

BASE CHEMICALS ZAMBIA LIMITED  
MAZZONITES LIMITED

v

ZAMBIA AIR FORCE  
THE ATTORNEY GENERAL

SUPREME COURT

SAKALA, C.J., CHIBESAKUNDA, AND MWANAMWAMBWA, JJS.,

13th APRIL, 2010 and 27th APRIL, 2011

(S.C.Z. Judgment No. 9 of 2011)

- [1] Contract - Offer and acceptance - Ascertaining the existence thereof.
- [2] Contract - Quantum meruit - Award whether dependant on a binding contract.
- [3] Civil Procedure - Fraud - Extent of onus on party alleging.
- [4] Civil Procedure - Fraud must be specifically alleged and proved.

This was an appeal against the judgment of the High Court dismissing the appellant's claims for damages for breach of contract, for the supply of fuel at the request of the 1st respondent. The respondents also filed a Notice of Cross appeal against the portion of the judgment relating to the dismissal of their counter-claim.

Held:

1. In analysing a business relationship in a given case, the Court has to take an objective approach of whether or not the parties conduct and communication between them amounted to an offer and acceptance.
2. The appellants were contracted by the 1st respondent. The existence of the contract is amply supported by the numerous documents confirming the communication about the contract between the parties, and some of the documents made to the appellant by the respondents for the works done.
3. If a party alleges fraud, the extent of the onus on the party alleging is greater than a simple balance of probabilities.
4. A party wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged.
5. When it comes to trial, the party must lead evidence so that the allegation is clearly and distinctly proved.
6. The defence of fraud or abuse of office was not clearly and distinctly alleged and proved.

7. Even if there had been a binding contract between the parties, the appellants would have been entitled to recover on a quantum meruit basis.

Cases referred to:

1. Salomon v Salomon [1897] A.C. 22
2. Sithole v State Lotteries Board (1975) Z.R.106.
3. D.P. Services Limited v Municipality of Kabwe (1976) Z.R. 110.
4. Zulu v Avondale Housing Complex (1982) Z.R. 172.
5. Chibwe v Chibwe (2001) Z.R. 1
6. Madaza v Coleen Appeal Number 186 of 2004 (unreported)
7. The Rating Valuation Consortium and Another v Lusaka City Council and Another (2004)

Z.R 109

Work referred to:

1. Halsbury Laws of England, 4th Edition, Volume 9.

For the appellants; No appearance

N. Nchito of Messrs MNB Legal Practitioners for the respondents.

SAKALA, C.J.: delivered the judgment of the Court. We heard this appeal on 13th April, 2010, at Kabwe in the absence of advocates for the appellants because we were satisfied that they were aware of the hearing date as it had been agreed upon by consent, when the matter first came up for hearing on 4th February, 2010. In addition, the Court was informed, by counsel for the respondents, that one of the advocates for the appellants was with him the day before, but did not indicate of the matter being adjourned.

We note, however, that both advocates for the appellants and for the respondents filed written heads of arguments with the Court on which they relied. There were no oral arguments. We have taken the written arguments into account in this judgment.

This is an appeal against the judgment of the High Court dismissing the appellants' claims:- for damages for breach of contract; for the sums of K3,398,393,110.44; for the sum of K10.4million; and for the sum of US\$40,000.00 for the supply of fuel at the request of the 1st respondent.

The respondents filed a Notice of Cross-appeal against the portion of the judgment relating to the dismissal of their counter-claim.

For convenience, we shall refer to the appellants as the 1st and 2nd plaintiffs; and the respondents as the 1st and 2nd defendants, which designations the parties were at trial.

The case for the plaintiffs as pleaded, according to the amended statement of claim, was that on or about January, 2000, to December, 2001, the 1st defendant contracted the 2nd plaintiff through the 1st plaintiff to carry out rehabilitation and construction works at the 1st defendant's Mumbwa and

Livingstone Bases; that the works requested and carried out at Livingstone Base involved:-

- a. Erection of complete new roof, water reticulation; ceramic tiles in the kitchen, toilet, construction of VIP toilets, dance floor, painting, and re-decorating of the officers' Mess;
- b. Erection and construction of two new classroom blocks, rehabilitation and completion of a partially erected classroom block, toilets and water reticulation of the 1st defendant's training school;
- c. Rehabilitation and construction of showers, toilets and water reticulation cipher of the 1st defendant's officer cadets Billets, and rehabilitation of cadets officer's mess;
- d. Rehabilitation and painting of base hangar, removal of trees and roofing sheets; and
- e. Renovation of Commanding officer's Office:-

It was further pleaded that the 2nd plaintiff completed the above mentioned works within fifteen months of the contract; and that the 1st defendant issued completion certificates for all the works; that the 1st plaintiff provided working capital to the main contractor, the 2nd plaintiff, and imported all roofing materials and prefab structures on credit for the construction of the classroom blocks.

It was further pleaded that the work requested and carried out at the 1st defendant's Mumbwa Base involved emergency repairs to houses which had their roofs blown off by a storm; that the total invoiced bill for the works under-taken at the 1st defendant's Mumbwa Base by the 2nd plaintiff amounted to K911,262,921.00; and that the said amount has remained unpaid to date as the 1st defendant has failed and or neglected, despite several reminders and demands, to settle.

It was also pleaded, in the amended statement of claim, that the total invoiced bill for the works undertaken at the 1st defendant's Livingstone Base was K3,742,130,189.44; and that the 1st defendant had to date only made payments totaling to K1,220,000,000.00; that the 2nd plaintiff discounted a sum of K35,000,000 from the K2,522,130.189.44 balance due, on account of changes in design made by the 1st defendant, which resulted in reduced rates; and that the 1st defendant has failed and neglected to pay the balance of K2,487,130,189.44, for the work done at it's Livingstone Base.

The 1st plaintiff further pleaded that the 1st defendant, over the period from 2000 to 2002, had a credit facility with the 1st plaintiff for the supply of Jet-A1 fuel; that the 1st defendant has an outstanding amount of US\$40,000.00 for fuel requested and supplied, which amount the 1st defendant has failed and or neglected to pay, despite several reminders and demands by the 1st plaintiff.

In the joint defence and counter-claim, the defendants pleaded that the 1st defendant never contracted the 2nd plaintiff; but that it contracted Daewoo International Trading (PTY) Limited for the rehabilitation of it's Mumbwa Hangar Works and contracted the 1st plaintiff for roofing repairs of it's

Livingstone officer's Mess; that the works at the Livingstone Base are incomplete and subject of criminal proceedings; and that the completion certificates were fraudulently done and are subject of criminal proceedings.

It was also pleaded in the defence that the rehabilitation works at Mumbwa Base were tendered at US\$112,172.00, and awarded to Daewoo International Trading (PTY) Limited; that Daewoo International Trading Limited was paid US\$70,924,24 by the 1st defendant for the works done at the Mumbwa Base before the contractor abandoned the works without any formal handover; and that the bills of quantities were fraudulently manipulated from the original quotations resulting in the 1st plaintiff being over paid, which action has resulted in criminal investigations and proceedings.

The defendants further pleaded, in their defence, that the 1st plaintiff was contracted to supply Jet-A1 fuel at the net price of CIF Lusaka at US\$0.30 per litre or K1,256.00 per litre/mt and were paid K157,000,000.00 on 31st December, 1999, as an advance payment; but that the 1st plaintiff only supplied the first consignment in June., 2000; and that the 1st plaintiff was over paid by K2,993,649,968.00.

In the counter-claim, the defendants pleaded that it was an express term of the contract that the 1st plaintiff would carry out the roofing repairs at Zambia Air Force Livingstone Base at a total cost of US\$19,922.29 (equivalent to K70,080,000.00); that it was an implied term of the construction contract that the plaintiff would exercise the skill and care of a reasonable competent contractor.

The defendants also pleaded that the 1st plaintiff did additional works; and by a letter dated 27th April, 2001, the 1st plaintiff stated that the works done at the Livingstone officer's Mess were incomplete; but despite the costs set out in the letter dated 27th April, 2001, the 1st plaintiff unilaterally adjusted upwards the costs for the works already completed.

The defendants further pleaded that the 1st plaintiff and Daewoo International Trading (PTY) Limited were illegally contracted to carry out construction/technical maintenance repairs contract, when they did not have the requisite skills and competence as required by law; and that the 1st plaintiff, despite being paid US\$70,924.24, for the Mumbwa Base works, abandoned the work uncompleted.

