laws of Zambia as read with **Order 88** of the Rules of the Supreme Court Practice (1999) Edition. This was accompanied with an Affidavit in Support of even date.

1.1 The originating process was amended with leave of court and the amended process filed on 15 June 2021 seeking the following reliefs:

- i. *Payment of USD207,412.12 by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Respondents to the Applicant, being money due under a Term Loan Facility executed between the Applicant and 1<sup>st</sup> Respondent;*
- ii. *Delivery and possession of the mortgaged property Stand No.4808 and 4768 Independence Avenue, Town Centre, Solwezi in North-Western Province of the Republic of Zambia;*
- iii. *Foreclosure and sale of the mortgaged property Stand No.4808 and 4768 Independence Avenue, Town Centre, Solwezi in North-Western Province of the Republic of Zambia;*
- iv. *Sale and/or eligit powers in respect of earth moving equipment namely a JCB 3DX supper backhoe loader and JCB JS205LC tracked excavator placed as security for a term loan facility between the Applicant and 1<sup>st</sup> Respondent;*

v. *Any other relief that the court deems fit;*

vi. *Interest, and*

vii. *Costs.*

1.2 By a series of interlocutory applications, the hearing of the Originating summons was adjourned on account of both parties for reasons ranging from Covid to that of clients being out of jurisdiction, all of which are on record and will not be repeated by the Court, save to note that the Respondents filed their Affidavit in Opposition on 18<sup>th</sup> August 2021 and also raised an issue calling for the matter to be dismissed for want of jurisdiction, and in the alternative, seeking an order to deem the matter commenced by Writ of Summons for reasons deposed in the supporting Affidavit sworn by one **Reji Anthony**, the 2<sup>nd</sup> Respondent for himself, and on behalf of the 1<sup>st</sup> and 3<sup>rd</sup> Respondents. The said application was supported by skeleton arguments of even date. (*hereinafter referred to as the Respondents' application*).

1.3 Again, for reasons which are on record, the Respondents application was not heard on the scheduled return date of 1<sup>st</sup> September 2021, pushing the hearing of the application to after the conclusion of the election petitions period.

1.4 Counsel for the Applicant opposed the Respondents' application by its Affidavit in opposition and skeleton arguments file don 24 November 2021

to which the Respondents filed their Affidavit in Reply and skeleton arguments in reply dated 6<sup>th</sup> December 2021.

1.5 The Respondents' application was heard on 6<sup>th</sup> December 2021, and there being a notice of hearing issued by the Court, the matter proceeded despite the non-appearance of Applicant Counsel for the applicant. In the preserve of case management, and noting the serious issues in contention, the Court issued an *ex tempore* Ruling ordering the matter to continue as if commenced by Writ in accordance with **Order 28 rule 8** of the Rules of the Supreme Court. The Parties will henceforth be referred to as Plaintiff and Defendants.

1.6 The Court did at the Scheduling Conference of 20<sup>th</sup> January 2022 issue its Orders for Directions and the matter proceeded to Trial on 22 June 2022.

## 2. The Plaintiff's claim

2.1 As noted from the introduction, the Affidavit in support of Originating Summons served as the Plaintiffs Statement of Claim. It is pleaded that the Defendants applied for a Term Loan Facility, in the sum of USD 228,520.00 on or about 30 February 2020 (*hereinafter referred to as the loan amount.*)

A copy of the Facility Letter was marked 'P.B.1' and appeared in its Bundle of Documents at *pages 1 to 12.* (*hereinafter referred to as the loan facility letter.*)

2.2 It was the Plaintiff's claim that the said loan was to be repaid in monthly instalments of USD 17,279.00 and that interest was payable at 1.9% and 2.5% on the outstanding amounts.

2.3 That the loan was to finance the acquisition of Earth Moving Equipment namely a JCB 3DX Super Backhoe Loader and JCB JS205LC Tracked Excavator, payable from receivables from a named third party and or any other resources due to the Defendants. The 1<sup>st</sup> Defendant's Board Resolution to authorise this borrowing was exhibited and marked "PB2" and appeared at *page 13* of its bundle of documents. (*hereinafter referred to as the two pieces of earth moving equipment.*)

2.4 The two pieces of earth moving equipment were pledged as security for the loan and marked "PB3" and at *page 14* of the Plaintiff's bundle is a copy of the pre-executed Agreement of Sale in the sum of USD 328,301.00. (*hereinafter referred to as the sale value for the two pieces of earth moving equipment.*)

2.5 That the loan was further secured by the deposit of Certificate of Title to Stand 4808 and 4768 Solwezi. The Plaintiff referred to exhibits marked "PB 4,5 & 6" and at *pages 16 to 28* of the Plaintiff's bundle, being the Security Agreement and copies of the Title Deeds of the 2 properties respectively. (*hereinafter referred to as the two landed properties.*)

2.6 Marked and produced "PB7,8 & 9" and at *pages 28 to 32* of the Plaintiff's bundle, are copies of the Letter of Undertaking to execute a legal mortgage and the Letter of Guarantee respectively.

