

**IN THE HIGH COURT FOR ZAMBIA**

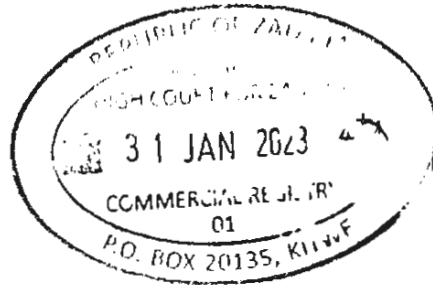
**2021/HKC/011**

**AT THE COMMERCIAL DISTRICT REGISTRY**

**HOLDEN AT KITWE**

**(CIVIL JURISDICTION)**

**BETWEEN:**



**SAMIT DRILLING LIMITED**

**PLAINTIFF**

**AND**

**MICAS INVESTMENTS LIMITED**

**DEFENDANT**

**Before the Hon. Lady Justice Abha N. Patel, S.C.**

For the Plaintiff: Mr. K. Mwiche  
Messrs Katongo & Company  
For the Defendant: Mr. C. Simuusa  
Messrs Iven Mulenga & Co.

---

**JUDGMENT**

---

**Cases referred to:**

1. Holmes Limited v Buildwell Construction Company Limited (1973) Z.R.9.
2. Premish Bhai Megan Patel v Rephidim Institute Limited (2011) ZR Vol.1, 134 (SC).
3. National Drug Company Limited and Zambia Privatization Agency v Mary Katongo. appeal No. 79/2001, Shogun Finance Limited v Hudson (2004) 1 A.C. 919.
4. Phinate Chona V Zesco Limited CAZ Appeal No. 66/2019.
5. Bank of Credit and Commerce International v Ali (2001) UKHL 8.

6. Ringford Habwanda v Zambian Breweries PLC (2012) Z.R (3) 75.
7. Reardon Line Limited v Yngvar Hansen Tangen and Sanko SS & Co Ltd (1976) 1 WLR 989.

Books referred to:

1. Treitel, G.H (1999), The of Contract. 12<sup>th</sup> Ed, London: Sweet and Maxwell at page 183 and
2. Chitty on Contracts Volume 1, 29<sup>th</sup> Edition, General Principles (2004).
3. PHIPSON ON EVIDENCE,

**1. Introduction**

1.1 On 2<sup>nd</sup> March, 2021, the Plaintiff, Samit Drilling Limited commenced an action against the Defendant, Micas Investments Limited, seeking the following reliefs:

- I. An order of payment of K2,496,158.00
- II. Damages for breach of agreement
- III. Interest, and
- IV. Legal costs.

1.2 It was pleaded that on 10<sup>th</sup> August, 2020 the Plaintiff entered into a tipper truck hire agreement with the Defendant, copies of the contracts are produced at **pages 1, 2 and 3** of the Plaintiff's bundle of documents. According to the said agreements, the Defendant hired three (3) tipper trucks and a roller compactor at daily rates of K3,500.00 and K4,700.00 respectively. During the tenure of the

contract, more tipper trucks were added as well as a water bowser and Roller.

- 1.3 The Plaintiff issued monthly statements to the Defendant, which were not queried. It was the Plaintiff's case that the Defendant paid the sum of K238,020.00 to the Plaintiff on 16<sup>th</sup> November 2020, leaving an unpaid balance of K2,496,158.00 depriving the Plaintiff of its income and making it difficult for the Plaintiff to meet its financial obligations. It was also the Plaintiff's claim that despite several requests the Defendant has failed and/or neglected to pay the outstanding sum.
- 1.4 In its defence, the Defendant contended that although the agreed daily rate for the trucks was K3,500.00, the mutual understanding was that the rate only applied to the actual days worked, and not the days when the trucks and bowser were not utilised.
- 1.5 The Defendant also asserted that the Plaintiff was in August 2020, paid in accordance with the mutual understanding referred to above and that this payment was accepted without reservation. It was also submitted that the Plaintiff made a demand for the payment of K1,359,862.00 as the amount due from September 2020 to December 2020. It was further submitted for the defendant that the contract did not specifically mention the number of days actually worked, as it was drafted by laymen.
- 1.6 The Defendant alleged that the calculation of the sum now demanded K2,496,158.00, only arose when the Plaintiff engaged lawyers, who

disregarded the parties' mutual understanding, that the rates applied only to the actual days worked.