The defendant further pleaded in the counter-claim that on the 16th December, 1999, the 1st plaintiff was awarded a contract to supply Aviation Fuel for Mumbwa and Lusaka Bases; that on the 31st December, 1999, the 1st plaintiff was paid K157,000,000.00, as an advance payment for fuel, but that two weeks later, the 1st plaintiff increased their fuel prices and supplied fuel at inflated prices as opposed to what was contracted; and that the 1st plaintiff was paid a total of K9,974,872,100.00 between 21st December, 1999 and 4th June, 2003, as opposed to the total value of fuel received by the defendant, which amounted to K6,981,222,132.00.

The defendants counter-claimed for the reimbursement, amounting to K66,995,000.00, being an over payment on the Mess roofing contract; reimbursement amounting to K800,362,943.00, being an

over payment on the Livingstone Base works; and reimbursement amounting to K2,993,649,968.00, being an over payment on the total amount of fuel supplied to the defendant and for damages for breach of the Mumbwa Hangar contract.

The plaintiffs filed a reply and a defence to the counter-claim in which they substantially denied all the counter-claims by the defendants and raised issues of estoppel.

In support of their claims, the plaintiffs adduced oral evidence from four witnesses, two of whom were employees of the 1st defendant; while the other two were the chief executives of the 1st and 2nd plaintiffs, respectively, and the defendants called three witnesses.

PW1's evidence in chief was based on two witness statements filed in Court on 27th September, 2006 and 18th September, 2007. The gist of the statement filed on 27th September, 2006, is that PW1, Brig. Gen. A. S. Nyirongo, served the 1st defendant as Chief of Logistics from 1999 to 2002; that during that period the 1st plaintiff and the 2nd plaintiff were contracted by the 1st defendant to carry out works at the 1st defendant's Livingstone Base and emergency works at the Mumbwa Base; that the said works were duly carried out according to the certificates signed by the supervising officers at the two Bases; and that the 1st plaintiff was also contracted to supply fuels to the 1st defendant.

The summary of PW1's additional witness statement, filed on the 18th September, 2007, is that during the period that he, PW1, served as Chief of Logistics, the security situation in Zambia was volatile; that there was tension in Mozambique, cessationist activities in caprivi, civil war in Angola, international war in the Democratic Republic of Congo and civil war in Burundi; that the tensions led to violation of the Zambian Air space, spill over of combatants and influx of the refugees into Zambia; and that this forced the Zambian Government to tighten up security along the borders by deploying soldiers and air defence forces.

According to the additional witness statement, new fighter Aircrafts were acquired from China; the 1st defendant had to recruit and train personnel to man the new aircraft and allied equipment; that there was need to procure a lot of fuel for training and deployment of the air defence forces; and that there was need to rehabilitate the officer cadets facilities in Livingstone.

PW1 explained in his additional witness statement that during the same period, there was a fuel crisis in the country because Indeni Oil Refinery had been gutted by fire, forcing the Government to allow oil Marketing Companies to source oil direct from abroad; and that fuel prices were charged at random depending on the source of fuel being PW1 explained that when he took over as Chief of Logistics in December, 1999, he found that BP Zambia Limited, suppliers of fuel to the 1st defendant, had stopped supplying fuel on credit due to a disagreement on the account; that the 1st defendant made efforts to find alternative sources of fuel to sustain the operations; that a decision was made in December, 1999, to source Jet-A1 fuel from Daewoo International Limited of South Africa, whose agents in Zambia were the 1st plaintiff; that payment problems between the 1st defendant and Daewoo International Limited arose, when the company started charging the prices citing marketing forces; that it was then decided to source the fuels from the 1st plaintiff, and that to the best of PW1's

knowledge all fuel transactions between the 1st defendant and the 1st plaintiff were settled by the time he, (PW1), was transferred from Air Force Headquarters to the Ministry of defence in January, 2002.

According to PW1's additional witness statement, the security obtaining between 1999 and 2002, forced the 1st defendant to overhaul the basic trainer aircraft based at Livingstone and the fighter aircraft based in Mumbwa, and construct Hangars in Mumbwa for the new fighter aircraft from China; that Daewoo International Limited, who had submitted quotations for construction of a new Hangar earlier, were asked to re-submit their quotation; that recommendations were sent to the Ministry of defence; but the project never took off; that the Hangar housing the Italian fighter aircraft was leaking badly and needed to be repaired before the specialists arrived to over haul some of the aircraft; that in March, 2000, Daewoo International Limited were contracted to repair the Hangar in Mumbwa through their agents, Base Chemicals, the 1st plaintiff. According to PW1, the contract was concluded to the best of his knowledge.

PW1 further explained in the additional witness statement that the 1st defendant were directed to accommodate the Presidential Aircraft at City Airport; that the Hangar at City Airport required renovation before the aircraft could be parked inside; that in November, 2000, Base Chemicals were contracted to undertake the renovations; and to the best of his knowledge this contract was concluded.

PW1 explained that a number of urgent renovations were required at the 1st defendant's Base in Livingstone; that quotations were sought from many companies; but Dockland was selected to undertake the works, but could not move quickly on site to undertake the works because they demanded mobilization funds; but due to the urgency of repairing the officer's Mess roof, the 1st plaintiff sub-contracted Mazzonites Limited the 2nd plaintiff, to do the works in Livingstone; but that due to funding problems and other factors, the project did not progress smoothly; and payments had not been completed by the time PW1 shifted to the Ministry.

PW1 further explained that a storm struck the 1st defendant's Mumbwa Base in November, 2001, destroying roofs of houses, offices, warehouses and a primary school; that all these required urgent repairs; that efforts were made to find companies that were ready to take up site at short notice and undertake the repair works; but that most companies were reluctant, citing funding problems from Government; that the 1st and 2nd plaintiffs, who were already working on the Livingstone maintenance works, were requested to suspend Livingstone works to attend to urgent works in Mumbwa; and that the contractor used it's own resources to carry out the urgent repair works; and that to the best of his knowledge, the contractor had not been paid, at the time he was transferred to the Ministry of defence.

PW1's cross-examination was based on his two witness statements. Under cross-examination, PW1 testified that he was the witness for the plaintiffs; but that he was aware that the plaintiffs' claims were against the Attorney-General and Zambia Air Force; that Daewoo International Limited was not a

party to the action; that the contract was awarded to Daewoo International Limited, but that Daewoo International Limited was not making the claim against the Attorney-General.

PW1 explained, under cross-examination, that Daewoo International Limited had subcontracted the 1st plaintiff, who in turn subcontracted the 2nd plaintiff, that the 1st defendant did not contract the 1st and 2nd plaintiffs, and that he was aware that the plaintiffs were claiming for the works done in Mumbwa.

PW1 further stated in cross-examination that there was no contract signed for the works which were done in Mumbwa, but that there was a verbal contract; and that the bills of quantity were provided before the work was done.

PW1 further testified in cross-examination that for the work done in Livingstone, a selective tender was used. PW1 explained in cross-examination that the contract was verbal, instructing the company to move to Mumbwa and whilst in Mumbwa, valuation of the works to be done were carried out and the company provided bills of quantities.

PW1 further explained that there was work done in Livingstone for which they used a selective tender ; that the tender was awarded to a company known as Dockland; that, that company did not do the work, that Dockland had quoted K83,000,000.00 for the leaking roof; that at the same time, there was also another quotation of K70,000,000.00, from the 1st plaintiff; that according to the recommendations by one Col. Mulenga, the contract was awarded to the 1st plaintiff; and that according to the Memorandum recommended by him, Dockland Limited was supposed to be awarded the contract; that the recommendation was accepted and a letter was written to Dockland Limited to take up the work about November, 2000.

PW1 also explained that there was no contractual document signed and that it was their normal way of operating. He also testified that Dockland did not move on site for the reason that they needed mobilization money to move to Livingstone.

According to PW1, when the company took site, there were changes in specifications; but the valuation was not documented, and that when the job was done; there were certificates issued.

PW1 also explained that when the 1st plaintiff was on site, additional jobs were given by the station authorities without tender. But he recommended payments for the jobs confirmed by the station authority that the contractor had done the work.

