

**IN THE SUPREME COURT FOR ZAMBIA**

**APPEAL NO. 54 OF 2015**

**AT THE PRINCIPAL REGISTRY**

**HOLDEN AT KABWE**

**(Civil Jurisdiction)**

**BETWEEN:**

**CROWN PARTS AND MACHINES INC**

**APPELLANT**

**AND**

**KONKOLA COPPER MINES PLC**

**RESPONDENT**

**Coram : Mambilima CJ, Malila and Mutuna, JJS**

**On 7th November 2017 and 21st November 2017**

**For the Appellant : Mr. F. Chalenga of Messrs Freddie and Company**

**For the Respondent : Mr. E.C. Banda SC and Mr. T. Chibeleka of Messrs ECB Legal Practitioners**

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## **J U D G M E N T**

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Mutuna JS., delivered the judgment of the court.

Cases referred to:

- 1) Rudnap (Zambia) Limited v Spynon Enterprises Limited (1976) ZR

- 2) **Koni v The Attorney General SCZ judgment No. 19 of 1990**
- 3) **Robins v National Trust Company (1972) AC 515**
- 4) **Joseph Constantine Steamship Line Limited v Imperial Smelling Corporation (1942) AC 154**
- 5) **Nkhata and four others v The Attorney General (1966) ZR 126**
- 6) **AMI Zambia Limited v Peggy Chibuye SCZ Judgment No. 8 of 1999**
- 7) **Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172**
- 8) **Shreeji Investments Limited v Zambia National Commercial Bank SCZ Judgment No. 2 of 2015**
- 9) **Teddy Puta v Abindwire Friday SCZ judgment No. 43 of 2017**

Legislation referred to:

- 1) ***The Authentication of Documents Act, Cap 75***

Other Works referred to:

- 1) **Furnston, Michael, Cheshire, Fitfoot and Furnston's Law of Contract, Oxford University Press, 2012**

This is an appeal against the ruling of the Learned Deputy Registrar on assessment of damages in terms of which he dismissed the Appellant's claim for damages to be assessed in the sum of USD304,038.96, in respect of spare parts for mining equipment allegedly supplied to the Respondent by the Appellant.

The backdrop to the appeal is that the Appellant, on divers dates, supplied various spare parts to the Respondent for its mining equipment. A dispute arose as to the quantities supplied and amounts owing to the Appellant by the Respondent, prompting the Appellant to commence an action against the Respondent in the court below. The Appellant claimed for: payment of the sum of USD324,348.13 being an amount allegedly outstanding on invoices for spare parts delivered; and the sum of USD245,542.00 being the cost of manufacture of spare parts ordered by the Respondent which parts it has not taken delivery of.

Prior to the trial being held, the parties executed a consent order in the following terms:

- 1) The parties agree that the issue for determination in the cause was the amount due to the Appellant, if any, arising from the sale to the Respondent of various goods.**
- 2) That for a determination to be made as aforementioned an inquiry or assessment had to be conducted into the amount or orders raised**

by the Respondent, the amount of goods supplied and delivered, the orders raised and goods not delivered, goods rejected and returned to the Appellant and the amount paid by the Respondent.

- 3) That it is ordered that the determination or assessment of the aforementioned issues be and is hereby referred to the Deputy Director Court Operations, Kitwe.
- 4) The Deputy Director Court Operations, Kitwe upon such determination is at liberty to enter judgment as he deems appropriate.
- 5) The Appellant's claim for USD245,542.00 in respect of goods ordered but not shipped will if not resolved by the parties in 30 days from the date hereof be referred back to the court for determination.

After the parties executed the consent order, the Appellant proceeded to file a summon and supporting affidavit for assessment of damages before the Learned Deputy Registrar. The Respondent's response was by way of an affidavit in opposition and a consolidated bundle of documents.

The evidence in the affidavit in support, by and large, contained details of spare parts allegedly delivered to the

Respondent by the Appellant and their costs. It also set out the supporting documents for the deliveries.

In response, the affidavit evidence led by the Respondent denied the Appellant's claim by contending that the spare parts were either not received or were rejected and returned to the Appellant. The evidence also contended that the Appellant actually removed the spare parts that were rejected by the Respondent from its custody. It revealed further that the Respondent had paid for the spare parts it retained.

The *viva voce* evidence led by the parties did not significantly depart from the affidavit evidence. The only departure was the revelation that a number of the exhibits relied upon by the Appellant had been expunged from the record because they were not authenticated in accordance with section 3 of ***The Authentication of Documents Act***.

