IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT KABWE
(Civil Jurisdiction)

APPEAL No. 47/2016
SCZ/8/334/2015

BETWEEN:

ATLANTIC BAKERY LIMITED **APPELLANT**

AND

ZESCO LIMITED **RESPONDENT**

Coram: **Hamaundu, Malila and Mutuna, JJS**
On 6th November, 2018 and 20th December, 2018

For the Appellant: Mr. K. Chenda, Messrs Simeza, Sangwa & Associates

For the Respondent: Mr. A. P. Mulenga, In-house Legal Officer, ZESCO

JUDGMENT

MALILA, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Shilling Bob Zinka v. Attorney-General (1990-92) ZR 73.*
2. *Attorney-General v. Marcas Achiume (1983) ZR 1.*
3. *Examinations Council of Zambia v. Reliance Technology Limited (2014) (3) ZR 171.*

Legislations referred to:

1. *Electricity Act, chapter 433 of the laws of Zambia*
2. *Zambia Electricity Supply Act, chapter 813 of the laws of Zambia*
3. *Electricity Act (Amendment) Act No. 21 of 2003*
4. *Government Gazette Notice No. 232 of 1990*

At all material times, the appellant ran a bakery business in the Emmasdale Area of Lusaka. The respondent is the dominant and in a sense a monopolistic public utility firm with a network infrastructure for generation (including in some cases the exclusive right to import), transmission and distribution of electricity for households and industrial use in Zambia.

The dispute that has escalated to this court, arose from a power supply agreement numbered 1094955 made sometime in 2000 between the appellant, as a consumer and the respondent, as the supplier of electricity. That disagreement started when the appellant raised some concern regarding the increase in the value of the invoices that it was receiving for electricity consumed in its bakery operations. The appellant formed the view that the bills were inflated and were thus not a true reflection of the power consumed by it.

Following some complaints made by the appellant to the respondent regarding this state of affairs, the respondent sent its employee to attend to the appellant's protestation. What the appellant did not at that stage realise was that its complaint about the seemingly inflated electricity bills would further compound its electricity billing position and lead to a complete withdraw of electricity supply to its premises by the respondent.

Subsequent to the visit to the appellant's premises by the respondent's agent or employee, the respondent alleged that the appellant had tampered with the electricity supply metering equipment at its premises in such a manner as to make the meter underread the actual electricity consumed by the appellant, thus resulting in a huge loss of billable kilowatts of electricity on the part of the respondent.

The respondent disconnected power to the appellant's premises and ultimately demanded a payment of the sum of K213,398,664.95, representing what it considered was the value of the lost kilowatts of electricity up to August 2007. Over and above that sum, the respondent also charged the appellant an

additional K1,750,951.19 which it called a fraud charge for the alleged meter equipment tampering. According to the appellant, its request that the respondent provides an account for the sum demanded, was not heeded by the respondent.

The appellant claims that although it was convinced that the respondent's invoice of K213,398,664.95 was unjustified and extortionate, it settled the bill nonetheless under protest in order to mitigate its business losses. This followed a letter of demand from the respondent's advocates. Electricity to the appellant's business premises, which had been disconnected on 31st August, 2007, was not, however, reconnected following the payment. This prompted the appellant to seek and obtain an *ex-parte* injunction on 17th October, 2007 restraining the respondent from withholding power supply to the appellant's premises. That *ex-parte* injunction was subsequently confirmed following an *inter-partes* hearing on 6th September, 2013.

Meanwhile, on 18th September, 2007, the respondent served on the appellant yet another invoice (No. 204738321) reflecting power consumption by the appellant of 109831 Kwh

for the period 1st August, 2007 to 1st September, 2007. The billed amount was K14,928,494.42. The appellant objected, pointing out that in its judgment, the invoice tendered was a replica of the earlier invoice No. 203745141 which the appellant had settled on 29th August, 2007. The appellant received no response.