### **3. Defence and Counterclaim**

3.1 The gist of the defendants' defence is that it did not dispute the contents of *paragraph 4* of the Plaintiff's Affidavit. (the importance of this admission will be addressed later in my Judgment).

3.2 The Defendants have pleaded that the rate of interest to be applied to the outstanding balance was agreed at 1.9% and that the rate of 2.5% was to apply at the end of the agreed loan period.

3.3 It was the defence that the monthly repayment plan was subject to the monthly invoicing that the 1<sup>st</sup> defendant enjoyed with a company called Buks Haulage Limited.

3.4 In response to the pledging of the two landed properties, the defendant has averred that the properties were not incorporated in the loan facility letter and was superseded by a sale agreement signed by the Parties on 6 October 2020.

3.5 The defendant also denied the Plaintiffs claims of exclusive rights over the two landed properties and has maintained that the sale agreement executed later in time replaced the facility letter.

3.6 The Defendant maintains that there was no default as at the commencement of this action as the period for the repayment was up to September 2021.

3.7 The defendants have also challenged the computation of the loan amount and seeks an order of assessment to correctly assess the dues.

3.8 The defendant has also alleged that the Plaintiff seized the two pieces of

earth moving equipment

3.9 The defendant has also alleged that the Plaintiff seized the JCB 3DX Supper Backhoe Loader for its own business and at a time when the 1<sup>st</sup> defendant had a running contract with Siltekk Limited in the sum of K8,000.00 per day and hence its counterclaim in the sum of K1,520,000 being loss of revenue for 190 days (hereinafter referred to as the counterclaim.)

3.10 It is the defendants defence that pursuant to a sale agreement, the two pieces of earth moving equipment were valued at USD328,301.00 which is due from the Plaintiff to the 1<sup>st</sup> defendant as at 6<sup>th</sup> September 2021, after which ownership in the equipment was to pass to the Plaintiff.

3.11 In its counterclaim the 1<sup>st</sup> Defendant seeks payment of the sum of K1,520,000 as pleaded above and the sum of USD 328,301.00 being the purchase price as afore stated.

3.12 The record will reflect that the Plaintiff filed its Reply and defence to counterclaim.

#### **4. Issues for determination by the Court**

4.1 From the Affidavit evidence of the plaintiff and the defence and counterclaim settled by the Defendant, it is trite that the Court must identify the issues for it to resolve in this matter. I note that the parties not having agreed on issues for determination, the plaintiff filed its list of issues



on 25<sup>th</sup> March 2022. Having analysed the matter at hand, and at the end of trial, the issues that require the Courts determination are the following:

- i. What was the amount borrowed under the Term Loan Facility?
- ii. What was the date of execution of the Term Loan Facility?
- iii. What was the nature of the Agreement to sell earth moving equipment executed between the Parties?
- iv. Was there a mortgage created over Stand 4808 and 4768 Solwezi in favour of the Plaintiff such that it is entitled to an Order of Delivery, possession, foreclosure and sale for recovery of the amounts due to it by the Defendants?
- v. Has the Defendant succeeded in its counterclaim in the sum of K1,520,000.00 being in respect of lost income and whether the Defendant is entitled to the sum of USD 328,301.00 being the unpaid purchase price for the two pieces of earth moving equipment?

## 5. The evidence of the Parties

- 5.1 The Plaintiff led evidence through one **Chipasula Chisanga**, in his capacity as Senior Relationship Manager of the Plaintiff Company and relied on his Witness Statement of 14<sup>th</sup> March 2022 and the Plaintiff's bundle of documents filed into Court on 3<sup>rd</sup> March 2022 respectively.
- 5.2 The contents of the Plaintiffs witness statement are on record and is principally a repetition of the Plaintiff's amended Affidavit in Support filed

in these proceedings on 15<sup>th</sup> June 2021 and which has been narrated in *paragraph 2* above.