- 1.7 The Record reflects that the Parties did enter into a Consent Order on 7<sup>th</sup> May 2021, the terms of which have a bearing on the issues before this Court. In terms of the Consent Order, Judgment on Admission was entered in the sum of K855,982.67 and the disputed amount in the sum of K1,640,175.00 was referred to trial.

## **2. The Plaintiff's evidence**

In his witness statement dated 3<sup>rd</sup> March, 2020, **Muzondi Mhango (PW1)**, a Director in the Plaintiff company, disclosed that in the year 2020 the Defendant hired from the Plaintiff tipper trucks and a roller compactor at the agreed rates of K3,500.00 and K4,700.00 respectively. Consequently two contracts were signed, the first one was signed on 10<sup>th</sup> August, 2020 and the second one was signed on 27<sup>th</sup> August, 2020. Further, in September, 2020 the Defendant also requested to hire a water bowser at the daily rate of K4,800 excluding VAT.

- 2.2 After the signing of the above contracts, the Plaintiff provided the Defendants with 5 tipper trucks, a roller compactor, a water bowser and operators. The equipment was used by the Defendant up to December, 2020. However, the Defendant has refused or neglected to make payments as agreed. The Defendant has only paid a sum of K855,982.00 and disputed the sum of K1,640,176.33.

- 2.3 In cross-examination, **PW1** stated that he was the one, who signed the contract of 10<sup>th</sup> August, 2020. He explained that the tipper trucks started working between 24<sup>th</sup> and 25<sup>th</sup> of August, 2020, meaning that in the month of August the trucks only worked for 5 days. He denied the assertion that the agreements was for the actual days worked but accepted that in August, 2020 the Defendant paid K17,500.00 for 5 days but pointed out that the initial truck was only on site for 5 days.
- 2.4 **PW1** informed the court that there was a schedule that was recording all the days that the equipment was on the Defendant's site and not just the number of days the trucks worked. And that the same schedule would indicate the days the equipment was operational and when they were not. He also denied that the calculation in the sum of K1,359.860.00 stated in the letter of demand was based on the actual days that the equipment was utilised. He also confirmed that the sum of K855,982.67 being the amount agreed as per the Consent Order of 7<sup>th</sup> May 2021 has since been paid by the defendant.
- 2.5 **PW1** accepted that the drivers, who were the Plaintiff's servants, were the ones signing the schedules.
- 2.6 Under re-examination, **PW1** clarified that the schedule was meant to capture the period the equipment was on site and what activity was being done, even when the trucks were not being utilised. He maintained that the agreement was based on daily rates as stated in the contract. He explained that the sum of K1, 359, 865.00 was based on

schedules that were submitted to the Defendant, prior to doing the final schedule, up to December 2020 and demobilisation.

### **3. Defendant's evidence**

- 3.1 In the witness statement dated 31<sup>st</sup> May, 2022, **Savner Chilombo (DW1)**, the Director of the Defendant Company, testified that in August 2020, the Defendant entered into a tipper hiring agreement with the Plaintiff and that during the tenure of the agreement, more trucks were added together with a water bowser and a roller compactor.
- 3.2 **DW1** informed the court that for the month of August 2020, the Defendant paid K17,500.00 for the 5 actual days the truck worked, and the Plaintiff did not raise any issue with the payment. According to **DW1**, the Plaintiff's acceptance of the payment for only the actual days worked in August 2020, confirmed that there was a mutual understanding that only actual days worked would be paid, although the contract did not specifically state that as it was prepared by laymen.
- 3.3 According to **DW1**, the Defendant did not deal with the Plaintiff directly, but with a middle-man, by the name of Tresford Kaunda. He stated that the arrangement was that the Defendant would be charged for the actual days worked by the trucks at the daily rate of K3,500.00. In the spirit of the said mutual understanding, the Plaintiff made a demand of K1,359,862.00 as the total money due from September, 2020 to December 2020.
- 3.4 Under cross-examination, **DW1** informed the court that the daily rate agreed upon by the parties and which was indicated in the contract was K3,500.00. When referred to the schedule on page 5 of the Plaintiff's

bundle of documents, DW1 said that although he did not recognise it, he understood it. According to him, the tipper trucks worked for 7 days in August 2020. He failed to state how many days the first tipper Registration No. AIC 3632 was on the Defendant's site because he didn't know what the term *idle* meant.

