SCZ Judgment No.

46/2014

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)

APPEAL NO. 194/2010
SCZ/8/254/2010

BETWEEN:

EXAMINATIONS COUNCIL OF ZAMBIA **APPELLANT**

AND

RELIANCE TECHNOLOGY LIMITED **RESPONDENT**

Coram: **Mwanamwambwa, Ag. DCJ, Wood and Malila, JJS.**

On 14th October, 2014 and 31st October, 2014

For the Appellant: Mr. S. Lungu of Messrs. Shamwana & Co.

For the Respondent: Ms. M. Mwalusi of Messrs. Chifumu Banda & Associates

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JUDGMENT

Malila, JS, delivered the Judgment of the Court

Cases referred to:-

1. **William Masautso Zulu v Avondale Housing Project Limited (1982) ZR 172**
2. **B S Brown & Sons Ltd v. Craiks Limited (1970) 1ALL ER 823**
3. **Rodgers and Another v. Parish (Scarborough) Ltd & Another (1987) 2 ALL ER 232, Page 235**
4. **Bernstein v. Pamson Motors (Golders Green) Limited (1987) 2 ALL ER 220.**
5. **Jaffco Limited v. Northern Motors Limited (1971) ZR 75 at 76**
6. **Public Utilities Commission of City of Waterloo v. Burrough Business machines Ltd (1974) 52 DLR (3d) 481, 490**
7. **Burroughs Business Machines Ltd v. Feed-Rite Mills (1962) Ltd. 42 DLR (3d) 303**

8. **The Attorney General v. Marcus Achiume (1983) ZR 1**
9. **Grant v. Australian Knitting Mills (1936) AC 85**
10. **Nkata and others v Attorney General (1966) ZR 124**
11. **Zambia Revenue Authority v. Dorothy Mwanza and Others (2010) ZR Volume, 2, 181**
12. **Simwanza Namposhya v. Zambia State Insurance Corporation Limited (2010) ZR Volume 2, 339**
13. **Attorney General v. Kakoma (1975) ZR 21C**
14. **Thornett & Ferr v. Beer & Sons (1919) 1RB 486**
15. **Wren v. Holts (1903) 1 KB 610**
16. **Crowther v. Shannon Motors Co. (1975) 1 ALL ER 139**
17. **Rogers et al v. Paris (Scarborogh) Limited (1987) 1QB 933**
18. **Grimoldy v. Wells (1975) L.R 10 CP 391 at 395**
19. **Scholfield v. Emerson Brantingham Implements (1918) 43 DLR 509**
20. **Findlay v. Metro Toyota (1977) 82 DLR (3d) 440**
21. **Lee v. York Coach and Marine (1977) RJR 35**
22. **Fisher, Reeves and Co. v. Armour & Co. (1920) 3 KB 614**

Legislation referred to:-

1. **Section 14(2) of the Sale of Goods Act, 1893**
2. **Section 35 of the Sales of Goods Act, 1893**
3. **Section 56 of the Sale of Goods Act, 1893**

Works referred to:-

1. **Chitty on Contracts, Volume 2, 1961 Edition, page 1407**
2. **Halsbury's Laws of England, Volume 41, 4th Edition page 710**

This appeal arises from the judgment of the High Court (Phiri, J.), given on the 14th of October, 2012 in favour of the respondent, which was the plaintiff in the Court below. In the High Court, the respondent claimed as against the appellant, the sum of forty-six million eight hundred and eight thousand, five hundred and ninety-two Kwacha and fifty Ngwee (K46,808,592.50), being the purchase price of a Tally Genicom T

6218 Line Printer supplied and commissioned by the respondent at the appellant's request and instance. The respondent also claimed for interest on the said sum, any other compensatory relief that the High Court would deem fit to award, and costs.

Briefly, the uncontroverted facts that gave rise to this litigation are these. At the appellant's request and instance, the respondent supplied and commissioned four Tally Genicom T 6218 Line Printers described in Purchase Order 18151 dated 12 May, 2008 as "Heavy Duty Tally Genicom T6218 Line Matrix Printer". Following the commissioning of the four printers on 26th August, 2008, the appellant began to use the printers for its heavy duty printing requirements. Less than four weeks after the printers were installed, to be precise, on 18th September, 2008, one of the printers developed a fault and, a report was made by the appellant to the respondent. It transpired that the said printer had a faulty hammer voltage drive board. The respondent replaced the faulty hammer voltage drive board and the fault appeared to have been rectified for a short while, only to recur later in the day.

The next day, on the 19th of November, 2008, the respondent's representative again attended upon the appellant, and upon examining the printer, came to the conclusion that it had a faulty hammer board, hammer bank and main control board. These were replaced and the printer was reported to be working properly for some time. However, the printer continued to be plagued with failure of normal operation even after the repairs were done and some parts replaced. On one occasion, the respondent had to bring in the Training and Support Manager, a Mr. Andre Van der Walt, from Tally Genicom, South Africa, the manufacturers of the printers, to assess the problems that were occurring on the printer, but this did not, apparently, resolve the failings of the printer.

Disconsolate with this state of affairs, the appellant's Director wrote to the respondent's Manager on the 4th of December, 2008 "returning the said printer" to the respondent and requesting the respondent to "supply" the appellant "with another working printer as soon as possible". In its response dated 8th December, 2008 to the appellant's said letter, the respondent, through its Manager, acknowledged the appellant's

concern on “the repetitive failure of the ‘Hammer Board’ on this printer” and assured that the respondent was trying its “level best to rectify the situation.”