PW1 also testified that he had a business relationship with the chief executive of the 1st plaintiff; that initially he entered into a Transport Lease Agreement after the job had been given to the 1st plaintiff, and that the second business transaction was his offer of the farm in Lusaka West to the chief executive to the 1st plaintiff, and that their transactions were done when he was still in Zambia Air

Force, and when the 1st plaintiff was doing works in Livingstone and in Mumbwa.

PW1 admitted, under cross-examination, that he received money from Mr. Sibande, the chief executive of the 1st plaintiff on a number of occasions and that he, PW1, was responsible for recommending payments to the 1st plaintiff based on the recommendation of his officers.

PW1 also testified under cross-examination that he received a total sum of K77,000,000.00, in cash transactions through the Bank for the two business transactions he had with the chief executive of the 1st plaintiff. PW1 also explained that the 1st plaintiff was not an Oil Marketing company; but that the 1st plaintiff came in through Daewoo International Limited, and that there was no tender when they engaged the 1st plaintiff in the importation of fuel, and and that they were cheaper.

In re-examination, PW1 explained that Daewoo International Limited had jobs to do in Mumbwa and had completed the works; but had nothing to do with the Livingstone works; and that Daewoo International Limited had the 1st plaintiff as their local agents until when they came in for fuel contracts and later when they did the works at Mumbwa Hangar.

PW2, Lt. Col. Beltson Mayumbela Kundwe, adopted his witness statement filed in Court on 27th September, 2006, as his evidence in Chief. The summary of the witness statement is that he served as Director of Works with the 1st defendant between 2000 and 2002, when the two plaintiffs were contracted to undertake various works at Lusaka, Mumbwa and Livingstone, Zambia Air Force Bases; that the Lusaka works, which included rehabilitation of the Hangar at City Airport were completed and fully paid for.

According to PW2's statement, the works at Mumbwa Base included roof repairs and rehabilitation of the Hangar and repairs to the control tower, which were completed by both plaintiffs and were fully paid by Zambia Air Force, and that thereafter, there were emergency works required as a result of a storm which damaged various residential and other structures within the Zambia Air Force Mumbwa Base, which were completed by both plaintiffs; but not paid for to date.

PW2's statement further stated that the Zambia Air Force Livingstone Base works included construction of a school, officers' Mess' roof repairs, officers' Mess' water reticulation, installation of billets, toilet, and showers, officers mess toilets and showers, existing classroom block completion, repairs to the Base Hangar, Air Officer Commandant's office renovation, base officer cadet mess [kitchen], dining room and toilets; that the completion certificates, and confirmation of works carried out, were sent to the then Air Commander from ZAF by the Station Commander for further action as these works were fully supervised by the Livingstone Station Commander.

PW2's witness statement also stated that the 1st defendant constituted a team to verify the works at Livingstone Base; that as Director of Works, he was asked to inspect the works in the presence of the two plaintiffs; that after the site visit it was found that the plaintiffs had carried out the works satisfactorily as per completion certificates, but that some works were pending due to none payment by



the 1st defendant; that both plaintiffs requested for part payment to complete the works and handover, and then negotiate on how to clear the outstanding balance; but that the part-payment was not paid and both plaintiffs abandoned the site.

In cross-examination, PW2 explained that as a Director of Works, his duties were to oversee the maintenance and construction programmes for the 1st defendant, as well as ensuring that the construction equipment was serviceable and supervising outside contracts.

PW2 explained that all the contracts were approved by the Air Force Commander. The witness explained that in relation to the contract of the works at Mumbwa Base, the two plaintiffs were the contractor's buyers; that there were design changes for the repair of Mumbwa Hangar; that the contract was initially given to Daewoo International Limited, but subsequently the contract was given to the 1st plaintiff, who undertook the works after the changes in the designs, and that the contract moved from Daewoo International Limited to the 1st plaintiff, and that Mr. Sibande was the chief executive of the 1st plaintiff, and Country Representative of Daewoo International Limited.

According to PW2, there was no written contract between the plaintiffs and the 1st defendant, there was no floating of tenders for the works as they used a selective tender, and they did not have a waiver from the Tender Board. PW2 further testified in cross-examination that the works at Livingstone Base were awarded to the 1st plaintiff, but that originally the contract had been given to Docklands Limited for K80million, that it was moved from Dockland Limited to the 1st plaintiff for two reasons:- Dockland Limited were pushing for payments before taking up site; but the 1st defendant had no money; whereas the 1st plaintiff agreed to do the work using their own resources and wait for payment; and they were cheaper than Dockland Limited.

PW2 explained in cross-examination that the claims for the works at Livingstone Base were no longer the original claims of K3.7 Billion because there were some payments made; that the roof contract was initially quoted at K70 Million; but thereafter, there were other works; that there were other works at the Livingstone Base extended by contract by the parties, but that there was no written contract.

PW2 also testified that he received a sum of K37 Million during the period of the contract from a Mr. Simasiku, the chief executive of the 2nd plaintiff, who was his friend for doing private works for him.

PW3 also adopted and relied on his witness statement for his evidence in chief filed on 27th September, 2006. The summary of the statement is that he was the Managing Director of Mazzonites Limited, the 2nd plaintiff; that he was invited by the 1st defendant to submit priced bills of quantities for the execution of various works at the Livingstone and Mumbwa Zambia Air Force Bases, which included emergency works, which were subsequently submitted and accepted by 1st defendant; who directed the 2nd plaintiff to carry out the works which were carried out between March, and November, 2001, as evidenced by completion certificates duly issued by the 1st defendant.

According to PW3, the 2nd plaintiff submitted an addendum bill of quantities on the Livingstone Base works; and the bill of quantities for emergency works at Mumbwa Air Force Base accepted by the 1st defendant, who gave the go ahead to the 2nd plaintiff, who subsequently carried out the works; that the 1st defendant made a part-payment in the sum of K50,000,000.00, to prove that the 1st defendant agreed to works being done by the 2nd plaintiff, which were duly completed as evidenced by voucher number 38 dated 5th October, 2002.

PW3's statement further stated that the Ministry of Works and Supply's Building Department's verification report was flawed, in that the contractor's rates and repeated works, were adjusted to suit Government rates, as opposed to the commercial contractor's rates.

According to PW3's statement, the claim for works done at Livingstone Base and emergency works at Mumbwa Base now stands at K3,398,382,480.00.

In cross-examination, PW3 explained that the 2nd plaintiff was a registered contractor with the Ministry of Works and Supply in category five; that the limit of the value of the work he is registered for is K8 Billion, that he had been in category five for twelve years, that he did the work at Mumbwa Hangar in 2000; and that he was the one who responded to the tender by the 1st defendant; that the tender was internal, where a client rings or indicates to the Director in writing to submit the bid.

PW3 explained further that the 1st defendant rang the 1st and 2nd plaintiffs to tender; that when the 1st defendant rang, the 1st plaintiff, chief executive officer, a Mr. Sibande, was present; that the first quotation for the works came from the 1st plaintiff, but that the design was changed from chemical treatment to civil engineering. PW3 further explained that the relationship between the 1st and 2nd plaintiffs was that they had a joint venture between them; that for the Hangar works, the contract was given to the 1st plaintiff; that the tender was given to the 1st plaintiff, but the 2nd plaintiff had a contract which was verbal, that in category five, verbal contracts are allowed, but that he did not tender, and that all the works done at Mumbwa were through verbal contracts.

PW3, further testified in cross-examination that the amount of the officer's Mess works was K77,000,000,00 million, but that they were now claiming K147,750,000.00. According to PW3, he did some works at Gen. Kayumba's farm; while the works at Livingstone and Mumbwa Bases were going on. He admitted lending K30million to PW2 as a personal friend.

PW4, Mr. Amon Sibande, also adopted and relied on his witness statement in his evidence in chief filed on 27th September, 2006, in which he testified that he was the chief executive officer of the 1st plaintiff; that between January, 2000, and June, 2002, the 1st plaintiff submitted quotations for petroleum products being Jet-A1 petrol and diesel upon request from the 1st defendant on extended credit terms; that the 1st plaintiff secured credit facilities with various suppliers in the Republic of South-Africa; that the 1st plaintiff extended these credit facilities to the 1st defendant; that the 1st defendant placed their orders through the 1st plaintiff, who in turn advised the various suppliers to supply direct to the 1st defendant, and that the 1st defendant paid the 1st plaintiff, who in turn remitted

the money to the various suppliers.

