IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 187 OF 2020**
HOLDEN AT LUSAKA
(Civil Jurisdiction)

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BETWEEN:

GASS TRANSPORT AND CONSTRUCTION LIMITED **APPELLANT**

AND

IMPALA TERMINALS ZAMBIA LIMITED **RESPONDENT**

Coram: Makungu, Sichinga, and Banda-Bobo, JJA
on 26th August, 2021 and 29th October, 2021

For the Appellant: No Appearance

For the respondent: Mr. K. Wishimanga and Ms. K. Nalombwa of Messrs AMW and company

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JUDGMENT

Sichinga, JA delivered the Judgment of the Court.

Cases referred to:

1. ***Stallion Motors Limited & African Services Limited v Zambia Revenue Authority Appeal No. 11 of 2012***
2. ***Savenda Management Services Limited v Stanbic Bank Limited SCZ Appeal No. 10 of 2018***
3. ***Atlantic Bakery Limited v ZESCO Limited SCZ Appeal No. 8 of 2015***
4. ***Newplast Industries v Commissioner of Lands and the Attorney General (2001) Z.R. 51***
5. ***George Belamoan v Aiden Gaffney (19 71) Z. R. 29***

6. *Anderson Mazoka and Others v Mwanawasa and Others (2005) Z.R. 138*
7. *Galaunia Farms Limited v National Milling Company Limited and Another (2004) Z.R. 1*
8. *Wilson Masauso Zulu v Avondale Housing Project (1982) Z.R. 49*
9. *Lyons Brooke Bond (Zambia) Limited v Zambia Tanzania Road Services Limited (19 77) Z.R 317*
10. *Clement Mweempe v Attorney General and Others Appeal No. 15 of 2008*

Legislation referred to:

1. *Value Added Tax Act Chapter 331 of the Laws of Zambia*
2. *High Court Rules Chapter 27 of the Laws of Zambia*
3. *Rules of the Supreme Court 1965 (1999) Edition, White Book*
4. *Judgments Act Chapter 81 of the Laws of Zambia*

Other works referred to:

1. *Halsbury's Laws of England, 5th Edition, Volume 76.*
2. *Black's Law Dictionary Bryne A. Garner 8th Edition, Reuters*
3. *Phipson on Evidence, 17th edition Thomson Reuters, 2010*

1.0 Introduction

1.1 This is an appeal against the decision of the High Court Commercial Division (W.S. Mwenda J) delivered on 27111 November, 2019 in which the lower court found that the plaintiff had failed to prove its claims.

1.2 On 1st July, 2015 Impala Terminals (Z) Limited engaged Gass Transport and Construction Limited to transport copper concentrates from Nchelenge to KCM Chingola using four routes. The contract was confirmed by a letter of even date from Impala Terminals to Gass Transport stating *inter alia,* "No VAT applicable on all 4 routes." Gass Transport presented its invoices to Impala Terminals exclusive of Value Added Tax and the latter settled the same.

1.3 Subsequently the Zambia Revenue Authority (ZRA) demanded remittance of VAT in the sum of five hundred and nine thousand, seven hundred and eighty-nine kwacha, fifty ngwee (K509,789.50) payable on all invoices Gass Transport issued to Impala Terminals for the transportation services together with accrued penalties and levies. Gass Transport settled the VAT with ZRA then sought to be reimbursed by Impala Terminals.

1.4 Impala Terminals resisted reimbursing Gass Transport for the VAT settled with ZRA. The issue in this appeal is therefore

whether or not VAT was payable by Impala Terminals on the routes Gass Transport used to transport the concentrates.

2.0 Factual Background

2.1 In sum, we have captured the background above. However, it is necessary to explain the background in terms of the parties in the court below. We shall do so by adopting the very clear narrative of the judgment below.