It appears that a series of correspondence was then exchanged and meetings between the parties held without agreement on the way forward. Each party ultimately handed the matter over to its lawyers, culminating inevitably in the action in the High Court.

In her judgment, which is the subject of this appeal, the learned Judge *a quo* held in effect, that the appellant was liable to pay for the faulty printer and could not, as it purported to do, exercise its right to reject the printer or rescind part of the contract in respect of the faulty printer, as such right had been lost.

Displeased by the Judgment of the High Court, the appellant took up cudgels against the findings of the learned trial Judge, and framed four grounds of appeal in this Court, upon which it seeks to assail the Judgment. Both counsel filed in written heads of argument and supplemented them with *viva voce* submissions. We propose to put forth seriatim, the grounds as set out in the

Memorandum of Appeal and the arguments around each ground, as submitted. We shall consider grounds three and four together since they both relate to the buyer's loss of the right to reject goods, albeit, under different circumstances.

Ground one was couched as follows:

> "**The learned trial Judge misdirected herself in both law and fact in holding that the printer had been used extensively for four months by the Appellant despite evidence to the contrary."**

In arguing this ground, Mr. Lungu, learned counsel for the appellant, referred us to the passage in the judgment of the learned trial Judge at page J8 (page 15 of the Record of Appeal) where the learned Judge stated that:-

> **"… the history of this case shows that each time the printer developed a fault the plaintiff repaired it in accordance with the terms and conditions of the warranty which did not include the terms for rejection after using it extensively for four (4) months as acknowledged by the defendant's Director on page 10 of the bundle of documents…"**

In addition to submitting that there was no acknowledgment by the appellant's Director of extensive use of the printer in question, the learned counsel for the appellant, referred us to the evidence of DW1 at page 90 of the Record of Appeal, where the

witness testified that when the printers were installed on the 26th of August, 2008; the problem with the one printer, subject of the present dispute, started on that very day, as it could not finish the 300 pages it was commanded to print.

The learned counsel argued that it was a misdirection on the part of the learned Judge in the court below to hold, in light of this evidence, that the printer had been extensively used for a period of four months. He cited our decision in the case of **William Masautso Zulu v Avondale Housing Project Limited**[1] where, at page 173, we said:

> **"Before the court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were, either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were on a proper view of the evidence, no trial court acting correctly could reasonably make."**

Counsel submitted that this was a proper case for this court to interfere with the findings of fact of the lower court.

In ground two, the appellant argued that:-

> **"The learned trial judge erred in both law and fact in holding that the terms and conditions of the warranty did not include the terms for rejection despite evidence having been adduced to show that the machine was not of merchantable quality."**

In developing this ground, the learned counsel for the appellant complained that the approach adopted by the trial Court was wrong, as the Judge should have addressed her mind to the fact that the goods were unmerchantable at the time of delivery and that the plaintiff was entitled to reject them. Instead, according to counsel, the learned Judge held at J8 that:-

> **"It is therefore my view that in this matter there is a binding contract for the supply of printers and the defendant accepted the printers, further there is a warranty in place to supply the parts, labour and transportation for the first three (3) months and the balance of nine (9) months for parts only and the history of this case shows that each time the printer developed a fault the plaintiff repaired it in accordance with the terms and conditions of the warranty which did not include the term for rejection."**

Citing **section 14(2) of the Sale of Goods Act, 1893**, counsel contended that on the evidence before the learned trial Judge there could not be any dispute that the goods subject of this action, were brought by description and that the respondent dealt in goods of that description. In his view, the sole question was whether the goods were of merchantable quality within the meaning of **section 14 (2) of the Sale of Goods Act, 1893**. He cited the case of **B S Brown & Sons Ltd v. Craiks Limited**[2] on the meaning of merchantability. He also referred to the case

of **Rodgers and Another v. Parish (Scarborough) Ltd & Another**[3] and further drew our attention to the learned authors of **Chitty on Contract**[1] to buttress two points namely that, the fact that the defect in the goods sold is capable of repair does not make the goods merchantable and; that examination of the goods would only exclude the implied condition as to merchantability in respect of defects which such examination ought to have revealed.

The learned counsel further argued that merchantability is not always tested by reference to a condition of the goods at the time of delivery. For this proposition, he called in aid the case of **Bernstein v. Pamson Motors (Golders Green) Limited**[4]. The burden of Mr. Lungu's argument is that the fact that the printer was installed and commissioned by the respondent and certified to be in good working order by the appellant, did not of itself signify acceptance that the goods were merchantable; the question of merchantability only arose after the respondent had delivered and installed the printer and the appellant became aware of the faults on the printer.

On a rather diffident note, the learned counsel submitted that the right of rejection and that of rescission were not the same and that the learned trial Judge had confused rejection and rescission. He continued by stating that the appellant had the right to reject the faulty printer but not rescinding the whole contract. He quoted a passage from the judgment of the Court of Appeal (Baron, J. A) in **Jaffco Limited v. Northern Motors Limited**[5] where it was stated of the rights of rejection and rescission, *inter alia*, that:

> **"…frequently the distinction is of no practical importance, and rejection of the goods will necessarily involve rescission of the contract…"**

Counsel ended his arguments on this ground by asserting that the appellant had the right to reject the faulty printer but by doing so, it was not rescinding the whole contract.