According to the appellant, repeated requests were made to the respondent to justify the charge of K213, 398,664.95 but to no avail. It is these developments that motivated the appellant to issue originating process in the lower court claiming:

(a) *a declaration that the respondent refunds the monies paid in excess of the actual consumption by the appellant;*

(b) *a declaration that the respondent's invoice No. 204738321 was a duplication of its earlier invoice No. 203745141;*

(c) *a declaration that the respondent's decision to charge the appellant the sum of K213,398,664.95 was arbitrary and contrary to section 7 of the Electricity Act, chapter 433 of the laws of Zambia;*

(d) *an order that the respondent renders an account of the sum of K213,398,664.95 charged to the appellant on invoice No. 204597941 as August, 2007 bill;*

(e) *an order of specific performance of agreement No. 1094955 between the appellant and the respondent for the supply of electricity;*

(f) an order of injunction restraining the respondent and its agents or employees from disconnecting the supply of electricity to the appellant's premises on the basis of the dispute invoice No. 204738321;

(g) damages for breach of contract, interest and costs.

The respondent's reaction to all these claims by the appellant was one of emphatic denial. Its position was that it discovered that the appellant had tampered with the supply meter for electricity and thus proceeded to disconnect electricity supply to the appellant's premises. Before doing so, a meter test was done which assisted the respondent to come up with the total sum of K213,398,664.95, being the re-billed sum together with K1,750,951.19 being a fraud billing charge for the tampering by the appellant of the metering equipment.

The respondent maintains that payment of its electricity invoices and any fraud charge is no guarantee for its continuation of electricity supply services. It denied all other claims and allegations made by the appellant and, or alternatively justified its actions by reference to the tampering of the electricity meter which it attributed to the appellant.

After hearing the parties and examining the evidence deployed before him, the learned High Court judge dismissed the appellant's claim in its entirety, holding that there was no evidence from the appellant specifying the amount paid in excess of the actual consumption and that, in any case, the appellant did not challenge the amount demanded by the respondent.

As regards the issue of the allegedly duplicated August, 2007 bill, the learned judge treated the matter as factual and preferred the respondent's evidence over that of the appellant, holding that there was no such duplication.

The learned judge also declined to grant the declaration sought by the appellant that the respondent's decision to charge the plaintiff the sum of K213,398,664.95 was contrary to section 7 of the Electricity Act. He held that the respondent was justified to rebill the appellant using a realistic estimate of electricity consumed following the fraudulent activity of the appellant through its agent or employees, of tampering with the metering apparatus.

The judge dismissed the appellant's prayer for an order that the respondent renders an account for the sum of K213,398,664.95 on the ground that the appellant had not protested, either in writing or otherwise, about this matter; the only complaint it made being that the respondent was taking too long to reconnect the power supply after the payment.

On the issue of specific performance of the power supply contract, the learned judge held that it was a clear understanding of the parties that the appellant was to be supplied with electricity for as long as it paid for its electricity consumption and did not tamper with the respondent's meter. The judge also entered judgment against the appellant in the sum of K14,928,494.42, representing the outstanding amount for the September, 2007 bill. As we point out later on in this judgment, the learned judge, also treated this amount as damages awardable to the respondent for the appellant's breach of the undertaking as to damages set out in the injunction which, as we have stated already, had been granted against the respondent.

On the appellant's prayer that the respondent fully compensates it for damage suffered as a result of the disconnection of power supply to the appellant's premises, the learned judge held that the respondent was justified to disconnect power supply in view of the appellant's action of tampering with the metering equipment. Any business losses incurred, according to the judge, was self-inflicted and the appellant could thus not claim any relief under that head.

With respect to the appellant's prayer for an injunction against the respondent for the latter not to interfere or discontinue the supply of electricity to the appellant's premises on the basis of the disputed invoice No. 20473821, the learned judge reiterated his finding that there was no duplication of invoices. He accordingly re-echoed his holding that the sum of K14,928,492.42 was due to the respondent. He discharged the interlocutory injunction the court had granted on 13th June, 2012. The judge's conclusion was that the appellant had come to equity with soiled hands. He declined all the other relief that the appellant had sought.