The Learned Deputy Registrar considered the evidence and arguments presented and found that the burden of proving the claim rested with the Appellant. He went on to state that the Respondent had contended that some of the spare parts were delivered and later returned to the Appellant whilst others were not delivered at all. Further, those that were delivered were paid for. He surmised that, if this were the position, the Appellant's claim would be unsubstantiated and went on to analyse the claims under two heads as follows:

***1) Delivered items but allegedly returned to the Appellant.***

Under this head, the Learned Deputy Registrar analysed the evidence and found that on a balance of probabilities, spare parts worth USD218,515.98 were returned to the Appellant. The basis of his finding was the evidence of Mr. Katontoka for the Respondent which he found to be credible and well corroborated by documentary evidence. He also found that the affidavit evidence revealed that there was an admission by the Appellant that some of the spare parts were rejected by the Respondent.

***2) Goods allegedly delivered and not paid for.***

Under this head, the Learned Deputy Registrar considered the fate of the remainder of the spare parts worth USD105,832.15 by initially making the following observations: the evidential burden

of proof only shifts to a defendant if a plaintiff has in the first place discharged the burden of proving that the spare parts were delivered (reference was made to the principle in the case of *Rudnap (Zambia) Limited v Spynon Enterprises Limited*<sup>1</sup>); the defendant has no obligation to prove that he paid for spare parts if the plaintiff does not prove that he supplied them; in order for a plaintiff to succeed in a claim for special loss he must table before the court evidence that proves his case with sufficient clarity and certainty; and, therefore, a claim for special loss must be supported by documents or independent evidence (reference was made to the case of *Koni v The Attorney General*<sup>2</sup>). After making the foregoing observation, the Learned Deputy Registrar then analysed the evidence led by the Appellant and found that some of the documents the Appellant relied upon in proving its claim had been expunged from the record. He also found that in modern day business transactions, tax invoices are a preferred mode of concluding transactions and found that some of the documents sought to be relied upon by the Appellant to prove delivery were not conclusive. Further, that if the Appellant had produced documentary evidence such as packing lists and stamped invoices it would have proved the contention that the spare parts were delivered. He went on to find that the delivery of the spare parts to DHL does not, in and of itself, prove that the transaction was concluded because it was still subject to verification of the spare parts delivered and rejection or acceptance of the spare parts after the said verification.

The Learned Deputy Registrar concluded that he found the explanation given by the Respondent more plausible

than that given by the Appellant. He went on to state that despite the parties having executed a consent order in respect of the sum of USD 304,038.96, it was still incumbent upon the Appellant to prove its claim on assessment. He accordingly dismissed the Appellant's claim with costs.

The foregoing decision has aggrieved the Appellant prompting it to launch this appeal on three grounds as follows:

- 1) **The Learned Honorable Deputy Registrar erred in law and fact when he ruled that the goods of a total value of USD218,515.98 were returned to the [Appellant] by the [Respondent] when there was no shred of evidence that the [Appellant] received and/or collected the said rejected goods.**
- 2) **The Learned Honorable Deputy Registrar erred in law and fact when he ruled that one Mr. Musonda Z collected the goods on behalf of the [Appellant] when the said Mr. Musonda Z was never called to testify to such allegation between the [Appellant] and the [Respondent].**
- 3) **The Learned Honorable Deputy Registrar erred in law and fact when he ruled that the computer printout from the [Respondent's] system was sufficient exoneration that goods making a balance of USD105,832.15 were paid for by the [Respondent].**

Prior to the hearing, the parties filed heads of argument which they relied upon. Counsel for the Respondent augmented the heads of argument with *viva voce* arguments.

Under ground 1, counsel for the Appellant set out the finding by the Learned Deputy Registrar in respect of the spare parts allegedly delivered by the Appellant and subsequently returned by the Respondent. Counsel then identified the issue for determination as being whether or not the spare parts delivered were actually returned to the Appellant. The issue that counsel took with the findings by the Learned Deputy Registrar was the fact that he concluded that the spare parts were returned to the Appellant's representative, one, Mr. Musonda Z. According to counsel, the said Mr. Musonda Z. was not an agent of the Appellant and neither did he have apparent authority to act as such agent. He, in this regard, drew our attention

to the Learned authors ***Cheshire, Fitfoot and Furnston's Law of Contract***. Counsel argued further that the said Mr. Musonda Z. was a stranger to the transaction between the two parties and in any event had not been called by the Respondent to testify before the Learned Deputy Registrar to the effect that he did indeed receive the rejected spare parts on behalf of the Appellant.