In the third ground of appeal, the appellant took issue with the finding by the trial Judge that four months from the date of delivery of the printer was not a reasonable time within which to return the printer. Counsel went on to define acceptance in the context of sale of goods and referred us to **Section 35 and 56** of

the **Sale of Goods Act 1893**. We observe in passing that the learned counsel made what we can only surmise to be erroneous reference to the Sale of Goods Act of 1843 on page 6 of his submissions and the Sale of Goods Act of 1853 on page 7 of his submissions. We are unaware of the existence of these Acts. Even assuming they did exist, they do not apply in this jurisdiction. We take it these are unintended slips on the part of counsel and the correct reference throughout was to the Sale of Goods Act of 1893 which is the only Sale of Goods Act that applies in this jurisdiction.

After quoting from Rougier J. in **Bernstain v. Pamson Motors**[4] the learned counsel submitted that the position in law as set out in Section 56 of the Sale of Goods Act, 1893 and as echoed by Rougier J. is that what was a reasonable time was a question to be determined on the particular facts of the case. Counsel then cited **Halsbury's Laws of England**[2] where it is stated that:-

> **"In determining what is a reasonable time for the rejection of the goods by the buyer, regard is had to the conduct of the seller, as where he has induced the buyer to prolong the trial of the goods, or has by his silence acquiesced in a further trial, or has threatened the buyer that any rejection will be treated as a breach of contract, or has negotiated with the buyer with**

> **a view to settling the buyer's claim, or has sought unsuccessfully to put the goods right."**

Counsel also referred to the Canadian case of **Public Utilities Commission of City of Waterloo v. Burrough Business Machines Ltd[6],** where a defective computer system was rejected by the buyer after eight months. The buyer, however, continued to use it for a further seven months while trying to make the computer work properly. The court held that the buyer could reject the goods after fifteen months since the goods were 'complex' and 'novel.'

In the fourth ground of appeal, the learned counsel submitted that the trial Judge misdirected herself in both law and fact in holding that the defendant had lost the right to reject the printer, despite evidence being adduced to show that the printer developed faults barely a month after installation and that it remained faulty despite it being repaired by the respondent.

Under this ground, the learned counsel argued that as the appellant had given the respondent time within which to remedy the faults on the printer, the appellant could not be deemed to have accepted the printer in the interval between installation and

intimation of rejection of the printers. The respondent made efforts to make good the defects on the printer to no avail. He found comfort for this proposition in the Canadian case of **Burroughs Business Machines Ltd v. Feed-Rite Mills**[7].

In riposte the learned counsel for the respondent equally made spirited submissions. On ground one, counsel denied that the learned trial Judge misdirected herself in the manner alleged by the appellant or at all. She asserted that the holding by the trial Judge was in accord with the evidence on record. Counsel referred us to the testimony of PW1, Raja Gopalan Khothandaraman, the Managing Director of the respondent company, on pages 81 to 86 of the Record of Appeal. She invited us to take cognizance of the installation report at page 50 of the Record of Appeal, which confirms that the printers were delivered and installed by the Respondent on 26 August, 2008 and certified to have been tested to the satisfaction of Mr. Constantino Chishimba, an employee of the appellant. She also referred to the letter at page 59 of the Record of Appeal as confirmation that the printer was extensively used and that heavy overloads caused such faults to the printer.

On page 59 of the Record of Appeal referred to us by counsel, is the letter dated 8th January, 2009 from Mr. Peter Viera, Director of Tally Genicom, the supplier to the respondent of the printers in question, to the Director of the appellant. Among other things, that letter states:-

> **"Heavy Duty printers may develop faults due to heavy workloads and hence there is a warranty procedure to back up such faults. In this instance we have gone through the Log Reports on the above mentioned printer and found that this unit had printed over 48,000 pages in the past couple of months prior to Tally Genicom's visit to your premises."**

The learned counsel then referred us to statistics of the characters printed by the printer which are at pages 90 and 91 of the Record of Appeal as confirmation that the printer was used extensively. Alive to the reality that she was dealing with issues of fact around this ground, the learned counsel quoted our statement in the case of the **Attorney General v. Marcus Achiume**[8] where we said:-

> **"The appeal court will not reverse findings of fact made by a trial judge unless it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were finding, on a proper view of the evidence, no trial court acting correctly can reasonably make… An unbalanced evaluation of the evidence, where only the flaws of our side but not of the other are considered, is a misdirection which no**

> **trial court should reasonably make, and entitles the appeal court to interfere."**

The learned counsel ended her submission on this point by reiterating that the learned trial Judge did not misdirect herself because her holding was supported by the evidence on record, and therefore, that there weren't sufficient reasons for this Court to interfere with the trial court's findings of fact.

On ground two, the learned counsel for the respondent argued that there was no misdirection on the part of the learned trial Judge in holding that the terms and conditions of the warranty did not include the term for rejection since the printer was being repaired in accordance with the terms and conditions of the warranty. She agreed with the learned counsel for the appellant that the goods supplied by the respondent had to comply with the implied condition as to merchantability in section 14 of the **Sale of Goods Act, 1893**. She also rightly referred us to the decision in **Grant v. Australian Knitting Mills**[9] where it was stated that:

> **"If goods have only one purpose, they are unmerchantable if they have defects rendering them unfit for that purpose."**

The learned counsel then took us through the evidence on record to show that prior to its developing a hammer voltage fault and before it was repaired on 18th September, 2008, the printer in issue had printed 3,209,186 characters. She referred us to the log sheet on page 52 of the Record and to the evidence of PW1, PW2 and DW1 which she said confirmed the extensive use of the printer. She further argued that the appellant had accepted and used the printer for its business and that the terms and condition of the sale did not include rejection. In the alternative, she argued, the implied condition of merchantability was excluded in terms of **section 14(2) of the Sale of Goods Act, 1893**; that the appellant had an opportunity to examine the printer when it used the printer three days before it developed a fault and could then have exercised its right to reject. The appellant instead, decided to use the printer after it was repaired and only claimed the printer was unmerchantable about the 4th of December, 2008. Furthermore, the parties had an independent agreement under which the respondent committed to repair the printer, and did in fact repair the printer, to the benefit of the appellant who used the printer thereafter.