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Unhappy with the High Court judgment, the appellant appealed, fronting five grounds as follows:

1. *The learned trial judge misdirected himself in law and in fact when he found that the respondent acted within permissible grounds of law in line with section 7(2) of the Electricity Act to do an estimate based on scientific and expert evaluation of the meter.*

2. *The learned trial judge misdirected himself in law and in fact when he found that the respondent did not need to render a detailed account of how it arrived at the sum of K213,398,664.95 because the payment was made by the appellant to the respondent without protest in writing or otherwise.*

3. *The learned trial judge misdirected himself in law and in fact when he found that the appellant had not proved breach of contract against the weight of evidence on record.*

4. *The learned trial judge misdirected himself in law and in fact when he found that the loss of business suffered by the appellant arising from the disconnection of electricity supply by the respondent was entirely the appellant's fault and as such it was the appellant who was in breach of contract.*

5. *The learned trial judge in the lower court erred in law and in fact when he awarded the respondent the sum of K14,928,494.42 (unrebased) which was not pleaded as a counter-claim by the respondent.*

The appellant filed its heads of argument. At the hearing of the appeal, Mr. Chenda, learned counsel for the appellant, intimated that he was placing absolute reliance on those heads of argument. The respondent too, filed its heads of argument and Mr. Mulenga, learned counsel for the respondent, confirmed his reliance on those heads.

As regards ground one of the appeal, it was contended on behalf of the appellant, that the lower court fell into grave error in coming to the conclusion that the respondent was justified to make an estimate based on what the court regarded as scientific evidence and expert evaluation of the meter and citing section 7(2) of the Electricity Act as justifications for this. The court purportedly quoted this section verbatim as follows:

> *"Provided that if for any cause it has not been possible to read for any cause, or where a meter has not been installed the corporation shall estimate the time consumed in the previous three months due allowance being made at the corporation's discretion for seasoned or other charges in the consumption or use of electricity on those premises or the locality."*

The learned counsel for the appellant made a technical argument, namely that the provision purportedly quoted by the learned judge, that is to say, section 7(2) of the Electricity Act, does not, in fact, exist. Consequently, the interpretation of the law and its application to findings of fact which the learned judge made, were erroneous. Counsel suggested that perhaps the correct provision which the court may have intended to cite is section 7 of the Electricity Act which enacts that:

> *"Subject to section eight, the charge made by an operator of an undertaking that supplies electricity to the public shall be determined in accordance with the license governing the undertaking."*

The foregoing being the case, Mr. Chenda argued that section 7 formed the basis upon which the appellant premised its claim for a declaration that the respondent's decision to charge the appellant K213,398,664.95 was contrary to the Electricity Act. The holding by the court that the respondent had demonstrated that its estimates of the disputed billed amount were based on scientific and expert evaluation of the meter, anchored as it was, in a non-existent provision of the law, was misconceived. We were thus urged to uphold ground one of the appeal.

In reacting to the appellant's arguments regarding ground one of the appeal, counsel for the respondent contended that the provision allowing the respondent's action is found in the Zambia Electricity Supply by-laws (the ZESCO by-laws) made pursuant to section 5 of the Zambia Electricity Supply Act, chapter 813 of the laws of Zambia and published in Government Gazette Notice as No. 232 of 1990 and are still in force. Those provisions do empower the respondent, where it is not possible to read the meter for any cause, to estimate the consumption by reference to average electricity consumption by the affected consumer in the previous months.

Mr. Mulenga submitted that although the lower court did cite a wrong Act in its judgment, the respondent had in its submission made reference to section 7(2) of the by-laws to support its action regarding the estimated value of the appellant's electricity consumption. Counsel termed the citing of a wrong statute by the lower court as a 'clerical error which does not go to the root of the matter and the judgment ought to be amended under the slip rule.' Counsel urged us to dismiss ground one of the appeal.

We have considered the parties' respective positions on this ground. The substance of the appellant's argument is that the trial judge quoted and based his holding on a non-existent provision. The question is whether this affects the legal soundness of the conclusions that the judge arrived at.