PW4 explained in his witness statement that upon change of command at the 1st defendant, around June, 2002, the new Air Commander stopped all orders through the 1st plaintiff, whilst there was product consignment in transit; that the balance outstanding on the product consignment in transit was valued at US\$50,971.73; that upon demand by the 1st plaintiff through their advocates, the 1st defendant did not, in a letter dated 9th July, 2002, dispute the balance; and that the payment of K50,000,000.00 translated into US\$10,000, which reduced the balance outstanding to US\$40,000.00, which amount has remained unpaid to date.

In cross-examination, PW4 testified that the 1st plaintiff was not registered with the Ministry of Works and Supply as contractor; that he is a metallurgical engineer, not very well conversant with the Tender Board Act, but registered with the Zambia Tender Board as suppliers; that he knew that in order for anybody to work with the Ministry of Works and Supply they needed to be registered with the Ministry.

PW4 also testified that the 1st plaintiff had a written contract to do works with the 1st defendant at Mumbwa; and that Daewoo International Limited was not involved in the transaction. PW4 explained that the 1st plaintiff were the agents for Daewoo International Limited to construct the Hangar at Mumbwa, that the contract that was awarded to the 1st plaintiff was in the actual fact awarded to Daewoo International Limited; that the person who wrote him a letter was Gen. Nyirongo, PW1, who informed him that the contract was awarded to Daewoo International Limited; who then subsequently sub-contracted it to the 1st plaintiff; that the letter had recommended that Daewoo International Limited takes up the contract, but Daewoo International Limited was not given the contract, it was instead awarded to the 1st plaintiff by PW1.

PW4 further explained in cross-examination that apart from the Memorandum written by Gen. Nyirongo, PW1, to the Air Commander, recommending the 1st plaintiff, there was no actual contract, and that the contract for the works at Mumbwa was verbal.

The foregoing is the summary of the evidence called on behalf of the plaintiffs. DW1, Col. Moses Phiri, who testified on behalf of the defendants, adopted and relied, in his evidence in chief, on his witness statement filed on 14th June, 2007. The gist of his witness statement is that he was in the employment of the 1st defendant as Director of Legal Services; that Daewoo International Limited bid to undertake repairs for the Mumbwa Hangar at a cost of US\$112,172; that on 18th March, 2000, Mr. Sibande, PW4, Daewoo International Limited Country Representative in Zambia, was informed of the approval of the bid through a letter dated 16th March, 2000; that there was no formal contract drawn between the parties, nor was there any tendering done in respect of the projects to the Zambia National Tender Board; that though Daewoo International Limited were selected to undertake the repairs of the Hangar; at a cost of US\$112,172; they were not capable of executing the order to the satisfaction of the 1st defendant as evidenced by a copy of a letter dated 18th January, 2000, written by the 1st plaintiff to Mr. Henry Swanepoel and Mr. Faustin Kabwe.

DW1 explained in his witness statement that the 1st defendant paid more than US\$117,000.00, though the work was not completed; that the none completion of the work was brought to the attention of the 1st plaintiff through a letter dated 13th August, 2001; that the 1st plaintiff acknowledged through a letter dated 14th August, 2001; and that to date, the 1st plaintiff has not gone back to complete the work; and that there are no signed completion certificates, nor documents to show or prove that the snags at Mumbwa had been attended to.

DW1 further explained, in his witness statement, that despite the huge amounts being claimed by the plaintiffs, there is no existing contract to show that the 1st and 2nd plaintiffs were contracted to repair any of the houses in Mumbwa; and that documents found show that on 29th January, 2002, the 1st plaintiff acknowledged abandoning the work in Mumbwa due to lack of funds.

DW1 further stated in his witness statement that in November, 2000, two quotations for the water proofing of the Livingstone officers Mess were received from Dockland Construction Limited and Kazuame Roofing by the 1st defendant; that the bid by Dockland Construction was approved as successful at the cost of K83million; but that in unexplained circumstances, the 1st plaintiff, who were not in the construction industry, was awarded the bid displacing Dockland Construction Limited at a reduced quotation of K70,080,000.00; that upon being awarded the bid, the 1st plaintiff revised the figures up to K77,000,000.00 in the 1st bills of quantities; that the 1st plaintiff further revised the bills of quantities, the figure shot up to K147,075,000.99; and that this is the figure now being demanded by the plaintiffs.

According to DW1's witness statement, the plaintiffs were not capable of executing the order to the satisfaction of the 1st defendant as evidenced by a copy of a letter dated 18th January, 2000; that upon an analysis of the actual bills of quantities, and documents submitted to the 1st defendant by the 1st plaintiff dated 27th April, 2001, it can be shown that the 2nd bills of quantities dated 7th January, and 27th January, 2002, submitted to by the 2nd plaintiff for works in Livingstone, were grossly inflated and falsified by the plaintiff; that the 1st defendant pointed out the irregularities and falsifications in the bills of quantity, which are now a subject of criminal proceedings; and that there was no explanation as to why the bills of quantity done by the 1st plaintiff were different to the bills of quantity done by the 2nd plaintiff.

DW1 further explained in his witness statement that from the original and approved bills of quantity dated 27th April, 2001, the 1st defendant owed only a total of K948,094,958.01 of contractual and completed work; that the 1st plaintiff acknowledged of having received a total sum of K920,000,000.00 for the Livingstone works as evidenced by a letter from the 1st plaintiff dated 12th December, 2001, acknowledging receiving the above sum; that the two bills of quantity by the 2nd defendant dated 2nd January, 2002, and 21st January, 2002, have falsified figures as follows:-

a. bills of quantity dated 7th January, 2002, show replacing all leaking taps in the kitchen, dining and toilet (quantity 51) all valued at K3,320,000.00, while identical bills of quantity dated 21st January, 2003, show cost of a concrete pavement floor, steps to kitchen/dining entrances at the value of

K3,320,000.00;

b. bills of quantity dated 7th January, 2002, and the bills of quantity dated 21st January, 2003, provide different items and yet the figures are deliberately to work out into the total of K89,900,000.00;

c. Bills of quantity in the defendant's bundle of documents at page 30 show the need to cut down existing trees for a total cost of K4,384,368.48, the same item is also shown at page 137 of the approved bills of quantity and yet the second bills of quantity at page 47 make no mention of it; and

d. Bills of quantity dated 7th January, 2002, show supply and fixing of 4MM thick clear glass to all areas; however, in the approved bills of quantity dated April, 2001, the bills of quantity show supply and fixing of 4MM thick clear glass areas at K29,850,000.00, and strange enough, the second bills of quantity dated 21st January, 2002, make no mention of this huge requirement.

DW1 also stated in his witness statement that on 16th December, 1999, the 1st plaintiff offered to supply Jet-A1 fuel CIF price at US\$378 PMT CIF Lusaka, the order was confirmed by the 1st defendant on 23rd December, 1999, which translated into a total sum of K548,964,000.00; that on 31st December, 1999 the 1st defendant paid the 1st plaintiff K157,000,000 on cheque No. 5731330, as part-payment towards the purchase of the said Jet-A1 fuel, but before the fuel could be delivered as per contract, the 1st plaintiff increased the price to US\$498 PMT, a difference of US\$120 PMT; that the 1st plaintiff only supplied fuels at inflated price; that despite paying the sum of K157,000,000.00 on 31st December, 1999, the 1st plaintiff failed, or neglected to supply the fuels for six months.

DW1 further stated in his witness statement that the 1st plaintiff was paid a total sum of K9,674,872,100.00 between 21st December, 1999, and 4th June, 2003, supported by various dated and numbered cheques showing various amounts; while the 1st defendant only received fuels from the 1st plaintiff totaling to K6,981,222,132.00, thereby making an overpayment to the 1st plaintiff of K2,993,649,968.

In cross-examination, DW1 stated that he was an advocate and an engineer in electronics by qualification, and not in construction, that he was not involved in construction; but that he investigated the matter.