Under ground three, the learned counsel for the respondent defended the learned trial Judge's finding that four months from the date of delivery was beyond a reasonable time within which to exercise the right to reject and return the printer. The learned counsel agreed with the principle set out in **section 35 of the Sale of Goods Act, 1893** and the decision in the case of **Bernstein v. Pamson Motors (Gold Green**) **Limited**[4] cited by the appellant's counsel, but maintained that four months was more than a reasonable time within which to reject; that 1 to 7 days would have been reasonable considering that the respondent needed to close its ledgers as soon as the transaction was done.

On ground four, which was in substance a repeat of ground three, the learned counsel for the respondent supported the decision of the learned trial Judge that the appellant had lost its right to reject the printer. She relied on a passage in **Jaffco Limited v. Northern Motors Limited**[5] to the effect that the right to reject is waived when conditional acceptance is made and the plaintiff's conduct in relation to the goods is inconsistent with the survival of the right of rejection**.** She then basically repeated

the point of the appellant having agreed to have the printer repaired after the initial fault and also having used the printer for its benefit after it was repaired. She distinguished this case from that of **Burroughs Business Machines Ltd[7],** which was cited by the learned counsel for the appellant on the basis that in the current case, the printer was repaired satisfactorily whereas in the **Burroughs Business Machines[7]** case, the seller struggled to make the computer function normally and the buyer did not benefit from the computer in question. In the present case, went on the learned counsel, the printer was repaired to the satisfaction of the appellant as per letters at pages 59 and 60 of the Record of Appeal. At page 59 of the Record of Appeal is the letter which we had referred to earlier from Mr. Peter Viera, Director of Tally Genicom addressed to the appellant's Director, stating among other things, that the Log Reports indicated that the printer had printed over 48,000 pages.

At page 60 is a letter dated 22nd January, 2009, from the appellant's Director to the respondent's Managing Director. The relevant paragraph reads:-

> **"While we appreciate that the heavy duty printer was worked on by your Training and Support Manager, we strongly feel**

> **that we should not keep the equipment with the full knowledge that it has been problematic from the word go. This being the case, you are advised to collect the equipment from our officer immediately."**

The learned counsel concluded her submission on this ground by urging us to apply the reasoning in **Jaffco Limited v. Northern Motors**[5] and hold that the appellant accepted the printer and used the printer in a manner inconsistent with the right to reject since it used the printer, repaired at the respondents cost, to print for its benefit some 48,000 pages.

The learned counsel for the appellant also filed in heads of argument in reply to the respondents' heads of argument. In his submissions in reply, the learned counsel did not cite further authorities but merely sought, we believe, to respond to the respondent's arguments and to contextualise by way of clarification, the evidence on record. He, however, brought up a new dimension to his submissions, namely, that although all the four printers were installed and commissioned on the 26th of August, 2008, by the evidence of DW1, one of the printers did not work satisfactorily after installation. The respondent's Managing Director then wrote the letter at page 53 of the Record, to the

appellant confirming that the 4th printer was installed and commissioned on 18th September,

2008. The letter at page 53 of the record reads in material parts as follows:-

> **"22nd September 2008**
>
> **Council Secretary**
> **Examinations Council of Zambia**
> **P O Box 50432**
> **Lusaka**
>
> **Kind attention Ms. M. V. Mwale**
>
> **Dear Madam**
>
> **Sub: delivery of 4 no. Tally Genicom T6218 Line Printers**
>
> **This is with reference to your Order no. 18151 towards supply of 4 no. Tally Genicom T6218 Line Printers at a total value of K187,234,370.00.**
>
> **We delivered 4 no. printers under Tax Invoice no. 3997 dated 22nd August, 2008, at a total sum of K187,234,370.00. Initially, we installed and commissioned 3 no. Line Printers and payment of K140,425,777.50 was received by us on 15th September, 2008.**
>
> **The 4th printer was also installed and commissioned on 18th September, 2008 and your IT staff have certified the same…**
>
> **Yours faithfully**
>
> **A K RAMAN**
> **MANAGING DIRECTOR"**

Counsel made the point that if all the printers were installed and were working properly on 26th August, 2008, there was no

need for the respondent to reinstall the faulty printer on 18th September, 2014. If the faulty printer, though delivered on the 26th of August, 2008 was reinstalled and commissioned on 18th September, 2008, the log reports cannot be a correct reflection of the printer's usage. He questioned the accuracy of the log reports if the printer was commissioned only on the 18th of September, 2008.

The learned counsel for the appellant then rebutted the contention by counsel for the respondent that the appellant had benefited from the use of the heavy duty printer, arguing that the evidence in the court below which was glossed over by the learned Judge, supports the position that between 26th August and 18th September, 2008, the faulty printer had not been in operation as alleged by the appellant.