At the hearing of the appeal, we sought clarification from Mr. Mulenga on a number of issues. This was in view of his claim that what the respondent alluded to in the lower court was not section 7(2) of the Electricity Act – which does not exist – but which the lower court nonetheless appeared to have quoted. The respondent instead claimed to have referred to the Zambia Electricity Supply by-laws. We asked Mr. Mulenga to show us where, in the record of appeal, the respondent is recorded to have referred the lower court to those by-laws of 1990, made under the Zambia Electricity Supply Act, chapter 813 of the laws of Zambia. He was unable to do so. At first, Mr. Mulenga graciously stated that he has never seen those by-laws. Later, he contended that he had seen them and that they are still valid and applicable.

We also asked Mr. Mulenga whether, given that the current edition of the laws is 1995 with all the subsidiary legislation appearing as regulations in the schedules to the Act, the said 1990 by-laws are still applicable. He maintained that they were applicable. Beyond that statement, Mr. Mulenga did not develop the argument on the validity and continued application of the by-laws.

We have addressed our minds to the issue of the provision of section 7(2) of the Electricity Act, chapter 433 of the laws of Zambia, purportedly quoted by the learned trial judge and upon which he based his finding that the respondent was justified to estimate the actual electricity consumed by the appellant during the relevant period. A perusal of the Electricity Act as amended by the Electricity Act No. 21 of 2003, does indeed confirm Mr. Chenda's submission that the learned judge did refer to a non-existent provision, namely the purported section 7(2) of the Electricity Act. Section 7 of the Electricity Act has no subsection and appears as quoted by Mr. Chenda in his submissions as we have earlier reproduced it. What compounds the misdirection is that the learned judge even purported to quote verbatim in his

judgment a section that does not exist. Not only that, he refers to the same section repeatedly in his judgment.

We have also examined Government Gazette Notice No. 232 of 2nd March, 1990 in which the Zambia Electricity Supply by-laws 1990 made pursuant to the Zambia Electricity Supply Act, chapter 813 of the 1971 edition of laws of Zambia, were promulgated. The non-existent provision which was quoted by the learned judge below as being in section 7(2) of the Electricity Act, chapter 433 of the laws of Zambia, in fact, mirrors clause 7(1) of the 1990 by-laws. What is worth noting is that under section 31 of the Electricity Act, chapter 433 of the laws of Zambia, the Zambia Electricity Supply Act, chapter 813 of the laws of Zambia (1971 edition) was repealed and replaced.

If it could, however, be demonstrated that the 1990 by-laws still subsist and are applicable, the mere fact that there was an erroneous reference as to the law in which the power to make the applicable subsidiary legislation resides, would not necessarily be fatal to the respondent's position. In the case of *Shilling Bob Zinka v. Attorney-General*[1], this court held that regulations

promulgated under incorrectly cited legislation did not invalidate the regulations if those regulations could in fact be made under another existing statutory provision.

Here, we would be inclined to accept that if the power to make an informed assessment of billable electricity where a meter reading could not be relied upon or was unavailable, was vested in the respondent by some enabling legislation or regulation, it would be immaterial that a wrong provision or Act was cited.

However, the Zambia Electricity Supply Act, chapter 813 of the (1971) edition of the laws of Zambia pursuant to which the said by-laws were passed was, as we have already pointed out, repealed by section 31 of the Electricity Act, chapter 433 of the current (1995) edition of the laws of Zambia.

In terms of section 5 of the repealed Zambia Electricity Supply Act, the Zambia Electricity Supply Corporation (ZESCO) is specifically empowered to make by-laws, subject to approval by the Minister. It was under that provision that Electricity Supply by-laws 1990 were made.

In terms of section 30 of the existing Act, i.e. the Electricity Act, it is the Minister who is empowered to make regulations for the better carrying out of the provisions of the Act, and has in this regard, by Statutory Instrument made numerous regulations. Subsidiary legislation made on various aspect of the Electricity Act are appended to the Act.