2.2 Gass Transportation commenced legal action against Impala Terminals on 23rd February, 2017 by way of writ of summons and statement of claim. The plaintiff's claims were for:

1. The sum of K509, 789.50 being outstanding Value Added Tax payable on the transportation services provided to the defendant by the plaintiff;
2. Zambia Revenue Authority penalties and levies chargeable on the sum of K509,789.50;
3. Interest at commercial lending rate;
4. Costs;
5. Any other relief the court may grant.

2.3 It was the plaintiff's averment that ZRA had demanded remittance of VAT in the sum of K509,789.50 payable on all

invoices the plaintiff issued to the defendant for the hired services together with accrued penalties and levies thereon. That, despite numerous requests and reminders for the defendant to settle the said outstanding amount, the defendant neglected, refused or ignored to pay thereby causing the plaintiff to suffer the loss claimed.

2.4 The defendant filed its defence on 6th October, 2017 wherein it admitted the contents of paragraph 3 of the statement of claim in so far as it stated that the plaintiff was engaged to transport copper concentrates from Nchelenge to Konkola Copper Mines (KCM), Chingola and Ndola. It stated that the said copper concentrates originated from the Democratic Republic of Congo (DRC) through multimodal transport from Kapulo Mine via Pweto Port on barges to Nchelenge for onward transportation to Ndola and KCM. The defendant denied that it misrepresented to the plaintiff that it was exempted from paying VAT by ZRA. It averred that it did not know or had no reason to believe that the plaintiff would rely on its advice. It further stated that the opinion it made of VAT not being

applicable to the transaction in question was not a term of the contract nor was it a pre-condition to enter into the contract.

2.5 The defendant claimed that when it was issued with invoices by the plaintiff, its understanding was that the plaintiff had done the necessary consultation with ZRA as it was not a tax expert. The defendant denied that it has neglected, refused or ignored to pay the plaintiff's claim. It averred that it believed that since the goods were transported on a "Removal in Bond" ZRA document, the VAT on the first part of the transport from Nchelenge to Ndola was zero rated.

2.6 The defendant ultimately averred that it was incumbent upon the plaintiff as the taxpayer to take reasonable steps to seek guidance from ZRA before deciding whether to charge VAT on the transaction. It stated that the plaintiff was not entitled to any of the reliefs claimed in the statement of claim and therefore, the action should be dismissed with costs to the defendant.

2.7 The plaintiff filed a reply on 5th February, 2018 in which it stated that the defendant misled it into believing that the

defendant was exempt from paying VAT for transportation of the defendant's goods from Nchelenge to KCM, Chingola and Ndola. That since it turned out that the defendant is not exempt from paying VAT, it was under an obligation to pay it. The plaintiff demanded a refund of the VAT it had paid on behalf of the defendant.

3.0 The decision of the court below

3.1 The learned trial judge considered the pleadings and evidence. She found that there were two questions for her to determine as follows:

1. Whether there was a misrepresentation on the part of the defendant, on the issue of VAT not being payable on the routes in question; and
2. Whether the plaintiff was entitled to payment of the sum of K509,789.50 by the defendant for VAT, penalties and levies chargeable on the said sum, interest and costs.

3.2 The learned judge went on to consider, at some length, what constitutes a misrepresentation and a representation per ***Haisbury's Laws of England'.*** She considered the evidence before her and took the view that the essence of the letter

written by the defendant confirming the engagement was to put finality to the rate applicable for the transportation services required by the plaintiff. That it was not for the defendant to render advice on taxes payable. She took the position that the representation by the defendant that VAT was not applicable was neither a term of the contract nor a pre-condition to enter into the contract between the defendant and the plaintiff. She found that the plaintiff had failed to establish that the representation it alleged to have relied upon was important.

3.3 On the second issue, the learned judge found that since the plaintiff had failed to prove that there was a misrepresentation, the claim for K509, 789.50 had no leg to stand on. It too failed.

3.4 The learned judge's net finding was that the plaintiff had failed to prove its case on a balance of probabilities. She therefore dismissed the action with costs to the defendant.