We have paid the closest attention to the rival submissions of the parties as well as the authorities cited. In our view, the issues in this case gyrate around merchantability and the buyer's right to reject unmerchentable goods. The short questions which this Court is called upon to decide are, first, whether the printer, subject of this action, was of merchantable quality, and if it was not, whether all factors taken together the appellant had lost the

right to reject the printer. Second, whether the respondent is entitled to the reliefs sought in the Writ of Summons, namely, the purchase price for the printer, interest and any other compensatory relief.

We wish to begin by reiterating the long held position of this Court which has been restated in numerous cases, namely, that this Court will always be loathe to disturb or lightly interfere with finding of fact of the lower court. The plethora of authorities on this principle include the case of **William Masautso Zulu v. Avondale Housing Project Limited**[1], which was cited by the learned counsel for the appellant, and that of **Attorney General v. Marcus Achiume**[8] which was cited by the learned counsel for the respondent. In **Nkata and others v Attorney General**[10] we stated as follows:-

> **"A trial Judge sitting alone without a jury can only be reversed on questions of fact if (i) the Judge erred in accepting evidence, or (ii) the Judge erred in assessing and evaluating the evidence taking into account some matter which he should have ignored or failing to take into account something which he should have considered, or (iii) the Judge did not take proper advantage of having seen and heard the witnesses, (iv) external evidence demonstrated that the Judge erred in assessing manner and demeanor of witnesses."**

The same principle was repeated in **Zambia Revenue Authority v. Dorothy Mwanza and Others**[11]and in **Simwanza**

Namposhya v. Zambia State Insurance Corporation Limtied[12]. In **Zambia Revenue Authority v. Dorothy Mwanza and Others[11],** we held that:-

> **"… it is trite law that this Court will not interfere with findings of fact unless it is satisfied that the finding was either perverse or made in the absence of any relevant evidence or misapprehension of the facts or that the findings which, on a proper view of the evidence no trial court acting correctly and reasonably can make…"**

We are not unmindful at this stage, that what the learned counsel for the appellant is attacking in grounds 1 and 3 of this appeal are findings of fact as opposed to law. Both learned counsel were indeed alive to this reality as they gave us the reasons they thought we should interfere or not interfere with findings of fact.

For this Court to interfere with the learned trial Judge's finding of fact in ground one relating to extensive use of the printer in the period of four months following its installation, it was incumbent upon the appellant to show that the Court's findings of fact on this matter were either perverse, or made in the absence of any relevant evidence or on a misapprehension of the facts or that the findings are such that on a proper view of the evidence, no trial court acting reasonably can make them.

The learned counsel for the appellant referred us to J8 of the Judgment where the learned Judge found that the printer was used “extensively” for four (4) months. Mr. Lungu also referred us to page 62 of the Record of Appeal for what he says was the purported acknowledgment by the appellant’s Director of extensive use of the printer referred to by the trial Judge in the passage we have quoted in relation to ground one. The document at page 62 of the Record of Appeal is in fact, a letter dated 23rd December, 2008 from the Council Secretary of the appellant to the Managing Director of the respondent. We reproduce, for completeness, the material parts of the said letter.

“23rd January 2008

Mr. R. K. Raman
Managing Director
Reliance Technology Ltd.
P O Box 32158
LUSAKA

FAULTY TALLY GENICOM HEAVY DUTY PRINTER

Reference is made to your letter of even date.

You will no doubt agree that the heavy duty printer issue started giving problems right at installation and has continued to do so since. The printing done which you refer to as “extensive” was done with a lot of hurdles. The number of articles printed is insignificant considering our operations in terms of printing requirements and this is the reason why we ordered Heavy Duty Printers.

Please note that ECZ had given an undertaking to pay for all the 4 printers ordered but only AFTER satisfactory performance of the equipment has paid for 3 printers whose performance has been satisfactory from installation. The one printer not paid for was found to be faulty at installation stage.

Please be advised that the issue here is the faulty machine and not the payment. ECZ Management will not knowingly spend Government Funds on anything that is so obviously faulty. The printer, is therefore returned to yourselves. Please contact our lawyers, Shamwana & Company at the address given below for any further issues you may wish to discuss on this matter.

M. V. Mwale
COUNCIL SECRETARY
EXAMINATIONS COUNCIL OF ZAMBIA

cc. Mr. S.N. Lungu
Shamwana & Company
Box 32369
LUSAKA"

We note that this letter is not from the appellant's Director, but the appellant's Council Secretary. A perusal of the Record of Appeal reveals that there are only two letters which were authored by the appellant's Director; one dated 4th December, 2008, and the other 22nd January, 2009. They appear at pages 56 and 60 of the Record of Appeal. In the first of these letters, the appellant's Director complained that one of the heavy duty printers of the four supplied was installed and tested, but was not in good working condition; that the printer had continued to give problems even after it was worked on and some spares replaced

by the respondent's engineers. He indicates the intention of the appellant to return the printer to the respondent.

In the letter of 22nd January, 2009, the Director of the appellant once again intimated rejection of the computer in the terms we quoted at J18 of this Judgment. It also appears from the record that although there was initial intimation that the Director of the appellant would be called as a witness, he was in fact never called to testify.