3.5 He testified that the payment made in August, 2020 of K17,500.00 was for the actual days the truck worked just like other trucks that were on site. It was his understanding that despite the contract indicating the daily rate as being K3,500.00, it was per day worked, like other contracts signed. He informed the court that the document produced on **page 11** of the Plaintiff's bundle of document was sent to the Defendant in 2021 and that the payments were not based on that bill but on other monthly bills. He confirmed that the Defendant has since paid K855,982.67 and that the total owed amount has been liquidated. It was his understanding that the sum of K3,500.00 per day meant each day worked and wondered why a schedule was maintained, if payments were due for the entire period the trucks were at the Defendant's yard.

3.6 In re-examination, DW1 explained that the amount paid in August, 2020 was calculated by multiplying the actual days worked by the agreed rate, as the days worked were recorded in the schedule.

#### **4. Submissions by the Plaintiff**

4.1 The Plaintiff filed their submissions on 1<sup>st</sup> September, 2022 where they argue that at trial the Defendant failed to show that the contract in issue was not intended to incorporate all terms and conditions of contract. It

was submitted that the Defendant signed the contracts without raising any query or dispute, showing that the Defendant agreed to the terms of the contract. Counsel referred to the rule against the admission of extrinsic evidence as being applicable in *casu*. To this end Counsel placed reliance of the case of **Holmes Limited v Buildwell Construction Company Limited** and **Premish Bhai Megan Patel v Rephidim Institute Limited**. In the Patel case, the Supreme Court on extrinsic evidence held as follows:

*"Extrinsic evidence can be admitted to prove any terms which were expressly or impliedly agreed by the parties before or after execution of the contract, where it is shown that the agreement was not intended to incorporate all the terms and conditions of the contract."*

- 4.2 It was the Plaintiff's submission that the contract between the parties was not made in a vacuum rather the contract had and has a setting, this setting was that the daily rate of K3,500.00 and K4,700.00 would be charged for the trucks and roller compactor respectively. This argument was supported by the case of **Reardon Line Limited v Yngvar Hansen Tangen and Sanko SS & Co Ltd**. Lord Wilberforce on the issue of contracts stated as follows:

*"No contracts are made in a vacuum: there is always a setting in which they have to be placed. The nature of what is legitimate to have regard to is usually described as the surrounding circumstances but this phrase is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating."*



- 4.3 It was further submitted that in construing a contract, the court is entitled to consider the intention of the parties as obtained from the whole contract, including the whole circumstances. Counsel insisted that the contract between the Plaintiff and Defendant is clear and unambiguous as it clearly stated that the daily rate to be charged for the trucks was K3500.00 and K4,700.00 for the roller compactor.
- 4.4 The all-time famous authority of **National Drug Company Limited and Zambia Privatisation Agency vs Mary Katongo** was cited in support of the legal principle that the duty of a court is to give efficacy to the terms of a contract, freely entered into by the Parties, when one party is in breach.
- 4.5 The Plaintiff quoted widely from the works of **Chitty, Evan Mckendricks** on contracts, and from the **Law of Contracts** in its overriding submission that Parties have intended what they have signed and that it matters not what was in their mind, and that courts should respect and uphold agreement entered into by the Parties.

## 5. Submissions by the Defendant

- 5.1 In their submissions filed into court on 14<sup>th</sup> September, 2022 Counsel for the Defendant submitted that when the court is called upon to interpret an agreement, its role is to merely ensure that the manifest intention of the parties triumphs. It was argued that the acceptance of the payment of K17, 500.00 for the actual five days worked in August 2020, and the final demand for payment of K1,359,862.00 for September to December,

2020 demonstrated that the intention of the parties was to charge for the actual days the equipment was utilised.