DW2 also adopted and relied for his evidence in chief on his witness statement filed in Court on 14th June, 2007. The gist of his witness statement is that he served as a Commanding Officer Engineering Wing, Zambia Air Force Livingstone Base between January, 2001, and June, 2007, during which period the 1st plaintiff came to the station to set up a site and undertake various project works. He explained that the station had neither contract, nor prior written notification concerning the scope of the projects that the 1st plaintiff had to undertake; and that the only verbal notification was from two representatives of the 1st plaintiffs, a Mr. Sibande and a Mr. Simasiku.

That according to the two officials, the works they were scheduled to undertake included repairing the officers Mess roof, officers Mess water reticulation, Airport Hangar, construction of showers at officer cadets billets at the Base, repairing of officer cadet Mess, construction of two

classroom blocks, completion of one classroom block, and renovation of the Air Officer Commanding's office.

DW2 stated, in his witness statement, that sometime in February, and March, 2001, the 1st plaintiff set up camp at the station to commence work; that the station was making preparations for the Commissioning Parade; that as part of the preparations, the engineering wing was told to undertake works at the officers Mess building. That during the month of March, 2001, the Air Commander, Lt. Gen. S. Kayumba, visited the Station to check on how the preparation for the Commissioning Parade were progressing; that the Station Commander requested the Air Commander to allow the 1st plaintiff to undertake the works that the engineering wing was tasked to perform; that the works were duly undertaken and a completion certificate dated 14th April, 2001, forwarded to Air Headquarters.

DW2 explained further in his witness statement that in August, 2001, the station forwarded to the Air Headquarters a progress report of the works carried out by the 1st plaintiff; that following the progress report of 24th August, 2001, the Director of Works at Air Headquarters, Lt. Col. Kundwe, in the company of Mr. Amon Sibande, came to the Station to inspect the works; that some works were completed, but with a number of snags, while other works were pending completion; and that about August./September, 2001, the contractor abandoned the project without completing the works.

DW3, who also adopted and relied on his witness statement filed on 8th November, 2007, was an Investigator at the Task Force on Corruption. He was in charge of the investigations on the allegations of irregularities in the award and execution of contracts by the 1st defendant to the 1st plaintiff for repair and rehabilitation works at Livingstone Base and for the supply of fuels to the 1st defendant.

According to the witness statement of DW3, he discovered that on 16th December, 1999, Lt. General Kayumba, then Air Commander, engaged 1st plaintiff to supply fuels to the 1st defendant; that on 13th November, 2000, the Air Commander approved the award of a contract to 1st plaintiff to carry out rehabilitation works for the said works at K70,080,000.00; that both contracts were awarded without Tender Board approval and no normal written contracts; that 1st plaintiff was not a building contractor; that 1st plaintiff subcontracted the 2nd plaintiff to carry out the building works at Livingstone Base; and that the 1st plaintiff put in a claim for payment for the works at Livingstone Base amounting to K3,742,180,189.04.

DW3 also stated in his witness statement that the 1st plaintiff undertook additional works at the Livingstone Base; that the additional works raised the amounts due to the 1st plaintiff from the initial K70,080,000 to K3,742,180,189.04; that no Tender Board approval was obtained for the additional works; and that it was inconclusive as to who approved the additional works.

According to DW3's witness statement the amounts claimed by the 1st plaintiff were approved

for payment by Lt. General Kayumba on the recommendation of Brig. General Andrew Nyirongo, who was then Head of Logistics.

DW3 explained in his witness statement that in order to confirm the amounts due to the 1st plaintiff for work done at the Livingstone Base, a verification exercise was undertaken by officers from the Ministry of Works and Supply; that it transpired that some works reflected on the bills of quantities submitted by the 1st plaintiff in support of their claim for payment were either not executed or rates relating thereto highly inflated; and that from the bill submitted by the 1st plaintiff a total of K1,432,498,523.74, was found to have been overstated.

According to the witness statement of DW3, during the period that the 1st plaintiff were engaged by the 1st defendant under the two contracts, both Lt. General Kayumba and Brig. General Nyirongo received various payments in cash and in kind from the 1st plaintiff and or Mr. Amon Sibande.

The foregoing was the evidence on behalf of the defendants. It must be observed at this juncture that the trial Court did not review or reflect DW3's evidence in its judgment. Putting it differently, the trial Court completely ignored the evidence of DW3 by not addressing its mind to it or even reviewing it. The trial judge, however, reviewed the pleadings, the oral and documentary evidence in twelve and half pages of his judgment.

In five paragraphs, the trial judge concluded and found that the Zambia Air Force Hangar at Mumbwa Base was contracted by Daewoo International Trading Limited; that the works in question were to cost the sum of US\$112,172; but that for an unexplained reasons, PW1, Brig. Gen. Nyirongo, later awarded the contract to the 1st plaintiff without referring the matter to the Tender Board. The Court found that the action of PW1 was unauthorized; and that the 1st plaintiff was not entitled to this contract as they did not follow the tender procedures, and did not bid for the work.

In relation to the 2nd plaintiff, the Court was satisfied that they were equally not entitled to do any works at Zambia Air Force, Livingstone Base, and that they were given the works at Livingstone as a result of office abuse by PW1 and PW2, as there was ample evidence that both PW1 and PW2 received some money from the 1st and 2nd plaintiffs, which they termed as loans; but in actual fact were inducements by the 1st and 2nd plaintiffs to obtain contracts without following the laid down procedures.

The learned trial judge observed that the evidence of PW1 and PW2, showed that the chief executives of the plaintiffs, namely:- Mr. Simasiku and Mr. Sibande, were aware of the necessary procedures to be under-taken in order for them to obtain the contracts from Zambia Air Force; but because they had friends, namely, PW1 and PW2, they ignored to follow the procedures. The learned trial judge found that the action of PW3 and PW4 in procuring the contracts from Zambia Air Force, was unlawful as they did not follow the laid down procedure of the Tender Board.

The learned trial judge then concluded as follows:-

“Having considered the entire evidence, I find that the plaintiffs have failed to establish that they were contracted by the Zambia Air Force; I therefore dismiss their claim. As to the counter-claim by

the defendants, I have also considered their evidence and find that it is not in dispute that some shoddy works were done by the 1st and 2nd plaintiffs, and I therefore also dismiss their counter-claim. The defendants May, wish to sue PW1 and PW2 who were in employment of Zambia Air Force in order to recover their money.”

The plaintiffs appealed to this Court against the whole judgment on the following five grounds:-

1. The learned trial judge erred in law and in fact when he held that the appellants herein failed to establish that they were contracted by the 1st respondent;
2. The learned trial judge erred in law and in fact when he held that the contracts awarded to the appellants for the repair works at the 1st respondent's Livingstone and Mumbwa Bases were procured through office abuse;
3. Having held as above the learned trial judge erred in law and in fact when he failed to award the appellants damages on a quantum meruit basis;
4. The learned trial judge erred in law and in fact by not addressing the raised issues of illegality, estoppel, and the Limitation Act; and
5. The judgment of the learned trial judge did not make any findings of fact and citation of the relative law and authorities to the actions below.

At this juncture, we must explain that we have deliberately delved into the evidence in great detail because the trial Court appears to have approached the complex issues in this case in a very simplistic manner. Indeed, in our view, justice in this appeal can only be done by rewriting the whole judgment. Hence, our detailed review of the pleadings and the oral evidence in order to bring out the real issues in dispute, and to ascertain what was the actual relationship between the parties.

Both the plaintiffs and the defendants relied on their respective written heads of arguments filed with the Court based on the five grounds of appeal. However, there were no heads of arguments filed in support of the cross-appeal. Our intelligent guess is that the cross-appeal must have been abandoned and we so hold.

The gist of the written heads of arguments on ground one, relating to the existence of a contractual relationship between the plaintiffs and the 1st defendant, is that the defendants' pleadings assist in determining that the plaintiffs were, indeed, contracted by the 1st defendant; that paragraph 2 of the defence is an admission that the 1st defendant contracted the 1st plaintiff for the roofing repairs of the 1st defendant's Livingstone officers mess; and that paragraph 17 of the same defence asserts both an express and an implied term of such contract; while paragraph 18 acknowledges the contract; and paragraphs 12 and 24 in the very least point to the existence of a contract for the supply of fuel, hence the overpayment alleged in paragraph 13.