We do not see from the evidence on record that there was any acknowledgment by the appellant's Director of extensive use of the printer over four months as stated by the learned Judge below at J8 of her Judgment. To that extent, we would agree with Mr. Lungu that acknowledgement of extensive use by the appellant's Director which was specifically mentioned by the learned trial Judge in her Judgment, is not apparent from any document before the Court below authored by the appellant's Director. The evidence on record, both documentary and *viva voce* from the point of view of the appellant, suggest the contrary position. However, the matter does not end there. As submitted by the learned counsel for the respondent, the respondent at trial also adduced evidence to buttress the view that the printer in

question was put to extensive use. The log reports (page 52 of the Record of Appeal); the letter from the respondent to the appellant dated 8th December, 2008 (at page 57 of the Record of Appeal), the letter dated 8th January, 2009 from the Director of Tally Genicom to the appellant's Director (page 59 of the Record of Appeal), the letter dated 23rd January, 2009 from the respondent's Managing Director to the appellant's Director (page 61 of the Record of Appeal) and the evidence of PW1 and PW2 (page 81 to 89 of the Record of Appeal), all seem to suggest that the printer in question was put to extensive use. What is unclear to us, at any rate, is why in view of evidence from the respondent confirming extensive use of the printer, the learned trial Judge rather than allude to this evidence to ground her finding on extensive use of the printer, opted to wrongly cite the appellant's Director as having acknowledged extensive use of the printer. In **Attorney General v. Kakoma**[13] we stated that:

> **"A court is entitled to make findings of fact where the parties advance directly conflicting stories and the court must make those findings on the evidence before it and having seen and heard the witnesses giving that evidence."**

It is apparent that the learned Judge in the court below did not apply herself to the question of evaluating the conflicting evidence before her and making findings of fact on that evidence.

This was a misdirection. We would on this score alone, be inclined to agree with the appellant's counsel that this is a proper case for this court to interfere with the findings of the lower court and review the facts and the evidence. To this extent only, this ground succeeds. However, whether or not we interfere with the findings of fact by the trial Judge on this ground would not address the issue of merchantability, which we stated at the outset, was at the heart of this appeal. In other words, whether we agree with the appellant that there was no evidence from the appellant of acknowledgment of extensive use of the printer, or agree with the respondent that there is evidence of extensive use of the printer by the appellant, will leave unanswered the first issue we have identified as being at the epicenter of this dispute, namely, whether the printer was or was not merchantable. We shall revert to this point later.

In regard to the second ground of appeal that the learned trial Judge erred by holding that the terms and conditions of the warranty did not include the term for rejection, we have perused the contract documents that were before the trial court as regards the warranty. They show that there is mention of the warranty in the Purchase Order No. 18151 at page 47 of the Record of Appeal. There is also reference to warranty in the Tax Invoice dated 22 August, 2008 at page 48 of the Record of Appeal as well as in the Installation Report at page 50 of the Record of Appeal. In the Purchase Order aforesaid, it is indicated that the "price includes 2 years warranty and installation." In the Tax Invoice there is equally reference to some warranty in the following terms:-

> "**All items remain the property of Reliance Technology Limited until paid for in full. It will be the responsibility of the customer to safe keep and insure the items till payment is made in full.**
>
> **All items supplied carry the respective manufacturers' warranty as per the standard terms and conditions of such Warranties."**

In the Installation Report, there is something said about the warranty as follows:

> **"1. Warranty does not cover damage caused to any product through abuse or misuse of the equipment for the purpose for which it is not intended**

2. **Warranty does not cover damage of equipment due to abnormal power input**

3. **Warranty automatically becomes void, if the equipment is serviced by persons not authorized by Reliance Technology Limited.**

4. **Warranty does not include maintenance of equipment for which the user has to enter into a maintenance contract with Reliance Technology Limited."**

In the letter dated, 8th December, 2008 from the respondent's Customer Support Manager to the appellant's Director, the warranty was extended "for a further period of 6 months from August 2009."

In the evidence of PW1 Raja Gopalan Khothandaraman at page 82 of the record, the Judge recorded(sic)

> **"that the tax invoice on p2 warranty normally as per manufacturers is three months plus parts, labour and transportation for the first nine months parts only total 12 months for the manufacturer."**

In the evidence of PW2 at page 86 the following was recorded by the trial Judge from the answers in cross examination.

> **"I have not brought the warranty to court for one year. Price includes two years warranty."**

These are all the references to the warranty that we see from the Record of Appeal. The precise terms and conditions of the Warranty, other than as set out in the Installation Report which we have quoted above, if they exist at all, are not part of the Record of Appeal. It is a reasonable inference to make therefore that no such terms and conditions exist. Clearly, there was no term for rejection in the terms and conditions of the warranty on record. The issue is however much deeper than is stated in the argument, because whether the warranty did or did not include a term for rejection is in our estimation, irrelevant in considering the question of the merchantability of the printer. This is the aspect we now consider.

We agree with both counsel that the transaction involved here was one of sale of goods and is therefore governed by the **Sale of Goods Act of England of 1893.** Section 14 of that Act so far as is material provides as follows:-

> **"14 Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:-**
>
> **.....**
>
> **(2) where goods are bought by description form a seller who deals in goods of that description (whether he**

> **be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed;**
>
> **.....**
>
> **(4) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."**

Merchantability and fitness for purpose are essentially factual issues and much will depend on the circumstances.