- 5.2 The Defendant placed reliance on the decision of the Court of Appeal in the case of **Phinate Chona V Zesco Limited** where the Court endorsed the view that in construing a contract, a court may resolve any ambiguity by looking at its commercial purpose and the factual background against which it was made. Counsel relied on the case of **Bank of Credit and Commerce International v Ali** where it was held that;

*"There is no conceptual limit to what can be regarded as background. Courts are not bound to merely interpret terms on a purely linguist basis but ought to place express terms in their proper context and not read terms in isolation."*

- 5.3 It was further submitted that courts are permitted to look at the factual background and circumstances to properly deduce the true meaning of the terms in a contract. This was to support the defendants submission that the interpretation of a contract, is not purely literal but the court can delve into the purpose of the agreement.
- 5.4 Counsel also submitted that although the strict rule was that where parties have embodied the terms of their contract in written document, extrinsic evidence would not be considered, although over time, a number of exceptions to the strict rule have emerged. One of the exceptions is where a written agreement is not intended to express the whole agreement. Counsel relied on the decision in the case of **Holmes Limited v Buildwell Construction Company Ltd (1973) ZR 97** and

Ringford Habwanda v Zambian Breweries PLC in support of its submissions.

## 6. Findings of the Court

- 6.1 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 findings of facts, for clarity of Judgment and to prevent repetition.
- 6.2 The Plaintiff and the defendant entered into several contracts for the hire of tipper trucks, road compactor and water bowzers. A copy of a contract for 3 HOWO tipper Trucks was produced at **page 1** of the Plaintiffs bundle. Another copy of a contract for 5 HOWO tipper Trucks was produced at **page 1** of the Defendants bundle, both contracts dated 10 August 2020 and executed by the same people on behalf of the Parties.
- 6.3 A contract for the hire of a roller compactor single drum at the hire rate of K4,700 per day was produced at **page 3** of the Plaintiffs bundle. The contract for the hire of the water bouser was not produced.
- 6.4 The Plaintiff rendered a demand notice by its letter dated 31 December 2020 in the sum of **K1,359,862.00**. this was produced on page 17 of the defendant's bundle. This figure was referred to by both parties in their witness statement and in their evidence. I will refer to this as the ***final demand for payment***.

6.5 A Writ was issued in the sum of **K2,496,158.00** on 2 March 2021 and as demanded by letter dated 19 February 2021 by Messrs Katongo & Co, counsel for the Plaintiff. I will refer to this as the ***amount claimed in the action.***

6.6 The Record reveals and as stated in paragraph 1.7 above, that Judgment on admission was entered in the sum of **K855,982.67** and the disputed amount in the sum of **K1,640,175.00** was referred to trial.

6.7 Suffice it to state that the sum of K1,640,175.00 is the sum that the Plaintiff needs to prove as being due and outstanding from the defendant.

6.8 The period for the contract was from August to December 2020. I make this finding not from the contracts on record, but from the evidence of the Parties.

## 7. The Issues

7.1 The only issue for determination as I see it is whether payment was based on actual days the equipment was utilised or on the entire period the equipment was in the custody of the Defendant?

Has the Plaintiff proved its claim as pleaded? In other words, was the Plaintiff entitled to claim from the defendant at the daily rate of K3,500 per truck? And though not specifically pleaded, at the daily rate of K4,700 in respect of the Roller Compactor Single Drum?

A

## 8. Analysis of the Law and Facts

8.1 In my considered opinion, the legal principles that are being canvassed by the Parties respectively, largely focus on the law of contract. In addressing my mind to the Plaintiff's claim, I will bear in mind 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.

8.2 I am alive to the pronouncements 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 and re-affirmed, time and time again, the above principle on the burden to be discharged by the Plaintiff. I will adopt this principle in its totality, as there really is no need for the Court to reinvent the wheel on this.

8.3 I have paid close attention to the submission of both Parties on the sanctity and value of contract and on the role of the Court to give effect to the terms of the contracts, where freely and voluntarily entered into by the Parties. On this fundamental principle on the freedom and privity of contract, I have no issue.