4.0 The appeal

4.1 Dissatisfied with the outcome of the lower court's judgment, the plaintiff appealed to this Court raising two grounds of appeal as follows:

1. ***The trial court erred in law when it failed to order the respondent to pay Value Added Tax applicable on the services provided by the appellant as its interpretation of the law on Zambian Value Added tax and its applicability was wrong at law.***

2. ***The trial court misdirected itself on the issue that it was decided upon as the dispute before court was on the interpretation of the law on the applicability of Zambian Value Added Tax on the services provided by the appellant to the respondent.***

5.0 Appellant's heads of argument

5.1 The appellant filed heads of argument on 6th October 2020. The arguments begin with a brief background which we have already highlighted at the commencement of this judgment. The two grounds of appeal were argued as one.

5.2 From the outset, we were referred to paragraph 3 of the respondent's defence which states that the respondent

reasonably believed that VAT was not applicable to the transaction as it was an international transaction.

5.3 We were also referred to the respondent's first witness' testimony. That in cross-examination he agreed that the dispute was on the interpretation of the law, and if the court was to find that VAT was applicable on the routes in question, then the respondent was ready to settle the amount.

5.4 It was submitted that there was no dispute regarding the invoices or the principal amount. That the respondent strongly believed that the transaction in question was an international transaction to which the Zambian law on VAT was not applicable. It was submitted that the trial court grossly misdirected itself when it delved into issues that were not materially in dispute and left out the main issue it was called upon to resolve.

5.5 The appellant argued that although the copper concentrates may have originated from the DRC, the appellant was never engaged to uplift the same from the DRC. That the concentrates were transported from the DRC into Zambia by

someone else. The appellant uplifted the concentrates from Nchelenge and transported them to KCM Chingola and Ndola which were within Zambia. It was submitted that it could not be argued by the respondent that VAT was not applicable for services rendered by the appellant to the respondent on account that the copper in question was originating from the DRC as there was a clear break in the journey. It was contended that the journey was in two segments as stated above.

5.6 That the services provided under the second segment fall within the classification of domestic services to which VAT applies. It was contended that VAT applies to the services rendered by the appellant to the respondent and that the respondent is under obligation to pay VAT under the ***Value Added Tax Act Chapter 331 of the Laws of Zambia'.***

5.7 We were then referred to the case of ***Stallion Motors Limited & African Services Limited v Zambia Revenue Authority'*** where the Supreme Court stated as follows:

"...we see no difficulty in the manner in which the learned judge interpreted paragraph 2(c) of the second schedule. Paragraph 2(c) relates to the supply of freight transport services from or to Zambia in an unbroken fashion. In other words, the freight transport services must be provided from a port as recognised by Customs and Excise (Ports of Entry Routes) Order No. 16 of 2003 which lists such ports in Part 11 of the first schedule. Mufu lira or Kapiri Mposhi are not listed as ports of export for goods exported by road. The journey or transportation must not end within Zambia. In this case, the goods were coming from Mufu lira and were offloaded in Kapiri Mposhi which is classified as a domestic service and is therefore subjected to the standard rate."

5.8 It was submitted that the ***Stallion case*** *is* applicable to the instant case. That the respondent has no legal basis for refusing to pay the said VAT.

5.9 We were urged to set aside the judgment of the lower court and order the respondent to refund the appellant the outstanding sum of K509,789.50, being the Value Added Tax that the appellant paid on behalf of the respondent on the transportation services which the latter provided, plus interest and costs.

6.0 Respondent's heads of argument

6 1 The respondent relied on its heads of argument filed on 141h December, 2020. The arguments begin with a preamble in which it was submitted that the appellant's direction in prosecuting the appeal, in effect departs from their claim as stipulated in their pleadings. That the appellant in its pleadings never sought any declaration but rather sought the payment of a specific sum. Reliance was placed on the case of ***Savenda Management Services Limited v Stanbic Bank Limited***[2] in which the Supreme Court stated as follows:

> ***"Ours is an adversarial court system, which shackles the Judge to the pleadings and the evidence adduced before him... he is not permitted to introduce a remedy or relief from the facts and circumstances of his own creation and outside the pleadings and evidence.***
>
> ***For the avoidance of doubt, the Appellant did not plead breach of confidentiality and neither did it deploy any evidence to that effect in the High Court."***

6.2 It was submitted that the appellant's case in the court below was defined by the pleadings filed. That this Court should

therefore confine itself to matters pleaded and the evidence adduced.