The other limb of counsel's argument was that he questioned the weight the Learned Deputy Registrar placed on the documentary evidence produced by the Respondent in disproving the Appellant's case. He, in this regard, engaged in an exercise of reviewing the documents relied upon by the Respondent and discrediting them.

In regard to ground 2, counsel for the Appellant questioned the finding of fact made by the Learned Deputy Registrar that the Respondent returned some of the spare part delivered to the Appellant via a Mr. Musonda Z. In

doing so, he advanced arguments on agency law and restated the argument advanced under ground 1 that Mr. Musonda Z. had no authority to act on behalf of the Appellant. Counsel also questioned the court's finding in respect of the competing demeanors of the two witnesses presented by the two parties, that is to say, Mr. F. Tembo by the Appellant and Mr. Katontoka by the Respondent.

Under ground 3 counsel read out passages from findings made by the Learned Deputy Registrar in relation to the balance of the Appellant's claim in the sum of USD105,832.15 in which he reminded himself that the Respondent had no obligation to prove that it had paid for the spare parts delivered in the absence of the Appellant discharging its burden of proving that it had delivered the spare parts. The Learned Deputy Registrar also analysed the various documents relied upon by the two parties and found, in relation to those relied upon by the Appellant,

that they did not conclusively prove its case. He accordingly dismissed the Appellant's claim. He also made findings of fact in relation to the documents relied upon by the Respondent to the effect that they proved the contention by the Respondent in regard to payments it made and the cancelation of some orders. Commenting on the foregoing findings, counsel argued that this was the wrong approach to take because there was an obligation placed upon the Respondent, as the one asserting that the spare parts were not delivered, to prove the assertion. Counsel criticised the fact that after the Learned Deputy Registrar found that the Appellant had failed to prove its case, he went on to consider whether the Respondent had successfully disapproved the Appellant's case. He, in this regard, argued that the negative is more difficult to prove than the positive and suggested that the Learned Deputy Registrar had placed a higher burden on the Appellant of

proving the deliveries than the burden on the Respondent of proving that it had paid for the goods delivered and rejected some of the others. Our attention in this regard was drawn to the cases of ***Robins v National Trust Co.***<sup>3</sup>, ***Joseph Constantine Steamship Line Limited v Imperial Smelling Corporation***<sup>4</sup> and ***Rudnap (Zambia) Limited v Spyron Enterprises Limited***<sup>1</sup>. Counsel concluded by making an analysis of the documents produced by the two parties before the Learned Deputy Registrar by criticising those produced by the Respondent and contending that the Appellant's documents were more credible.

We were urged to allow the appeal.

In response to the arguments advanced under ground 1, counsel for the Respondent made lengthy arguments which substantially tackled two issues. The first being that this court has, on a number of occasions, pronounced itself

on when it will reverse findings of fact. They recited passages from our judgments in the cases of ***Nkhata and Four others v The Attorney General***<sup>5</sup>, ***AMI Zambia Limited v Peggy Chibuye***<sup>6</sup> and ***Wilson Masauso Zulu v Avondale Housing Project Limited***<sup>7</sup>. The view taken by counsel was that when one considers the findings of fact made by the Learned Deputy Registrar in their entirety, it is clear that he was on firm ground and the findings were, therefore, not wrong nor did they meet the threshold we set in the three cases referred to warranting their reversal.

The second issue counsel addressed related to the trial court's examination of the demeanors of the witnesses presented by the two parties. They argued that we have on a number of occasions made it clear that it is only a trial court that has the opportunity of examining the demeanor of witnesses. We were referred to our decisions in the cases of ***Shreeji Investments Limited v Zambia National***

**Commercial Bank Plc<sup>8</sup>**. They argued that the portion of the ruling of the Learned Deputy Registrar which the Appellant was challenging is a finding made in respect of the demeanor of the witnesses. This court, it was argued, does not have an opportunity of examining demeanors of witnesses and as such, there is no basis upon which we can impeach the finding made by the Learned Deputy Registrar.

Counsel concluded by stating that the onus of proving the case lay with the Appellant and that it did not discharge the said onus, hence the dismissal of the claim.

In regard to ground 2 of the appeal, counsel's arguments, were on the finding made by the Learned Deputy Registrar that Mr. Musonda Z. collected the rejected spare parts on behalf of the Appellant. It was argued that in arriving at the finding, the Learned Deputy Registrar examined the evidence in its totality and not

isolated pieces of it, as contended by the Appellant. In this regard, the Learned Deputy Registrar found that the contention made by Mr. Katontoka was corroborated. Counsel outlined the basis of the foregoing which he contended justified the finding made by the Learned Deputy Registrar especially that he had the added advantages of seeing the witnesses.