We are not unmindful of the provisions of section 15 of the Interpretation and General Provisions Act, chapter 2 of the laws of Zambia, which allows for continuation of subsidiary legislation made under repealed legislation. The section provides that:

> *Where any Act, Applied Act or Ordinance or part thereof is repealed, any statutory instrument issued under or made in virtue thereof shall remain in force, so far as it is inconsistent with the repealing written law, until it has been repealed by a statutory instrument issued or made under the provisions of such repealing written law, and shall be deemed for all purposes to have been thereunder.*

The test then becomes one of whether the by-laws of 1990 were expressly repealed by a statutory instrument issued by the Minister under the Electricity Act, or whether they are otherwise inconsistent with the Electricity Act. This is the argument that we would have expected Mr. Mulenga to have developed and

driven home to our satisfaction. As we lamented earlier on, he did not do so. Unsurprisingly, given Mr. Chenda's line of argument on this point, he did not come anywhere close to pursuing this argument either.

What appears clear to us is that the Electricity Act does not, in fact, empower any electricity generating and supplying company to make by-laws, and indeed the whole Act does not make reference to by laws. This in itself does not, however, mean that the by-laws of 1990 are inconsistent with the Act. Furthermore, a review of the regulations made under the Electricity Act does not show any single provision that revokes or repeals the 1990 by-laws. In these circumstances, we are inclined to agree with the learned counsel for the respondent that the 1990 by-laws are still valid and applicable. The respondent's reliance on them to make an estimate of the power consumed was thus justified.

Ground one of the appeal is therefore bound to fail and we dismiss it accordingly.

Under ground two of the appeal, the appellant's contention is effectively that the learned High Court judge misdirected himself when he found that the respondent did not need to render an account of how it arrived at the sum of K213,398,664.95 because the payment was made by the appellant without any protest either in writing or otherwise.

Counsel submitted that the evidence on record shows to the contrary, that the appellant paid under protest as it had on the 19th September, 2007 requested the respondent for a breakdown of how the sum of K213,398,664.95 for the appellant's August, 2007 account was arrived at. The demand for a breakdown of that sum was, according to counsel for the appellant, made long before the court proceedings commenced. Electricity was disconnected without warning resulting in huge loses being incurred by the appellant in its bakery business. In these circumstances, the appellant was forced to pay the sum demanded by the respondent in the hope that the respondent would forthwith restore power.

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We were in this connection referred to two letters dated 11th September and 19th September, 2007 respectively from the appellant's lawyers to the Legal Counsel and the Managing Director respectively, of the respondent. The first of these letters stated in part that:

> *"Your Commercial Manager had expressly undertaken to reconnect supply within 5 minutes of our client settling the K213,398,664.95 demanded of him on account of fines, penalties etc. which payments we assume atoned for all the wrongs allegedly committed by our client. It was in fact on the strength of this undertaking by your Commercial Manager that our client agreed to settle the money demanded without questioning how you arrived at the assessment..."*

The later letter states in part:

> *"We also are instructed to demand a breakdown of how you arrived at the sum of K213,398,664.95 billed to our client purportedly as the August, 2007 bill which our client has nonetheless settled. This amount appears to have been arrived at arbitrarily by your Commercial Manager and is over and above the actual consumption and fraud charges slapped on our client."*

Counsel called our attention to some items of evidence given in the lower court appearing in the record of appeal with a view to showing that the business position of the appellant was dire; that the appellant in truth only had a Hobson's choice regarding

paying the sum demanded by the appellant, and that there was in fact no scientific method employed in coming up with the K213,398,664.95 declared as due. The court, therefore, misdirected itself in determining that the appellant accepted without protest to pay the said sum. Ground two should, accordingly to counsel, succeed.

The respondent reacted to the arguments under ground two by maintaining that the lower court was right to hold that the K213,398,664.95 was paid by the appellant to the respondent without protest on its part or through trickery on the respondent's part. It was submitted that an audit of the meter was done by the respondent at the appellant's premises which confirmed a considerable reduction in the appellant's power consumption by two thirds. In these circumstances, the respondent had the option of either prosecuting the appellant or rebilling it. The latter course was taken after both parties agreed. The process of rebilling involved an estimate of an average cost of K14,000.00 per month for 15 months. According to the respondent, this charge was not arbitrary but was based on

comparative data of actual consumption reached using the charges approved by the regulator.

The learned counsel then quoted section 7 of the ZESCO by-laws of 1990 which we have earlier referred to. His conclusion was that the respondent was right to make the assessment of the consumption of power by the appellant. We were urged to dismiss ground two of the appeal.