5.3 The defendant relied on the Witness Statement of **Reji Antony**, the 2<sup>nd</sup> Defendant on behalf of himself and the other Defendants of 14<sup>th</sup> March 2022 and its bundle of documents of 3<sup>rd</sup> March 2022. The essence of his evidence has been stated at *paragraph 3* above.

## 6. **The submissions**

6.1 The submissions of the Parties having been filed, at the end of the Trial, and on 6 July 2022 and 26<sup>th</sup> July 2022 respectively, are on record, and have been duly considered by the Court. The same will not be restated here, save for emphasis where necessary, save to thank Counsels for their diligence and industry, as they have assisted the Court in arriving at its Judgment.

## 7. **Documents in casu**

7.1 I am of the considered view that before I embark on analysing the facts, the evidence, the law as well as the supporting skeleton arguments and submissions filed by Counsels, I will proceed to make reference to salient documents, the subject of this action and thereafter make findings of facts, for clarity of Judgment and to prevent repetition.

- 7.2 The 1<sup>st</sup> Defendant obtained a term loan facility from the Plaintiff in the sum of USD228,520.00. This is set out on *pages 1 to 12* and *pages 2 to 13* in the bundles of the Parties respectively.
- 7.3 The Term loan Facility is dated 30 February 2020, each page having been initialled and signed by the Parties.
- 7.4 Extracts of the Board Resolution of the 1<sup>st</sup> Defendant dated 13 February 2020 which is produced at *page 13/14* of the Plaintiff's bundle of documents.
- 7.5 Agreement to sell personal property relating to the two pieces of earth moving equipment produced at *pages 15* in both bundles of documents respectively.
- 7.6 Security Agreement for the deposit of Certificates of Titles relating to Stand 4808 and 4768 Solwezi dated 24 February 2020 and produced at *page 16/17* of the Plaintiffs bundle of documents. Also produced at *pages 18/27* are copies of the Title Deeds for the aforementioned properties.
- 7.7 Letter of Undertaking to execute a legal mortgage and a Third-Party Mortgage between the Plaintiff and the 2<sup>nd</sup> Defendant is produced at *pages 28/30* and at *page 1* of the bundles of documents respectively.

- 7.8 Letter of Guarantee executed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants relating to the term loan facility is produced at *pages 31/32* of the Plaintiff's bundle of documents.
- 7.9 Schedules of transaction history between the Parties produced at *pages 33/36* of the Plaintiff's bundles of documents.
- 7.10 Contract between the 1<sup>st</sup> defendant and Siltek produced at *pages 18/20* of the defendants bundles of documents.

## **8. Findings of Facts**

- 8.1 From the evidence of the Parties, the documents produced and submissions of counsels respectively, the following are findings of facts in *casu*:
- 8.2 The Parties executed a Term Loan Facility in the sum of USD 228,520.00. Much ado was made by defence counsel in his attempt to convince the court that the date of execution of the term loan facility being 30 February 2020, a date which is non-existent, brought into issue the validity of the Agreement itself. Having considered the argument, I find this to be a self-defeating exercise, as the defendants in *paragraph 6* of their defence, categorically admit the contents of *paragraph 6* of the Plaintiffs Affidavit in Support, and in several places and documents placed before the Court accept that the 1<sup>st</sup> Defendant obtained a term loan from the Plaintiff in the sum of USD 228,520.00.

A clear example of this is the document marked "PB2 1" annexed to the Plaintiff's Affidavit in Support and being a copy of the Resolution passed by the Board of Directors of the 1<sup>st</sup> Defendant, and attended by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendant, dated 13<sup>th</sup> February 2020, approving the loan from the Plaintiff to acquire the two pieces of equipment. I note also that there is confirmation of the amount of the facility being the sum of USD 228,520.00. I therefore find that other than a clerical error in the date of the term loan agreement, it was an agreement entered into and accepted by both parties.

8.3 I also note that the two landed properties Stand 4808 and 4768 Solwezi, were pledged as collateral for the term loan. This is evidenced by the document referred to above as well as extracts of the board resolution from the same meeting of directors as above and marked "PB2 (2)" and received by Cavmont Bank Solwezi Branch, on 13 February 2020, the terms of which show clear intention of clearing the indebtedness of the 1<sup>st</sup> defendant with Cavmont Bank so as to offer the same properties as additional collateral to the Plaintiff. These documents appear as annexures to the supporting affidavit filed on 15<sup>th</sup> June 2021 and also appear in the Plaintiffs Bundles, the contents of which were admitted by the 2<sup>nd</sup> Defendant. Any attempts by the Defendants to disassociate themselves from this finding are rejected as being against the weight of evidence before the court.