It was contended in ground one that the repair works to the roof of the officers mess in Livingstone had a written contract embodied in a letter addressed to the 1st plaintiff signed by PW1 dated 6th December, 2000, informing the 1st plaintiff of their successful bid; that this letter was sent after Dockland Limited had been contracted for the same job; but failed to go on site due to lack of



mobilization of funds; that the 1st plaintiff took up site in Livingstone on this basis; but that when the 1st plaintiff moved on site, officers of the 1st defendant suggested that the best solution was to put a roof, instead of waterproof material; that this changed the job specification from water proofing to putting up a roof; but that this being a construction job, the 2nd plaintiff was subcontracted by the 1st plaintiff.

It was further pointed out that PW1's evidence was that when the 1st plaintiff was on site, additional jobs were given by the station authorities; that this evidence was supported by paragraph 4 of the witness statement of DW2, filed into Court by the defendants, which explains how the Air Commander was asked by the station Commander to allow the 1st plaintiff to undertake the works that the engineering wing was to perform; and that the works, according to DW2, were duly undertaken and a completion certificate dated 14th April, 2001, was forwarded to Headquarters.

It was explained that it was while the plaintiffs were carrying out the works that they were requested to carry out further additional works in Mumbwa as well; and that the plaintiffs, who were already working in Livingstone, were asked to suspend that work and attend to Mumbwa; that according to PW1 in cross-examination, no contract was signed for the Mumbwa emergency works; but a verbal one.

In relation to fuel contracts between the 1st plaintiff and the 1st defendant, it was pointed out that they were established by the undisputed evidence in paragraphs 5 to 7 of PW2's witness statement. It was contended that the trial Court ignored, without reasons being proffered, the evidence of PW1, who explained that there was no tender because the sole supplier, BP Zambia Limited, had stopped supplying, while operations had to go on in the midst of the prevailing security situation.

It was finally submitted, on ground one, that this ground should be determined on the basis of this Court's pronouncement of the law in the case of *The Rating Valuation Consortium and D.W. Zyambo and Associates (suing as a firm) v. The Lusaka City Council and Another (1)*, where at page 127, this Court said:

“There is a growing school of thought, supported by a plethora of authorities, that the analysis of putting labels to the process of reaching agreement as offer and acceptance is to simplify the issues and thus being unrealistic. The proper approach according to these developments in the law, is that the Court has to, in a given case, take an objective approach. In other words, what should guide the Court in analyzing business relationship should be whether or not the parties' conduct and communication between them, amounted to an offer and acceptance”.

The gist of the written response to ground one, on behalf of the defendants, is that the learned trial judge was on firm ground, when he found that the plaintiffs failed to establish that they were contracted by the 1st defendant; and that as pleaded in the amended statement of claim, the 1st defendant contracted the 2nd plaintiff through the 1st plaintiff to carry out rehabilitation and construction works at the 1st defendant's Mumbwa and Livingstone Bases.

It was submitted that the only contract[s] that existed were that between Daewoo International

Limited for the Mumbwa Base works and a specific contract with the 1st plaintiff for the Livingstone works; and that the defendants were not party to any subcontracting; and that the 2nd plaintiff was a stranger to the contract.

It was pointed out that the 1st plaintiff was to carry out the works for the sum of US\$19,222.29, converted into the sum of K70,000,000.00. It was submitted that this was the only contract that existed between the 1st defendant and the 1st plaintiff; that there was no contract for the payment of the “exorbitant” sum of K3,398,393,110.44, that was being claimed by the plaintiffs.

It was firmly submitted in response to ground one that the trial Court was on firm ground, when it found that the 1st plaintiff was not contracted by the 1st defendant to render services to the value claimed by the plaintiffs; and that there was no authority for any variations to the earlier agreed works.

It was argued that what was interesting to note about the 1st plaintiff's contract with the 1st defendant was that the 1st plaintiff's bid came later and in dubious circumstances and displaced the fair quotation by Dockland Limited, who were in the construction business.

It was further submitted that the 2nd plaintiff was a stranger to any contract entered into between the 1st defendant and Daewoo Limited for the Mumbwa and subsequently between the 1st defendant and the 1st plaintiff for the Livingstone works; and that the 2nd plaintiff was thus precluded from sustaining an action against the defendants by virtue of the doctrine of privity.

It was also submitted that since the relationship between the 1st defendant and Daewoo in respect of the works undertaken at Mumbwa Base was one of disclosed principal, then only the principal alone can maintain an action against the defendants; and that as such, the plaintiffs' claims in the Court below were unfounded and the Court was correct in finding that the plaintiffs did not establish that they had been contracted by the 1st defendant; and the only person entitled to sue in respect of the Mumbwa contract was Daewoo International Limited.

It was pointed out that from the evidence of PW3, the 2nd plaintiff was never contracted by the 1st defendant to carry out works at the Livingstone Base; but was merely subcontracted by the 1st plaintiff. It was submitted that, as a subcontractor, the 2nd plaintiff had no locus standi to maintain an action against the defendants as there was no privity of contract between the 2nd plaintiff and the defendant.

On the supply of fuel contract, it was conceded that there was no doubt that there was a contractual relationship to supply aviation fuel in specific quantities at CIF price of US\$378 PMT; that there is evidence on record that the 1st plaintiff was given an advance payment of K157,000,000.00; but that before the fuel could be delivered, the 1st plaintiff increased its price to US\$498/PMT and the fuel was supplied at inflated price, and that DW2 in his witness statement highlighted numerous payments that were made by the 1st defendant to the 1st plaintiff in respect of fuel showing that the 1st plaintiff was overpaid, and thus has no claim for any funds under the fuel contract.

It was finally submitted that ground one of appeal had no merit; and that it be dismissed.

At this juncture, we would like to observe that the outcome of the whole of this appeal centres to a large extent, on the determination of ground one. The learned trial judge dismissed the whole of the plaintiffs' claim in one sentence as follows:

“Having considered the entire evidence, I find that the plaintiffs have failed to establish that they were contracted by the Zambia Air Force; I therefore dismiss their claim”.  
ground one of appeal is that: the learned trial judge erred in law and in fact when he held that the plaintiffs herein failed to establish that they were contracted by the 1st defendant.”

In our considered view, the rest of the four grounds of appeal are anchored and defendant, on the outcome of the determination on ground one. It is, therefore, imperative to deal and dispose of ground one first before delving into the other four grounds. In relation to ground one, we have anxiously and critically analyzed the pleadings, the oral and documentary evidence, the judgment and the detailed written heads of arguments and the submissions on behalf of the parties. At the outset, we are compelled to state, with due deference to the trial judge, that the judgment is scanty and devoid of serious findings of fact and flies in the teeth of common cause facts.

That said, the first issue on ground one is whether there was a contractual relationship between the plaintiffs and the 1st defendant for the works carried out at Livingstone and Mumbwa Bases. As stated in the case of *The Rating Valuation Consortium and Another v Lusaka City Council and Another* (7), in analyzing a business relationship in a given case, the Court has to take an objective approach of whether or not the parties' conduct and communication between them amounted to an offer and acceptance. Indeed, the analysis of putting labels to the process of reaching agreement as offer and acceptance is to simplify the issue and thus being unrealistic.

The case for the plaintiff, as pleaded and supported by the oral and documentary evidence, is that between January, 2000, and December, 2001, the 1st defendant, Zambia Air Force, contracted the 2nd plaintiff through the 1st plaintiff to carry out rehabilitation and construction works at the 1st defendant's Mumbwa and Livingstone Bases and that the 2nd plaintiff completed the works within 15 months of the contract; and that the 1st defendant issued completion certificates for all the works. How the 2nd plaintiff came into the picture is adequately, explained by the evidence of PW1 and PW2, that Daewoo International Limited, who was awarded the contract, subcontracted the 1st plaintiff, who in turn subcontracted 2nd plaintiff because the works had changed from water proofing to roofing.

The case for the defendants, as pleaded in paragraph 2 of the defence, apart from denying never contracting the 2nd plaintiff, is that they contracted Daewoo International Limited for the rehabilitation of its Hangar works at Mumbwa and the 1st plaintiff for roofing repairs of it's Livingstone officers, Mess. In paragraph 17 of the defence, the defendants assert both the express and the implied terms of the contract that the 1st plaintiff were to carry out the roofing repairs at Livingstone Base at a

total cost, including labour, of US\$19,922.29 (equivalent of K70,000,000.00). This is acknowledged in paragraph 18 of the defence in which it is pleaded that the plaintiffs failed to take account of the express term of the contract on total cost of roofing repairs, and seemingly overstated the final bill to K147,075,000.00.