In ground 3 of the appeal, like in the other two grounds, counsel set out the portions of the findings by Learned Deputy Registrar which the Appellant was challenging. They went on to argue that the Learned Deputy Registrar was on firm ground in making the said findings in view of the documentary and *viva voce* evidence presented before him. Counsel concluded by restating that the onus of proof lay with the Appellant and that it failed to discharge it.

In the *viva voce* arguments, counsel for the Respondent, Mr. T. Chibeleka, re-iterated that although the appeal hinged on findings of fact the Appellant had not alleged that the finding by the Learned Deputy Registrar met the threshold for reversal.

We were urged to dismiss the appeal.

We have considered the record of appeal, the ruling which is the subject of the appeal and indeed the arguments presented by counsel. What is evident from the aforementioned arguments is that in seeking to impeach the decision of the Learned Deputy Registrar, the Appellant is challenging findings of fact; findings in respect of the demeanor of the witnesses; and the evaluation of documentary evidence and credibility of some documents presented by the Respondent.

In regard to the Appellant's challenge of the findings of fact, as counsel for the Respondent has (quite) rightly argued, these findings can only be set aside if they meet the threshold we restated in the case of ***Wilson Masauso Zulu v Avondale Housing Project Limited***<sup>7</sup>, that such finding must be perverse or made in the absence of any relevant evidence or upon misapprehension of fact. This is what the Appellant is required to prove if we are to reverse the findings of fact that it is challenging.

On the other hand in relation to findings on the demeanor or credibility of the witnesses, Ngulube, CJ (as then was) put the matter in its proper context in the case of ***AMI Zambia Limited v Peggy Chibuye***, thus:

"The Supreme Court has evolved and constantly affirmed some definite principle when it comes to reversing a trial court's findings of fact, especially those based on credibility. Not having had the advantage of seeing and hearing the witnesses at first hand which the trial court has, we do not lightly interfere. Unless it unmistakably appears that the trial court fell into error and could

**not have taken proper advantage of seeing and hearing the witnesses first hand."**

This, therefore, is the threshold that the Appellant should meet if we are to reverse the findings on demeanor. It must, in other words, give us a justifiable excuse for reversing the Learned Deputy Registrar's findings in this regard. We also hasten to add that the Learned Deputy Registrar was on firm ground when he assessed the demeanors of the two witnesses in view of the conflicting evidence. This position is reinforced by our decision in the case of ***Teddy Puta v Ambidwire Friday***<sup>9</sup> where Malila JS said in part, that in cases where evidence is in contest, it is essential that the judge observes the witnesses' demeanor.

Lastly, regarding the challenge to the evaluation of the documentary evidence made by the Learned Deputy Registrar, in particular as it relates to the credibility of such documentary evidence, we must state that it is not our task, as an appellate court, to determine the credibility

or authenticity of documentary evidence. This is done at the trial stage either at discovery or when a party raises objection prior to or at the hearing of a matter. To this end, the record of appeal reveals that the Respondent raised such a challenge in respect of documents marked exhibit FT1 to FT5 to the affidavit in support of summons for assessment on the grounds of their non compliance with the law on authentication of foreign documents. The Appellant was equally free to challenge the authenticity of the Respondent's documents it took issue with prior to or at the hearing of the assessment.

Having put the challenges raised by the Appellant in their proper perspective we now turn to consider the grounds of appeal as presented.

Ground 1 attacks the finding by the Learned Deputy Registrar that spare parts valued at USD218,515.98 were returned to the Appellant by the Respondent. The

contention being that there was no shred of evidence led by the Respondent to show that the Appellant received or collected the said spare parts. Our starting point is that we have observed and noted that there is no contention by the Appellant that the said finding was perverse or made in the absence of any relevant evidence or upon a misapprehension of facts. These, as we have stated, are the only grounds upon which a finding of fact can be reversed. Be that as it may we shall still tackle the contention.