8.4 The two pieces of equipment that were acquired by the term loan are namely:

JCB 3DX Supper Backhoe Loader 2019 model and  
JCB JS205LC Tracked Excavator 2019 model

9. **The Law**

- 9.1 In my considered opinion, the legal principles that are being canvassed by the Parties respectively, largely focus on the law of contract and the sale of goods. I will begin by analysing the Plaintiff's first claim as identified in *paragraph 1.1i* above and consider whether the Plaintiff is entitled to payment in the sum of USD 207,412.12 being money due under a term loan facility executed between the Parties.
- 9.2 It is trite and the law is clear with regards the burden of proof in civil matters. The law guides that where such burden is not discharged to the satisfaction of the Court, the Party claiming is not entitled to its claims, even in the face of a failed defence.
- 9.3 I am alive to the statement of the Supreme Court in the cases of **B.J. Poultry Farms Limited vs Nutri Feeds Zambia Limited and Zambia Railways vs Pauline S Mundia**, which cases have affirmed, time and time again, the above principle on the burden to be discharged by the Plaintiff. I will accept this in its totality, as there really is no need for the Court to reinvent the wheel on this principle.
- 9.4 The defendant has submitted that the Plaintiff having failed to defend the counterclaim as required by *Order LIII rule 6 (2-5)* of the High Court Rules,

as amended by S.I. No. 27 of 2012, the Court is invited to enter Judgment on Admission for the Defendant on the counterclaim. I have noted the submissions of counsel on this issue as well as attempts of Counsel to submit on pertinent sections of the **Sale of Goods Act 1893** to persuade the Court that the Plaintiff is obliged to pay for the two pieces of equipment at the agreed value of USD328,301.00 being the purchase price agreed in writing and on 6<sup>th</sup> October 2020, which according to defence counsel was a new agreement entered into and which varied the Term Loan Facility of February 2020. This has been pleaded in **paragraph 9** of the defence.

- 9.5 The Plaintiff has submitted on the law governing contracts by stating that Parties are bound by the terms and conditions upon which they have agreed. They have relied on the case of **Tijem Enterprises Limited vs Children International Zambia Limited** in which case, Hon J Mutuna, as he then was, quoted as follow:

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

- 9.6 It is the thrust of the Plaintiff’s submission that *clause 5* of the term loan facility listed the security required for the amounts advanced. Counsel referred the Court to documents marked collectively from *pages 16 to 27* of and *28 to 30* in its Bundle of Documents. What is evident to the Court, is the pattern that emerges, of the Plaintiff obtaining executed documents to

support the lending under the term loan and in fulfilment of the conditions under *clause 5*.

9.7 It is cardinal to note that as the transaction unfolded between the Parties, and as default was made by the Defendants in servicing the monthly loan instalments, the Plaintiff resorted to *self-help measures* while the Defendants attempted to read into documents clauses that are not supported by the weight of evidence. It was the defendant's submission that the letter of sale, entitled '*Agreement to Sell Personal Property*' which appears at *page 16* of the Defendants bundle of documents, had the effect of altering the conditions of the term loan agreement.

A close scrutiny of this *Agreement* cannot be further from the truth. It is apparent that this document was not executed by the Defendant, and the defendant's witness admitted this under cross examination. As per the pattern that appears consistent, this was another document prepared by the Plaintiff, executed and hand-dated on 24 February 2020, though the typed date on the document is 6<sup>th</sup> October 2020. The sale value of the two pieces of land is USD 328,301.00 and title was supposed to pass on 6<sup>th</sup> June 2021. I therefore find that this document does not aid the case of the Defendant at all, as the two properties were already offered as collateral in accordance with *clause 5* of the term loan facility.

9.8 My attention has also been drawn to the document at *page 15* of the Defendants bundle of documents marked "*Agreement to Sell Personal*



*Property*” which appears to be an agreement for the sale of the two pieces of equipment at an agreed value of USD 328,301.00

This Agreement, is hand dated 30 February 2020, was executed by the Parties, though type dated 6<sup>th</sup> October 2020 and agreeing to transfer title of the properties in ‘*an as is*’ condition on 6<sup>th</sup> September 2021.