From the evidence available on record, it is discernable that the respondent is a dealer in various types of equipment including printers of the kind supplied to the appellant even though it is not the manufacturer of the printers sold to the appellant. It is also evident that the printers were sold by description as evidenced by the Local Purchase Order No. 18151 at page 47 of the Record of Appeal and the Tax Invoice at page 48 of the Record of Appeal. They were described as "heavy duty Tally Genicom T62T8 Line Matrix Printer as per attached specifications." We are satisfied that as the printers in question were sold by a dealer in goods of that description and words were used to describe the printers, the sale was one by description and fell neatly within **section 14(2)**

of the **Sale of Goods Act**, which we have quoted above. This means that there was an implied condition that the printers were of merchantable quality save for defects which could be discoverable upon examination of the printers by the appellant. The description of the printers implied that the printers were capable of undertaking heavy duty printing jobs. Deficiencies which might be accepted in a light duty printer put to heavy duty use were not expected in one purchased for heavy duty printing. The description 'heavy duty' conjured up a particular sense of expectation in the buyer not the same as would be prompted in the purchase of an ordinary printer. There is a strict duty to provide goods which are of merchantable quality and which are reasonably fit for the purpose for which they were being sold. In **Grant v. Australian Knitting Mills Ltd[9],** Dixon J. at page 418 provided useful guidance as to the meaning of the term merchantable quality as follows:-

> **"The goods should be in such a state that the buyer, fully acquainted with the facts, and therefore knowing what hidden defects and not being limited to their apparent condition would buy them without abatement of the price obtainable for such goods if in reasonable sound order and without special terms."**

We agree with the surfeit of authorities that have determined merchantability within the context of sale of goods, including the observations made by the court in **B S Brown & Sons Limited v. Craiks Limited**[2] as quoted by the learned counsel for the appellant in his submissions. Goods are said to be of merchantable quality if they are fit for the purpose for which goods of that kind are commonly bought.

With these factors in mind, can it be contended with any degree of comfort in the present case that the printer in question as delivered was as fit for the purpose as the appellant could reasonably expect? Was the printer merchantable within the intendment of section 14 (2) of the Sale of Goods Act? In our judgment, the point does not admit of elaborate discussion. We can only state that the recurrence of faults on, and breakdowns of, the printer the existence of which are not in dispute, clearly demand a negative answer. The defects that plagued the printer from inception had seriously compromised its functional character.

We hold, therefore, that the printer was not merchantable. We further hold that the appellant as buyer was entitled to

exercise the primary remedy available to it when there is a breach of a condition, namely, to reject the printer as provided for in **section 11(2) of the Sale of Goods Act**.

We now turn to consider whether the absence of a term in the warranty conditions precludes the appellant from exercising the right to reject the printer as held by the learned Judge in the Court *a quo*.

We find the provisions of section 14 (4) of the Sale of Goods Act inarguably clear and answers the question. That section provides that:

> **"An express warranty or condition does not negative a warranty or condition implied by this Act, unless inconstant therewith."**

The implied condition as to merchantability as well as the right of rejection are legal rather than contractual matters. They needed not be provided for in the warranty. For the avoidance of doubt, the exercise of a buyer's right to reject unmerchantable goods, under section 14 (2) of the Sale of Goods Act, is not dependent on the existence of a provision in the contract of sale allowing the buyer to reject the goods. Conversely, the absence of a term in

the contract of sale allowing a buyer to reject unmerchantable goods, does not bar the buyer from exercising his right of rejection. It was therefore a misdirection on the part of the learned Judge below to hold that merely because the warranty did not provide for rejection, the appellant had no right to reject the unmerchantable printer. Ground two of the appeal succeeds.

As we have intimated elsewhere in this Judgment, we will consider the arguments on grounds three and four together for the reason we have given.

Evidence on record indicates that when the four printers were delivered and installed at the appellant's premises on the 26th of August, 2008, there was certification by the appellant's representative, a Mr. Constantino Chishimba, that the printers were in good working condition. This certification is set out in the Installation Report at page 50 of the Record of Appeal in the following terms:-

> **"The above configurations is installed successfully and completely tested to our satisfaction."**

We can comfortably surmise that prior to the certification as aforesaid by Mr. Chishimba on behalf of the appellant, an

examination of the printers, including of the one that turned out to be faulty, was conducted. The question we have to ask is whether the examination undertaken could trigger the proviso to section 14 (2). In other words, did the examination conducted on the printers such as to negative the implied condition as regards the defects on the one printer?

Where the buyer examines the goods, he will not be protected as regards defects which 'that examination' ought to have revealed. Thus, in **Thornett & Ferr v. Beer & Sons**[14], a buyer of glue carried out an examination of the outside of the barrels of glue. The seller had given the buyer an opportunity for a more thorough examination of the outside of the glue but the buyer did not take it. Had the buyer carried out a thorough examination by looking inside the barrels, the defect in the glue complained of would have been discovered. The court held that the proviso applied and no condition of merchantability applied in the circumstances.

In **Wren v. Holts**[15] on the other hand, arsenic in beer was a defect not discoverable on examination by the buyer. The court held that the condition of merchantability was not excluded by

any examination of the goods. The seller was liable. See also **Chitty on Contracts**[1].

Counsel for the appellant argued that the defects in the printer could not have been discovered during the installation and commissioning of the printer and therefore, that the proviso in section 14(2) is not applicable. We agree with this contention. There is no evidence that the examination conducted at installation and commissioning of the printer could have revealed a faulty hammer voltage driver, hammer bank and the main control board. The examination would have to take a serious mechanical and electric stripping of the printer to discover those faults. The implied condition as to merchantability and not the proviso to section 14 (2) was therefore applicable to this sale.

In **Crowther v. Shannon Motors Co.**[16], it was held that goods should be merchantable at the time of the sale, but the fact that goods deteriorate soon after the purchase may be evidence that they were not of merchantable quality at the time of sale.