The Learned Deputy Registrar in making the finding of fact complained of stated as follow:

**"Placing reliance on exhibit DK 10 - "KCM Exit Permit" and exhibit DK 11 - "Goods Returned to Supplier Advice Note" allegedly signed by Mr. Musonda Z, it is the defendant's contention that goods identified and described in the said exhibit, initially delivered by the plaintiff to the defendant worth USD218,515.98 were returned to the plaintiff because there was no supporting orders. On a balance of probabilities, I find it probable that goods items described in exhibit DK 10 were returned to the plaintiff."**

From the foregoing extract one can ascertain that, what swayed the Learned Deputy Registrar were the documents "*KCM exit permit*" and "*goods returned to supplier advice notes*." A perusal of these documents clearly indicates that the Respondent returned a number of items to the Appellant. The view we take is that there was no misapprehension of the evidence by the Learned Deputy Registrar nor was the finding perverse because, presented with such documents, that is the only logical conclusion a tribunal is bound to make. Further, his finding in this regard was complemented by the evidence of Mr. Katontoka (for the Respondent) which revealed that he spoke to Mr. Tembo (for the Appellant) of the rejection of the goods following which Mr. Musonda Z. collected the goods. Before accepting the said evidence the Learned Deputy Registrar examined the demeanors of the two witnesses and concluded that there was no reason to doubt the testimony

of Mr. Katontoka especially that it was corroborated by documentary evidence. The Appellant has not challenged this finding on demeanor in line with the threshold we set in the case of **AMI Zambia Limited** case. Consequently we cannot disturb the finding.

In view of what we have stated in the preceding paragraphs we are of the firm view that ground 1 has no merit.

Ground 2 challenges the finding by the Learned Deputy Registrar that Mr. Musonda Z. collected the returned goods on behalf of the Appellant.

In our consideration of ground 1 of the appeal, we partially dealt with the issue raised in ground 2. We say this because the finding by the Learned Deputy Registrar which is under challenge in this ground was made at the time he was assessing the demeanor of Mr. Katontoka

against that of Mr. F. Tembo which, as we have said, he was entitled to do. The finding that Mr. Musonda Z. collected the rejected spare parts on behalf of the Appellant was made at this stage as we have demonstrated under ground 1 of the appeal. It follows, therefore, that the Appellant having failed to impeach the finding on demeanor, this ground of appeal is also bereft of merit.

The last ground of appeal questions the finding by the Learned Deputy Registrar that the computer print out from the Respondent's system was sufficient evidence to prove that spare parts valued at USD105,832.15 were paid for.

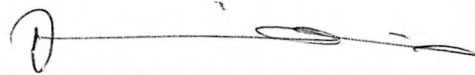
The findings made by the Learned Deputy Registrar in respect of this ground of appeal were findings of fact. Once again in seeking to impeach these findings, the Appellant has not contended nor proved that they meet the threshold we restated in the three cases referred to in the earlier part of this judgment, and as such, amenable to reversal.

Further, in making the said finding, the Learned Deputy Registrar was confronted by two sets of competing documentary evidence. On the one hand, the Appellant relied on documents marked exhibit "FT6" and "FT7" to the affidavit in support whilst the Respondent relied upon documents marked exhibits "DK1" to "DK9" to the affidavit in opposition. After examining the two sets of documents, the Learned Deputy Registrar found that *"exhibits marked FT6 and FT7 and other documents relied on [were] not conclusive to place the court in a clear picture as to what was exactly delivered ..."* In other words, the documents were unclear as to what spare parts they related to. We have examined the documents in issue and are just as at sea as the Learned Deputy Registrar was because there is no proper description of the spare parts delivered by the Appellant, quantities or indeed their values. We, as a result, can not fault the Learned Deputy Registrar for

arriving at the finding he made. On the other hand, the exhibits "DK1" to "DK9" which are titled "*review purchase order*" and relied upon by the Respondent are more specific as to what they relate to and in respect of the values, quantifies and status as to payment.

Ground 3 is, therefore, also lacking in merit.

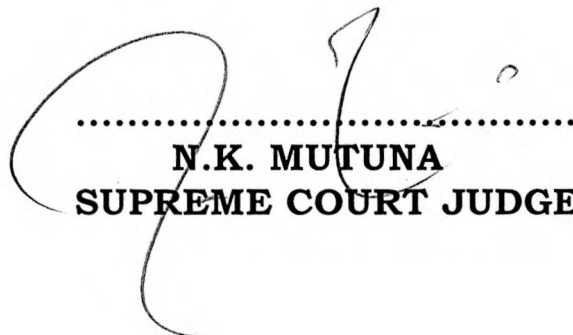
Having found that all three grounds of appeal are unmeritorious, the fate of this appeal is that it is doomed to fail and we dismiss it in its entirety, with costs. The same are to be taxed in default of agreement.



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**I.C. MAMBILIMA**  
**CHIEF JUSTICE**



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**Dr. M. MALILA, SC**  
**SUPREME COURT JUDGE**



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**N.K. MUTUNA**  
**SUPREME COURT JUDGE**