The evidence of PW1, the Chief of Logistics of the 1st defendant, was that during the relevant period, the 1st defendant contracted the 1st and 2nd plaintiffs to carry out works at Livingstone Base, and emergency works at Mumbwa Base; and that the works were duly carried out according to the certificates signed by the supervising officers at the two Bases.

The evidence of PW2, the Director of Works, was also to the effect that the 1st defendant contracted the two plaintiffs to undertake various works at Lusaka, Mumbwa, and Livingstone Bases.

PW3 explained, how on behalf of the 2nd plaintiff, was invited by the 1st defendant to submit priced bills of quantities for the execution of various works at Mumbwa and Livingstone Bases, which works were subsequently executed and completion certificates issued by the 1st defendant.

Our understanding of the arguments on behalf of the defendants is that they do not dispute the existence of a contractual relationship between the parties; but that the only contract that existed was between Daewoo International Limited for the Mumbwa works, and a specific contract with the 1st plaintiff for the Livingstone works; and that the defendants were not party to any subcontracting and that therefore the 2nd plaintiff was a stranger to the contract. The defendants concede, in their submissions, to the existence of a contract between the 1st plaintiff and the 1st defendant; but deny the existence of a contract for the payment of an “exorbitant” sum of over K3billion, and that the purported variations were not documented and not authorized.

From the foregoing, the question is: did the parties' conduct and communication, between them, amount to an existence of a contract? In our considered view, the existence of a contractual relationship between the parties on the whole evidence on record is not in dispute. The “overstating” of the final bill and the “exorbitant” sum being claimed or the variations of works or the subcontracting of the contract did not affect the contractual relationship between the parties. We are satisfied that a number of issues raised by the defendants in challenging the existence of the contract are matters for assessment and not for liability. The arguments on behalf of the defendants do not challenge the existence of a contractual relationship.

On the first issue raised in ground one, we find and hold that the plaintiffs were contracted by the 1st defendant to execute the various works at Livingstone and Mumbwa Bases and that upon completion, certificates of completion were issued. The existence of the contract is amply supported by the numerous documents confirming the communication about the contract between the parties and some payments made to the plaintiffs by the defendants for the works done.

The second issue on ground one is whether there were fuel contracts between the 1st plaintiff and the 1st defendant. The first thing we note on fuel contracts is that in paragraphs 12 and 24 of the defence, the 1st defendant admits that the 1st plaintiff was contracted to supply Jet-A1 fuel and made an advance payment and that the contract was awarded to the 1st plaintiff on 16th December, 1999. Secondly, the evidence of PW2 gave a detailed background of the security issues leading to the fuel contracts between the 1st plaintiff, and the 1st defendant.

In the submissions on behalf of the defendants, the existence of contracts to supply fuel in specific quantities is admitted. What is contended is that they overpaid the 1st plaintiff for the fuels and that before the fuel was supplied, the 1st plaintiff increased the price. In our view, there is no dispute on the fuel contracts. The issue of overpayment is for determination at assessment. From the pleadings, the oral and documentary evidence and from the numerous admissions in the pleadings and in the submissions, we are satisfied that the plaintiffs established the existence of the fuel contracts. In conclusion on ground one, we hold that the trial judge misdirected himself in law and in fact in holding that the plaintiffs failed to establish that they were contracted by the Zambia Air Force. We, therefore, allow ground one of appeal.

The second ground of appeal is that the trial judge erred in law and in fact when he held that the contract awarded to the plaintiffs for repair works at Livingstone and Mumbwa Bases were procured through office abuse. Although the trial judge had concluded that the plaintiffs did not establish that they were contracted by the 1st defendant, he had, earlier on in his judgment, found that the plaintiffs were given the works as a result of office abuse by PW1 and PW2. This was, in our view, a contradiction because it was either there were no contracts, or they existed, but obtained as a result of office abuse.

However, the gist of the written heads of arguments on ground two is that the defendants' alleged fraud is in two material respects; first in paragraph 4 of the defence in which they pleaded that the completion certificates were fraudulently done, and second is in paragraph 9 of the defence in which they pleaded that the bills of quantities were fraudulently manipulated from the original quotations, resulting in the 1st plaintiff being overpaid. It was argued that the combined effect of all this must have convinced the trial judge that there was office abuse.

It was submitted that the business relationships of PW1 and PW2, agents of the plaintiffs, on the one hand, and the 1st plaintiff and 2nd plaintiff on the other, was not proved to be irregular; that the evidence led by the defendants was insufficient, and most unsatisfactory to establish fraud; and that the trial judge's findings that the contracts in question were procured through office abuse was not supported by cogent evidence to meet the standard of proof set out in *Sithole v State Lotteries Board* (2), which is a standard greater than a simple balance of probabilities.

The summary of the written response to ground two, on behalf of the defendants, is that, none of the circumstances envisaged in the case of *Zulu v Avondale Housing Complex* (4), of reversing

findings of fact made by a trial Court, existed.

We were urged to agree with the trial Court that any contracts awarded to the plaintiffs for repair works were procured through office abuse as the evidence of PW1 showed that he had a business relationship with PW4, Mr. Sibande, the chief executive officer of the 1st plaintiff during the period when the 1st plaintiff had dealings with the 1st defendant; and that PW1 flouted the procedures of the 1st defendant as he had an interest to serve; and that from the evidence of PW2, it was also apparent that the purported contracts were awarded on the basis of office abuse.

We have carefully addressed our minds to the arguments on ground two. The fact that PW1 and PW2 had personal business relationships with the chief executives of the 1st and 2nd plaintiffs, respectively, was not in dispute. Also not in dispute is the fact that PW1 received a total sum of K77 million from Mr. Sibande; while PW2 received K37 million from Mr. Simasiku for their personal business transactions with the 1st and 2nd plaintiffs.

The learned trial judge had this to say in his judgment in relation to PW1 and PW2:-

"I am satisfied that Zambia Air Force Hangar at Mumbwa was contracted to Daewoo Trading [PTY] Limited and that the works in question were to cost the sum of US\$112,172.00. However, for unexplained reasons, PW1 later awarded the contract to the 1st plaintiff without referring this matter to the Tender Board. I find the action of PW1 as unauthorized. I also find that the 1st plaintiff was not entitled to this contract as they did not follow the tender procedures and did not bid for this work.

The trial judge continued:-

"As regards to the 2nd plaintiff, I am equally satisfied that they were not entitled to do any works at the Zambia Air Force at Livingstone. They were given these works as a result of office abuse by PW1 and PW2. There is ample evidence on record that both PW1 and PW2, received some money from the 1st and 2nd plaintiffs, which they termed as loans, but in actual fact were inducement by the 1st and 2nd plaintiffs to obtain contracts without following the laid down procedures.

The contention on behalf of the plaintiffs is that PW1 and PW2's business relationships were not with the 1st and 2nd plaintiffs; that on the authority of the case of *Salomon v Salomon (5)*, the plaintiffs were legal entities on their own; but that above all, PW1 and PW2, were not responsible for awarding contracts to the plaintiffs.

We agree that the conduct of PW1 and PW2, in the process of awarding the contracts to the plaintiffs was highly suspicious and reprehensible. Perhaps it is for that reason that the defendants pleaded in their defence that certain matters surrounding the award of the contracts and works at Livingstone and Mumbwa Bases are the subject of criminal investigations.

However, on the evidence on record, we are not satisfied that PW1 and PW2 were responsible for awarding the contracts to the plaintiffs for the works at Livingstone and Mumbwa Bases. The evidence on record is that the contracts were awarded by the Air Commander. It was, therefore, a

misdirection on the part of the trial judge to hold that the contracts awarded to the plaintiffs for the repair works at Livingstone and Mumbwa Bases were procured through office abuse. In any event, there was no evidence establishing fraud or office abuse. In the case of *Sithole v State Lotteries of Board* (2), we pointed out that if a party alleges fraud the extent of the onus on the party alleging is greater than a simple balance of probabilities. At page 115, the Court stated

“I agree, however, that there is nothing in the judgment to suggest that the learned judge appreciated that if a party alleges fraud the extent of the onus is greater than a simple balance of probabilities. In *Bater v Bater* [9]

Denning, L. J., said:

[A civil] case may be proved by a preponderance of probabilities, but there may be degrees of probability within that standard. The degree depends on the subject-matter. A civil Court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal Court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion.