9.9 From the evidence led by the Parties, the 2<sup>nd</sup> defendant appeared not to understand the transaction that he had entered into with the Plaintiff. He appeared to be a witness of limited understanding who admitted the contents of all the documents shown to him and which are on record. He did little, if at all, to aid his defence.

9.10 It is obvious that of the two Parties, the Plaintiff was in the stronger position being the one that authored all the documents, and the Defendants simply signed them, with little or no understanding of what they/he were being called upon to execute. It is obvious too that despite all the shenanigans at play, and the attempt by the parties to muddy the waters, the term loan facility has not been challenged.

However, as has been stated and it is trite that Parties must discharge the burden placed on them, I will address only two issues that are pertinent in *casu*.

9.11 What is the amount due and outstanding to the Plaintiff?

Is it the sum of **USD 207, 412.12** claimed in the Originating Process?

Is it the sum of **USD 87,049.05** being the residual balance outstanding at the conclusion of the trial and having seized and sold the two pieces of equipment.

9.12 Upon answering the question above, is the Plaintiff entitled to its successive orders as prayed and foreclose on the properties offered as collateral for the term loan facility?

9.13 I will then consider the Defendants counterclaim in the sum of **K1,520,000.00** being the value of lost income and the sum of **USD328,301.00** being the purchase price for the two pieces of equipment.

#### 10. **Analysis of the law and facts**

10.1 As has been noted above, the burden of proof is on the party alleging. Am I satisfied that the Plaintiff is owed the sum of **USD 87,049.05**? I have scrutinised the statements in the Plaintiffs bundle at **pages 33 to 35**. One relates to Loan Id: 51138 and is a Kwacha Invoice Discount Facility and the one appearing at page 35 Loan Id: 50889 is dated 31 December 2021 and shows the balance due in the sum of **USD 87,049.05**. The Plaintiff's witness was also shown a statement on **page 14** of the defendants bundle which confirmed that the amount outstanding at 31 August 2021 under Loan Id 50889 was the sum of **USD 172,933.12**.

From the jumbled evidence of the Plaintiffs witness, it appears that the two entries on 31 November 2021 and 1<sup>st</sup> December 2021 under the description '*part payment*' may relate to the sale value of the two seized pieces of equipment. However, this may appear to be speculation on the part of the Court, as the evidence did not bring this out, nor does the Witness Statement of the Plaintiff confirm this.

10.2 The Court must express its displeasure in the manner the Plaintiff appears to have repossessed these properties and after the commencement of the action. There was no Order by the Court authorising the seizure nor was there any agreement between the Parties. The Plaintiff in its originating process seeks an Order of Sale and or Elegit Powers in respect of the equipment.

Order 42 rule 3 of the High Court Rules is instructive and provides that execution of a Judgment by way of a Writ of Elegit can only be done if the execution by a Writ of Fieri Facias has failed. This of course requires that Judgment must have been obtained, as a starting point. In the circumstances in *casu*, no matter the fact of the defendant having left Jurisdiction and or the earth moving equipment having been abandoned, all of which allegations were not proved to the required standard, the Court condemns the action of the Plaintiff in resorting to self-help measures, when it was open to the Plaintiff to seek the necessary interim orders from the Court.

10.3 The Court would be failing in its duty if it did not censure the Plaintiff for this blatant abuse of power and while the matter is in Court. It is trite that any sale under *elegit* is supposed to be closely supervised by the Court which should also approve the price which must not only be fair but in the best interest of both Parties. This was clearly pronounced by the Supreme Court of Zambia in the case of Clement and **Hilda Chuuya vs J.J. Hakwenda**.

10.4 I am alive to the decision of the Supreme Court in the case of **Sylvester Musonda Shipolo vs Shadreck Maipambe** where the court stated:

*"A Judgment must be anchored on (or supported) by evidence adduced before the Court"*.

As lamented above, it is not the function of the Court to wade through evidence and calculate the indebtedness of the defendant, for claims which the Plaintiff has not been able to prove. I accept the defendant's evidence and their submissions on the conflicting amounts claimed by the Plaintiff. It is evident that the Plaintiffs operations are governed and regulated by the Banking and Financial Services Act and the Plaintiff failed to provide clear statements as required to the Defendants.