In our estimation, the question under this ground of appeal is whether there was, in the first place, any need to render an account; if yes, whether such account was rendered. If not rendered, whether the reason for failure to render it was legally justified.

Whether or not the respondent was obliged to justify its bill when called upon to do so is, in our view, a question which goes beyond mere contractual or statutory provisions applicable to the two parties. We are here dealing with a government owned, strong, sector dominant body on one hand and a weak and vulnerable consumer on the other hand. This is a reality which this court cannot ignore in its quest to do justice to the parties.

Public utility institutions such as the respondent, which provide what is, in all respects a monopoly service, ought to be above board in determining their charges and in their dealing with consumers generally. We take judicial notice that the respondent is a parastatal body, government-own. Being a monopoly institution backed by statute – the respondent enjoys a significant measure of advantages fashioned for its protection. The respondent's conduct should therefore fall along a continuum of transparency and responsibility to individuals and society – the whole electricity consuming public – deriving from its parastatal and proprietary functions. The monopoly position of the respondent in itself makes the consumer vulnerable. Additionally the many statutory safeguards in the Electricity Act designed to ensure the smooth provision by the respondent of its services, coupled with the provisions meant to deal with errant consumers of electricity supplied by the respondent, puts the respondent firm in a position of near absolute privilege. In these circumstances, it is not too much to ask of an entity occupying market dominance in the manner that the respondent does, to be responsive to individual customers, and accord a smidgen of

respect to electricity consumers no matter how insignificant such customers may appear to be.

Although the learned judge in the court below held that the payment of K213,398,664.95 was done without protest on the part of the appellant, the facts on record reveal quite the opposite. On 11th September 2007, a letter was written by Messrs Simeza Sangwa & Associates on behalf of the appellant, explaining the basis upon which the payment was made by the appellant of the K213,398,664.95. On 19th September, 2007, the appellant through a letter, again written on its behalf by its advocates, did request the respondent to provide a breakdown of how it arrived at the disputed figure of K213,398,664.95. We have already reproduced portions of those letters earlier on in this judgment.

The appellant's explanation, as we decipher it from the record, particularly from the two letters we have lately referred to, was that payment of the amount demanded was forced upon it. In consideration of its business interests, and in order to mitigate its losses, it made the said payment on the understanding that power would be restored immediately after

effecting the payment. The learned judge does not appear to have taken this into account, adopting instead the approach that the appellant's conduct justified the respondent's action.

Clearly, the holding by the lower court that the appellant willingly paid the sum of K213,398,664.95 is contrary to the evidence on record. It is a finding which finds no support in the evidence deployed before the court and just as little in logic. The respondent demanded an explanation of the sum of K213,398,664.95. The respondent should have given an account of how it came up with that sum.

The respondent also charged the appellant a sum of K1,750,951.19 which it termed as a fraud charge. At the hearing of the appeal, we asked Mr. Mulenga to explain the legal basis for this fine or penalty. He was unable to do so and in fact gracefully conceded that there was no legal provision sanctioning such penalty though it was imposed by the respondent as a deterrence measure.

While the respondent is entitled under section 9(b) of the Electricity Act to discontinue the provision of services to a consumer who breaches the conditions upon which power is supplied, it is not for the respondent to arbitrarily impose punitive measures over and above what is owed to it for services already provided. Under Part IV of the Electricity Act there are criminal sanctions prescribed for interference with electricity supply and for tampering with the suppliers apparatus. They do not include arbitrary charges such as the one imposed on the appellant by the respondent.

It is thus not in the domain of the respondent to mete out punishment or charge fines for any breach of contract or transgression of the provisions of the Electricity Act. There is an orderly way of redressing any contractual or statutory violation of obligation by a consumer. If an entity is allowed to charge penalties without any statutory backing there is a real danger for that entity to introduce arbitrariness extravagance and unconsciousability and to pass on the cost of its inefficiencies to the consumer under the guise of penalties.

Ground two has merit, and it is upheld accordingly. The respondent is ordered to render a satisfactory account of how it arrived at the sum of K 213,398,664.95 within thirty days from the date hereof failing which it should refund the said sum to the appellant.