8.4 I am also familiar with the principle that where there is no ambiguity, a Court must enforce the terms of a contract as being their contract of choice. On this principle, I am alive to the decision of the English Court of Appeal in the case of **Rollop and Colls Ltd vs Northwest Metropolitan Regional Hospital Board D** where the Court stated that:

*"if the express terms are perfectly clear from ambiguity, there is no choice to be made between different possible meanings; the clear terms must be*

*applied even if the court thinks some other terms would have been more suitable”.*

8.5 The arguments advanced by the Plaintiff, albeit appear attractive in theory, in my considered opinion, lack the evidence to back the terms of the contract. It is trite that the Plaintiff must prove its claim to be entitled to any Judgment in its favor. Although the Plaintiff has attempted to persuade the court on the basis of the decision in the cited case of **National Drug Company limited and Zambia Privatization Agency vs Mary Katongo**, 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”.*

8.6 Having heard from the Parties, and in dealing with the specific issue identified above, I note that although the contracts in *casu*, and which have been referred to above, refer to the sum of **K3,500 per day**, there was no suitable explanation offered nor evidence tendered to produce schedules that had been submitted to the Defendant, in accordance with the various contracts. Further and a close look at the contract at **page 1** of the Plaintiff's bundle, relates to the hire of 3 tipper trucks, but does not state the duration of the contract and shows a fixed amount of K273,000.

8.7 In similar vein, the contract at **page 1** of the defendants bundle, relates to the hire of 5 tipper trucks for an unspecified period at the daily rate of K3,500 and for a fixed cost of K455,000.00

- 8.8 The contract at **page 3** of the Plaintiffs bundle in respect of the hire of a Roller compactor at the daily rate of K4,700.00. As already noted, there is no contract for the hire of the water bouser. It is clear therefore that the terms of the contract left more questions than answers.
- 8.9 Moving on, I have anxiously perused the schedules at **pages 5 to 10** of the Plaintiff's bundle and noted the final statement at **page 11** of the same bundle. I have painstakingly scrutinised the schedules at **pages 5, 6, 7, 8 and 9** which are monthly statements in respect of the hired equipment, namely 1 water bouser, 1 roller and 5 trucks. The schedule at **page 10** is a summary of the amounts on **pages 5 to 9** and the Account Statement at **page 11** appears to be a consolidated summary and showing the total amount in the sum of K2,496,158.00 as claimed in *casu*.
- 8.10 However, I am not convinced that these Schedules, were sent to the Defendant, nor was any evidence led to how the statements were delivered or rendered. The schedules are neither signed nor dated nor issued on any official stationery of the Plaintiff Company. Simply put, they could have been authored at any time by any one and not counter signed or accepted by the Defendant. I was also not impressed with the evidence of the Plaintiff who failed to answer pertinent questions as to the intention of the Parties to the contract. It is without doubt that the Statement on **page 5** of the Plaintiffs bundle of documents is the statement for the month of August 2020. I have noted that the statement is in the sum of **K89,320.00**.

8.11 The evidence on record from the defendant and which was accepted by the Plaintiff's witness, was that the defendant paid the sum of **K17,500.00** for the 5 days that the trucks worked. The Plaintiff's witness, **Muzondi Mhango** confirmed that he executed the contract on behalf of the Plaintiff and also confirmed that the trucks only worked for a period of 5 days in the month of August 2020. This can clearly be calculated as follows:  $K3,500 \times 5 = K17,500.00$ . On the other hand, the Defendant's position is that it was their understanding, that they would only pay for the actual days worked. It has been argued that although the contracts did not specifically bring out the issue of payments being based on the actual days the equipment was utilised, the conduct of the parties showed that there was a mutual understanding that the rate only applied to the actual days the equipment was used. This is the interpretation that the court will accept, as this has been supported by the evidence.

8.12 The evidence supports the understanding that in August, 2020 the Plaintiff was paid for 5 actual days the equipment was utilised and no objection was raised by the Plaintiff. There was also no claim for balance of any unpaid dues for the month of August 2020. Further, the final demand for the payment of K1,359,862.00 as the amount due, related to the period from September 2020 to December, 2020. This confirmed the spirit of the mutual understanding that the rate only applied to actual days worked.

8.13 Under cross examination, the Plaintiff's witness also confirmed that the drivers signed all the schedules and yet the Court has noted the complete lack of supporting evidence of the signed schedules and or any statements delivered by the Plaintiff.