10.5 Suffice it to say, that this is the Plaintiff's action. I am not convinced that the Plaintiff has discharged the burden placed on him. Authorities abound on the issue of burden of proof. In **Zambia Railways vs Pauline S Mundia and Another** it was held that:

*“..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....”*

10.6 The Court is all too familiar with similar principles espoused by the case of **Wilson Masauso Zulu v Avondale Housing Project** which echoes the general rule of thumb that a Plaintiff who has failed to prove his case cannot be entitled to Judgment, whatever may be said of the opponent’s case.

**Phipson on Evidence**, states as follows:

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

10.7 The Plaintiff not having discharged the burden of proof, I have no hesitation therefore in dismissing the Plaintiff’s claims, save for its first claim numbered (i) for payment in the sum to be quantified as directed below.

I therefore decline to grant the further orders as prayed and order that the matter be referred to the Hon District Registrar for assessment of the amount outstanding, if any.

I also condemn in the strongest terms the attempt by both Parties to drag in the Courts and its resources, to solve private law disputes, when they themselves have not attempted to assist the Court in this exercise.

## 11. The Counter claim

11.1 I have already noted the burden of proof that the defendant ought to have discharged to prove its counterclaim. Although I note that reference was made to a running contract with a company called Siltek Limited, and the purported loss of income for 190 days from 1<sup>st</sup> March 2021 to 6<sup>th</sup> September 2021, there was no evidence placed before the Court, no statements or bank remittances to show remunerations received, for the so called contract, nor any witness called to support the existence of the said contract.

The defendant's witness was shaky on this issue and admitted that they had not placed any evidence before the Court to prove the counterclaim other than what purports to be an Equipment Lease Agreement at **pages 18 to 20** of the Defendant's bundle of documents.

I will not spend any more judicial time on this non-issue, as it has not been substantiated to the required standard. I therefore dismiss the counterclaim in the sum of K1,520,000.00

11.2 As to the defendant's claim in the sum of USD 328, 301.00 being the agreed purchase price for the two pieces of equipment, I am guided by the cases of

**National Drug Company limited and Zambia Privatization Agency vs Mary Katongo** in which the Supreme Court stated:

*"it is trite law that once the parties have voluntarily and freely entered into a legal contract, they become bound by the terms of the contract and that the role of the Court is to give efficacy to the contract when one party has breached it by respecting, upholding and enforcing the contract."*

11.3 In the case *in casu*, I have already noted that the Parties voluntarily and freely entered into the term loan facility and the Agreement to sell personal property whose value was agreed. I have also found that all documents were prepared by the Plaintiff. It is also a fact that the Plaintiff was in a stronger position than the Defendants in this transaction being the lender. The old age adage: *He who lives by the sword must die by the sword* comes to mind in this context, and in upholding this claim by the defendant.

**12. Findings of the Court**

12.1 For the avoidance of doubt, the amount due to the defendant, will follow the referral to the Honourable District Registrar for the assessment of the statement between the Parties.

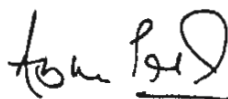
Upon completion of the assessment proceedings, the sum owed to the Plaintiff, will be offset from the sum of USD 328,301.00, and will form the basis of Judgment entered for the Defendant and payable by the Plaintiff within 30 days of the Assessment.

12.2 As a post-script I add the observation that the purpose of pleadings is trite and does not need judicial pronouncement. The authorities in the jurisdiction abound. I am alive to the principles espoused in noted cases such as **Wise v Henry** (1985) ZR 179 and **Bernard Chilunda vs Zakaria Chinanzi** (1979) ZR 195 and **Admark Limited vs Zambia Revenue Authority** (2006) ZR 43.

I make these observations in the context that both the Plaintiff and the defendants, (in the prosecution of their counter-claim), did little to support their respective statement of claim(s) as pleaded. From the start of the action, to when it was concluded, Parties simply moved on and away from the Pleadings as settled. In my considered opinion, the neatest thing Counsel could have and should have done, was to apply to amend Pleadings, rather than tread down the slippery slope of adducing evidence from their Witnesses and as submitted in their submissions. This conduct will obviously have an effect on the order of costs issued by the Court.

12.3 Ultimately, the discretion to award costs rests with the Court. In my considered opinion, and in my discretion, and the Parties being successful on their claims partially, I make no award of interest or costs.

Delivered at Kitwe, the 8<sup>th</sup> day of November 2022.



**Lady Justice Abha Patel, S.C.**