The fraud charge of K1,750,951.19 should never have been imposed in the first place. We shall under ground three and four deal with the appellant's claim that it was not involved in meter tampering. Whether or not the appellant is right in its explanation, the charging of a fine or penalty which is not backed by the law, was illegal. The respondent is hereby ordered to refund the money paid to the appellant as a penalty of fraud charge forthwith. The appellant shall, unless some other acceptable arrangement for crediting the appellant with the said amount is agreed, be entitled to recover same as a liquidated civil debt.

Turning to grounds three and four of the appeal, the appellant's argument was that had the learned trial judge properly directed himself, he would, on the evidence available, not have held that the appellant had not proved a breach of

contract by the respondent, and that he would likewise not have concluded that the appellant's loss of business was entirely of the appellant's own making.

The learned counsel went to considerable lengths to explain what a breach of contract entails before submitting that the respondent was in breach of its obligation to supply electricity when it did not reconnect power supply to the appellant's premises following the settlement by the appellant of the invoices presented to it. It was not, according to counsel for the appellant, the appellant who was in breach of contract but rather the respondent. He quoted section 9 of the Electricity Act which enacts as follows:

> *"Except for causes beyond the control of the operator of an undertaking, and subject to any regulations made under this Act, no operator shall lessen or discontinue the supply of electricity stipulated in any contract of supply unless:-*
>
> *(a) the consumer has failed to pay charges lawfully due in terms of the conditions of supply or the agreement, as the case may be; or*

(b) *the consumer has failed to comply with conditions of supply or the regulations and failed to remedy the default within seven days of receiving, from the operator of the undertaking, a notice served on the consumer in accordance with section twenty-nine calling upon the consumer to do so."*

Mr. Chenda submitted that the import of this provision is that a supplier is only entitled to discontinue supply where the charge is lawfully due but has not been paid. In the present case the charge of K 213,398,554.95 was arbitrary and unlawful and could not form the basis of discontinuance of supply of electricity to the appellant.

Mr. Chenda also advanced the argument regarding compliance following a notice of default. The gist of his argument was that the Electricity Act allows a supplier of electricity to discontinue electricity supply where there is failure to comply with the conditions of supply and the consumer has failed to remedy the default within seven days of receiving the notice. In the present case, the appellant disconnected power supply on the day it issued the notice to the appellant.

Mr. Chenda then sought to show that available evidence did not confirm any meter tampering on the part of the appellant. He stressed that the respondent did not lead any cogent evidence to show that the appellant had in fact tampered with the meter.

The respondent's response to the arguments on grounds three and four was rather brief and to the point. First, it was submitted that the respondent had tendered into the trial court evidence confirming that the meter at the appellant's premises was running in reverse as a result of a clear instance of meter tampering. The appellant agreed to have his account re-billed rather than be prosecuted. When the appellant was served with the September, 2007 bill (No. 204738321) amounting to K14,928,494.42, he refused to settle it, leading to the disconnection of power supply at his premises.

Counsel for the respondent quoted section 7 of the Electricity Act, which we earlier reproduced in this judgment. He also quoted clause 5(2) of the ZESCO by-laws of 1990 which reads as follows:

"The corporation may without prejudice to any right or action or other remedy open to it, disconnect the supply to a customer's premises on a number of events which in particular section 5(2)(f) include tampering or interference of any of the plant or apparatus belong to the corporation's network."

The learned counsel furthermore referred us to section 9(3)(iv) of the Electricity Act which prohibits consumers from altering, adjusting, handling, operating, tampering or interfering with the property of the undertaker. For the respondent, this provision, together with the others referred to, interpreted in the light of the evidence of tampering with the metering equipment, meant that the respondent was aptly justified in its actions.

We have no misgivings whatsoever in holding that grounds three and four have no merit. The finding by the lower court that the appellant had tampered with the metering apparatus was one of fact. We have stated time and again that this court, as an appellate court, is loathe to disturb findings of fact made by a trial court which had the privilege of hearing and seeing the witnesses first hand and making a credibility assessment. The cases of *Attorney-General v. Marcas Achiume*[2] and *Examinations council of Zambia v. Reliance Technology Limited*[3] are authority for that position.