In the case of *Madaza v Coleen* (6), this Court said at page 113:-

“As we said in the case of *Sablehand Zambia Limited v Zambia Revenue Authority* (appeal No. 56 of 2003) a defendant wishing to rely on the defence of fraud must ensure that it is clearly and distinctly alleged. When it comes to trial, the defendant must lead evidence so that the allegation is clearly and distinctly proved.”

We are not satisfied that the defence of fraud, or office abuse was clearly and distinctly alleged. Equally, we find no evidence led by the defendants clearly and distinctly proving the allegation. In the circumstances, we find and hold that the finding of office abuse were not supported by cogent evidence. We uphold and allow ground two.

We now turn to ground three relating to quantum meruit. The written heads of arguments on ground three were preceded by a quotation from paragraph 695 of *Halsbury's Laws of England* 4th Edition, volume 9, under the heading:-Work done under unenforceable, void or illegal contract, which reads as follows:-

“In some circumstances, a plaintiff may recover on a quantum meruit in respect of work done under a contract which is unenforceable, void or illegal. Where a contract is unenforceable, as a general rule, a defendant is not precluded by the fact of performance by the plaintiff from pleading the unenforceability. If, however, the contract has been performed by the plaintiff, and anything has been done by the defendant upon the doing of which the law would imply a promise to pay, the plaintiff can recover on the implied promise notwithstanding the unenforceability of the contract. Thus where work is done at the request of the defendant and of which he has the benefit, the plaintiff can recover on a quantum meruit. Where a contract is void as being made without authority, plaintiff who has rendered services under it may be entitled to recover on a quantum meruit.”

Council and Another (7), was also cited, where the Court stated:-

“the obligation to pay reasonable remuneration for the work done when there is no binding contract between the parties is imposed by a rule of law, and not an inference of fact from the acceptance of services or goods.”

It was contended that the cited authorities dictate that even if it were found that no binding contracts existed, or that the contracts were unenforceable or illegal, the law demands that reasonable remuneration be provided for the work done; and that this rule applies whether or not the work was completed. It was submitted that the most paramount consideration, when considering the question of quantum meruit, is the work that was done.

It was pointed out that paragraph 3 of PW1's witness statement particularized the Livingstone works to include construction of a school, officers' Mess roof repairs, officer's mess water reticulation, installation of billets, officer's mess toilets, and showers, existing classroom block completion, repairs to Base Hangar, Air Commanding officers' office renovation, base officer cadet mess kitchen, dining room and toilet. It was also pointed out that completion certificates were issued in respect of all these works.

It was further pointed out that in paragraph 2 of PW2's witness statement it was stated that the emergency works following the storm which damaged various residential and other structures at the Mumbwa Base were completed and not paid for; that in addition, PW3, in paragraph 1 of his witness statement, deposed that completion certificates duly issued by the 1st defendant were sent under cover of letters dated 24th April, and 24th August, 2001, together with a restricted minute confirming final inspection dated 21st November, 2001, were sent; and that in paragraph 5, PW3 broke down the claims as K2,487,130,189.44 for Livingstone works and K911,262,291.00 for Mumbwa emergency works.

In conclusion on ground three, the case of D. P. Services Limited v Municipality of Kabwe (3) , was cited where this Court stated:-

“although the words “quantum meruit” have not been used in the pleadings, this in no way debars a party from being entitled to judgment for such a claim.

The summary of the written response to ground three on behalf of the defendants is that the trial Court was on firm ground when it did not award the plaintiffs damages on a quantum meruit basis. It was contended that the judgment of The Rating Valuation Consortium case (7) , had been selectively cited as the Court also stated:

“We, without hesitation accept that where in construing a statute, the contract is rendered illegal, unenforceable, or void by a provision in the statute, the Court will not enforce such contract”.

It was submitted that the purported contracts contravened the now repealed Zambia National Tender Board Act, chapter 394 of the laws of Zambia; and that the Court cannot enforce such a contract and any claims thereunder; and that the case did not meet the standard for a Court to award damages or compensation on a quantum meruit basis.



We have considered the argument, and the authorities on ground three based on quantum meruit. Our short answer to the argument on this ground is that following our conclusions on grounds one and two that a contractual relationship existed between the parties and that there was no abuse of office, it follows that we must uphold ground three, and hold that on the evidence on record, supported by signed completion certificates of works done at Livingstone and Mumbwa Bases, it is clear to us that works were done at the request of the defendants of which the defendants benefited. We, therefore, find and hold that even if there had been no binding contract between the parties, the plaintiffs would have been entitled to recover on a quantum meruit basis, and that the trial judge erred in law and in fact when he failed to award the plaintiffs damages even on a quantum meruit basis. ground three of appeal is, therefore, allowed.

We now turn to ground four of appeal which is that the learned trial judge erred in law and in fact by not addressing the raised issues of illegality, estoppels and the Limitation Act.

According to the pleadings, the issues of illegality, estoppel, and the Limitation Act, were raised in the counter-claim and in the reply, and defence to the counter-claim. In his judgment on the counter-claim, the trial judge had this to say:-

“As to the counter-claim by the defendants, I have also considered their evidence and find that it is not in dispute that some shoddy works were done by the 1st and 2nd plaintiffs and I therefore also dismiss their counter-claim. The defendants May, wish to sue PW1 and PW2 who were in employment of Zambia Air Force in order to recover their money.”

An examination of the record of appeal shows that the counter-claim runs into eleven paragraphs covering four pages; while the defence to the counter-claim runs into eight paragraphs, covering two pages.

Although the parties have filed detailed written heads of arguments on ground four, we have serious difficulties to follow the judgment of the trial Court on the counter-claim. The reasoning and the conclusion on the counter-claim in our view are certainly illogical.

The counter-claim was dismissed, according to the trial judge, because “it was not in dispute that some shoddy works were done by the 1st and 2nd plaintiff .....” Suffice it to say that the counter-claim was not made by the plaintiffs, but by the defendants. The Court, as we see it, did not address issues raised in the counter-claim.

On account of the view we have taken on ground four that the cross-appeal be deemed to have been abandoned, we do not intend to delve into the written heads of arguments on ground four. Suffice it to state that we agree that the learned trial judge erred in law and in fact by not addressing the raised issues of illegality, estoppel, and the Limitation Act.

We allow ground four of appeal as well.

Lastly, we deal with ground five. This is that the judgment of the learned trial judge did not make any findings of fact and citation of the relative law and authorities.

The gist of the written heads of arguments on ground five is that the trial Court rendered a judgment without reference to any judicial precedents as asserted by this Court in the case of Chibwe v Chibwe (5). We were urged to follow the case of Sithole v State Lotteries Board (2), in which we held that

“Where an appellate Court is in as good a position as a trial Court to draw inferences, it is at liberty to substitute its own opinion for any opinion which the trial Court might have expressed.”

In response to the arguments on ground five, it was contended that the trial judge cannot be faulted for not citing any law and authorities in his judgment. It was submitted that the trial Court did make findings of fact which can only be reversed if it is shown that they were made on a misapprehension of facts, or in the absence of any relevant evidence in

terms of the principles in the Zulu (4) case.

In discussing ground one, we expressed our discontent in the manner the judgment was written and the reasoning. We made our own findings of fact in ground one.

Given the oral and documentary evidence on record and the nature of pleadings in the whole case, we agree that the judgment of the trial Court did not make any findings of fact. This ground of appeal is also allowed.

In conclusion, all the grounds of appeal are allowed and upheld. But for the avoidance of any doubt, we emphasize that on liability, based on all the grounds of appeal, judgment is entered in favour of the plaintiffs. But we order that damages be assessed before the Deputy Registrar; who will, undoubtedly, take into account our findings on all the grounds of appeal.

On account of the issues raised in the appeal; and on account of the conduct of the parties, in the transaction; we make no order as to costs; but that each party will bear its own costs.

Before we leave this appeal, we wish to observe that the conduct of PW1 and PW2, officers in the employment of the defendants, left much to be desired in relation to the contracts awarded to the plaintiffs. We hope serious investigations into their conduct have been carried out to ascertain whether no criminal offences were committed by them.

Appeal allowed.