In **Rogers et al v. Parish (Scarborogh) Limited**[17], which was quoted by the learned counsel for the appellant in his

submissions, Sir Edward Eveleigh, dealing with the issue of merchantability of a motor vehicle, noted at page 947 that:-

> **"Whether or not a vehicle is of merchantable quality is not determined by asking merely if it will go. One asks whether in the condition in which it was on delivery it was fit for use as a motor vehicle of its kind. The fact that the plaintiff is entitled to have remedial work done on the warranty does not make it fit for its purpose at the time of delivery."**

We find these authorities sufficiently persuasive. Having had the printer delivered and installed at its premises on 26th August, 2008, the appellant only first intimated rejection of the faulty printer in the appellant's Director's letter to the respondent on 4th December, 2008. Two subsidiary questions arise: first, did the letter constitute effective rejection? The second is the question whether by reason of keeping the printer for four months the appellant had accepted the goods within the meaning of section 14(2) and thereby lost the right of rejection. Could the letter of the appellant to the respondent of the 4th of December, 2008, qualify as a rejection of the goods? In **Grimoldy v. Wells**[18] Brett J. said as regards the mode of rejection that:-

> **"The buyer may in fact return the goods or offer to return them, but it is sufficient, I think, and the more usual course to signify his rejection of them by stating that the goods are not according to contract, and that they are at the vendor's risk.**

> **No particular form is essential. It is sufficient if he does any unequivocal act showing that he rejects them."**

It is clear to us that the intimation contained in the appellant's letter of 7th December addressed to the respondent seller constituted a sufficient act of rejection of the goods.

Section 35 of the Sale of Goods Act, however, requires that any rejection of the goods should be done within a reasonable time. It states as follows:

> **"the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains them without intimating to the seller that he has rejected them."**

It has been canvassed on behalf of the appellant that the finding of the learned judge in the court below that the period August 26 to December 8, 2008 – a period of nearly four months, was beyond a reasonable time within which to exercise the right of rejection.

Section 55 of the Sale of Goods Act provides that what is a reasonable time is a question of fact. This is to be determined from all the circumstances of the case. In this particular case, the efforts made to bring the printer into good working order should inevitably be taken into account in considering the reasonableness of the period

within which rejection was intimated by the appellant. We take full note and accept of the guidance given by the learned authors of **Halsbury's Laws of England**[2] as quoted at J11 of this Judgment as cited by the learned counsel for the appellant in his submissions. Counsel for the respondent supported the learned trial Judge's finding that four months was too long a period to have allowed to elapse before the right to reject was exercised. We do not accept this contention. Given that what was involved here was a piece of equipment as complex as a heavy duty printer, the process of discovering or confirming its non-compliance with the implied condition of merchantability could not be expected to be an overnight affair.

In **Bernstein v. Pamson Motors (Golders Green) Ltd**[4] it was held that although the buyer does not reject the goods at the first sign of trouble, but tries to have the matter put right, he should not be debarred from rescinding the contract as long as he is not deemed to have accepted the goods, a car in that particular case.

In **Scholfield v. Emerson Brantingham Implements**[19], which involved the sale of a motor vehicle, it was held that a representation by the seller that the vehicle would be all right in time, or if not, then

the seller would make it right, extends the time for rejection. Similarly, in **Findlay v. Metro Toyota**[20], where a buyer retained possession of a vehicle for six months giving the seller every opportunity to correct the defects in it and attempting to use it for the purpose for which it was bought, the right to reject the goods for breach of fundamental term was held not to be lost.

Taking into account the nature of the goods involved in this case and the assurances made by the respondent to rectify the anomalies on the printer as well as efforts made in that direction by the respondent, we do not think that a period of four months is beyond a reasonable time within which to reject the printer. In so concluding, we are properly persuaded by the authorities in *consimili casu,* which we have alluded to.

The learned counsel for the appellant argued that the learned trial Judge gave unduly too much weight to the fact that the defects in the printer were capable of repair and that the respondent had in some measure been able to repair the subject printer.

Counsel for the respondent retorted that by allowing the respondent to repair the printer after the defects were discovered and using the printer to do some printing works which the respondent's

counsel maintained was substantial, entailed the loss of the right to reject the printer.

We do not accept the respondent's arguments in this vein. We are of the firm view that the fact that the defects in the printer may have been repaired by respondent at its expense under a warranty neither made the printer merchantable nor eliminate the appellant's right to reject it. We accept and adopt the holding of the Court of Appeal in **Lee v. York Coach and Marine**[21]. It will be recalled that in that case, the buyer of a defective car did not reject the car outright but spent six months attempting to have it repaired and to have the garage fix it. It was held that the fact that a defect is repairable does not prevent it from making the *res vendita* unmerchantable if it is of a sufficient degree. The defective brakes in that case, could be repaired for £100 as against the purchase price of £355.

Scrutton L. J. in **Fisher, Reeves and Co. v. Armour & Co.**[22], while acknowledging that a buyer should exercise his right to reject within a reasonably short space of time once the defect comes to his attention stated that, he is however, entitled during that time **"to make inquiries as to the commercial possibilities in order to decide what**

to do on learning for the first time of the breach of condition which would entitled him to reject."

Grounds three and four of the appeal equally succeed.

The net result of our decision is that the respondent's claim is dismissed. The Judgment of the lower Court is set aside. The appellant is entitled to reject the defective printer and not to pay the purchase price for the said printer. We note that the appellant made no counterclaim of any sort in the lower court.

Costs to the appellant to be taxed in default of agreement.

.....
M.S. Mwanamwambwa
ACTING DEPUTY CHIEF JUSTICE

....
A.M. Wood M. Malila, SC
SUPREME COURT JUDGE **SUPREME COURT JUDGE**