8.14 Having looked at the contracts especially the one dated 10<sup>th</sup> August 2010 and in line with the guidance of the learned authors of **Treitel, G.H (1999) The Law of Contract** referred to by the Defendant that *"apart from the terms that the parties may wish to include in the contract.....there maybe other terms imported into the contract from its context. These implied terms may be terms implied in fact"*, it is my firm view that the intention of the parties, as can be ascertained from line vii and xiii, was that payment would be for the actual days worked. Line vii provides that:

*"a minimum of 8 hours per day will be charged excluding Sundays. Should the hirer decide to use the trucks on Sunday(s) or beyond 8 hours daily charge, the hourly rate of K437.50 shall apply on extended period of time on each particular day."*

And line xiii provides that:

*"All time sheets to be signed on a daily basis, and to be kept in the machine or operators possession."*

8.15 The import of the above quotes appears to be that for a daily rate to apply, the truck would have to have been used for a minimum of 8 hours, meaning anything less than the minimum 8 hours was not charged. If the intention was to charge for the entire period the equipment were in the Defendant's custody, what was the purpose of including *line vii* and maintaining timesheets which were signed on a daily basis and kept in the custody of the operators, who were the Plaintiff's employees?

8.16 In re-examination, **PW1** explained that the purpose of the schedule was to capture the period the truck was on site and what activities it was actually doing, even when the truck was on site but was not being used by the client. **PW1** could not explain why it was important to record everything in a schedule, if it was already known that the entire period the equipment was in the Defendant's custody would be charged.

8.17 I have also noted that the Plaintiff purported to issue a letter of demand which is produced at **page 17** of the Defendant's bundle and is dated 31 December 2020 and claims the sum of **K1,359,862.00**. I also note that the Plaintiff's witness, who authored this letter, could not explain how that figure was arrived at.

I have further noted the letter at **page 19** from the Plaintiffs lawyers dated 19 February 2021 demanding the sum of **K2,496,158.00**. The Plaintiff's witness failed to account for or explain the huge difference in the two sums demanded barely six weeks apart.

8.18 On the evidence before me, I accept the submissions of the defendant that upon retaining counsel, the Plaintiff *adjusted* its claims to fall within the terms of the daily rate of hire for the equipment. The Schedules on **pages 5 to 11** of the Plaintiffs bundle of documents appear *structured* to arrive at the figure demanded.

There being no satisfactory explanation or at all, I accept the defendant's evidence that the agreement between the parties, and as proved by their conduct, by the payment of the sum of K17,500.00 for the 5 days worked, in the month of August 2020, leads to the only conclusion that this Court

is willing to make, that the hire charges were for days worked and not payable daily. The evidence of the defendant's witness was more credible, although he appeared not to understand the terms of the contract. However irrespective of his understanding, his evidence supported the defence that payment was made for the number of days worked.

8.19 I accept the defendant's submission that this case is an exception to the strict rule that precludes extrinsic evidence from being considered when parties have embodied the terms of their contract in written documents. Apart from the cases referred to in their submissions and which are on record, the Defendant also relied on the learned authors of **Treitel, G.H (1999), The of Contract. 12<sup>th</sup> Ed, London: Sweet and Maxwell at page 183 and Chitty on Contracts Volume 1, 29<sup>th</sup> Edition, General Principles (2004).**

8.20 It is trite that the burden of proof in civil cases lies with the Plaintiff, this position was aptly pointed out by the learned authors of **PHIPSON ON EVIDENCE**, paragraph 6-06 (17<sup>th</sup> Ed) at page 151 that:

*"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. If, when all the evidence is adduced by all the parties, the party who has this burden has not discharged it, the decision must be against him."*

8.21 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...."*

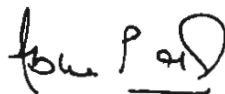
8.22 Having found as I have above, that the contract between the Parties was for payment for days worked and having noted that under the terms of a consent order, the defendant has paid the admitted sum of K855,982.67.

I find that the Plaintiff has not proved its claim in the sum of K1,640,175.33 and dismiss the Plaintiff's claim.

8.23 In view of the fact that the Defendant's witness did not appear to have full knowledge of the transaction between the Parties, and in view of the fact that the Plaintiff has failed to prove its claim against the Defendant, I will, in the interest of justice and in my discretion, make no order of costs and direct that each Party bears its own costs.

Leave to appeal is granted.

Dated at Kitwe this 31<sup>st</sup> day of January, 2023.



**Mrs. Abha N. Patel, S.C.**

**HIGH COURT JUDGE**