There was no attempt, not even a feeble one, on the part of the appellant's learned counsel in arguing this ground, to demonstrate that the findings of fact by the trial judge were perverse and not borne out of the evidence adduced, or were so glaring in their defiance of logic that a trial court, properly directing its mind to the evidence could not have made those findings. Above all, there is admission by the appellant that there was tampering of the metering equipment which resulted in the meter under-reading the power consumed. Such tampering amounts to a breach of the power supply contract which entitles the respondent to discontinue forthwith (without notice) the power supply service under section 9(2) of the Electricity Act and the 1990 by-laws.

As the respondent was entitled to discontinue the power supply service on grounds set forth above, it follows that losses arising from such disconnection should lie where they fall. The claim for compensation was thus rightly rejected. Ground 3 and 4 have no merit and they are dismissed accordingly

Under ground five of the appeal, the appellant's grievance was with regard to the sum of K14,928,494.42 awarded by the lower court judge to the respondent. It was contended by Mr. Chenda that it was wrong for the lower court to have awarded this sum to the respondent when the same was not claimed by the appellant in its defence and counter claim.

In its response, the respondent submits that one of the appellant's claim in its statement of claim was that the September, 2007 bill was a replica of the August bill hence the appellant's refusal to pay it. However, the evidence on record shows that the two bills related to two different billing cycles and therefore, the said amount remained outstanding as a debt owed to the respondent.

The respondent further submitted that it was unable to secure payment of that sum because of the injunction which was obtained by the appellant. Under that injunction the appellant had made an undertaking to pay damages in the event that the respondent suffered any damage as a consequence of the injunction.

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The learned trial judge dealt with the issue of the K14,928,492.42 in a somewhat confusing manner. He considered this amount as representing the September 2007 bill which he held was not a duplication of the August 2007 bill. He further found that this amount could not be recovered owing to the injunction which the appellant had secured against the respondent. Under that injunction, the appellant had made an undertaking as to damages. The court concluded that:

> *The plaintiff having undertaken to pay all such damages as the defendant may suffer because of the injunction, I hold and find that the defendant has suffered the loss of the said ..... and I enter judgment in the sum of K 14,928,494.42 with interest at short bank term deposit rate from the date of the September 2007 bill up to the date of the judgment debt thereafter interest to run up to date of payment.* [sic!]

Probably motivated by the zeal to stymie delay that would result by insisting that the respondent should make a specific claim for what it regards as outstanding in respect of the September 2017 bill, the learned judge made an order which violates a fundamental rule of civil procedure, namely that evidence can only be considered where a plea which that evidence supports has been put forward in the pleadings. A court

is not to decide on an issue which has not been pleaded. Put differently, a court should confine its decision to the questions raised in the pleadings. It can thus not grant relief which is not claimed. Litigation is for the parties; not the court. The court has no business extending or expanding the boundaries of litigation beyond the scope defined by the parties in their pleadings. In other words, a court has no jurisdiction to set up a different or new case for the parties.

We agree with Mr. Chenda that by taking this somewhat proactive approach in regard to the sum of K 14,928,494.42, the judge fell into error. As pointed out by the appellant's learned counsel, the respondent did not claim this sum in its counter claim although the natural implication of the finding by the court that the September bill was not a duplication of the August bill, was that the bill was pending settlement by the appellant. It was up to the respondent to recover it in the best available manner. We reiterate that it is not the role of the judge to grant liquidated sums of money which are not pleaded by a party. Ground five of the appeal succeeds.

The net result is that this appeal partially succeeds. Grounds 1, 3 and 4 fail for reasons we have articulated while grounds 2 and 5 succeed.

For the avoidance of doubt, we hold that the respondent should render a proper account as to how it came up with the disputed bill of K 213,398,664.95 within 30 days of the judgment, failing which the said sum shall be recoverable by the appellant. It should equally refund the penalty or fraud charge it levied the respondent in the sum of K 1,750,951.19. We also reverse the judgment entered in the sum of K 14,928,449.42.

Each party shall bear its own costs.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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N. K. MUTUNA
SUPREME COURT JUDGE