Respondent's arguments

6.3 In response to the appellant's grounds of appeal, the respondent contended that the appellant's case in the court below was for the payment of a liquidated sum, the alleged amount being VAT. The record shows that the appellant admitted that the claim was liquidated and this demonstrates the appellant's failure to prove its case. Reliance was placed on ***Order 6, Rule 2 (5) of the Rules of the Supreme Court (1999) edition***[2] which states:

> ***"A liquidated demand is in the nature of a debt i.e. a specific sum of money due and payable under or by virtue of a contract. Its amount must either be already ascertained or capable of being ascertained as a matter of arithmetic."***

6.4 Also ***Black's Law Dictionary***[3] which defines *'liquidated'* as *"an amount or debt that is settled or determined."*

6.5 It was submitted that the observation made leads to the conclusion that the question as to whether or not VAT was

applicable *in casu* is one that begged no answer in the court below. That the reliefs sought by the appellant relate to the payment of a quantified sum and not a declaration that VAT is applicable. Counsel relied on the case of ***Atlantic Bakery Limited v ZESCO Limited***[3] in which it was held that:

> ***"A court is not to decide on an issue which has not been pleaded. A court should confine its decisions to questions raised in the pleadings. It thus cannot grant relief which is not claimed. Litigation is for the parties and not for 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 the court has no jurisdiction to set up a new case for the parties."***

6.6 In view of the foregoing case, it was submitted that the appeal in its entirety is untenable as the same, in effect, invites the Court to address its mind to matters that were not proved, prayed for, or pleaded.

6.7 On the appellant's submission that the respondent's first witness agreed that the dispute was the interpretation of the law, it was submitted that the appellant was misquoting the proceedings. We were invited to peruse the proceeding in the

court below. It was submitted that if the appellant's quest was to secure a declaration that VAT was applicable on the routes and outstanding, then the appellant ought to have joined the ZRA to the proceedings as a party in order to assist with the establishment of that fact.

6.8 It was submitted that *in casu* the amount claimed was not outstanding. In support of this submission reliance was placed on ***Black's Law Dictionary supra*** which defines the word *'outstanding'* as ***"unpaid; uncollected."*** That in casu the record will show that the appellants made payments to ZRA and adduced receipts as proof of payment.

6.9 It was submitted that if the appellant's intention was to seek an interpretation of the *VAT Act,* then the matter in the court below ought to have been commenced by way of originating summons and not writ of summons and statement of claim. In support of this submission, reliance was placed on ***Order 30, Rule 11(c) of the High Court Rules***[2] which provides that:

> ***"11. The business to be disposed of in chambers shall consist of the following matters which under any other rule or by statute or by the law and practice for the time being***

observed in England and applicable to Zambia may be disposed of in chambers.

(C) An application by a person claiming any legal or equitable right, in a case where the determination of whether he is entitled to the right upon the question of construction of statute, for the determination of such question of construction and for a determination as to the right claimed."

6.10 Reliance was also placed on the case of ***Newplast Industries v Commissioner*** *of* ***Lands and the Attorney General***[4] in which it was held *inter alia* that:

"... the mode of commencement of any action is generally provided for by the relevant statute and where a statue provides for the procedure of commencing an action; a party has no option but to abide by that procedure..."

6.11 The case of ***George Belamoan v Aiden Gaffney***[5] was cited for its holding that:

"... if a plaintiff chooses a wrong mode of action and thereby makes the defendant to incur costs, he should not thereafter allege that any costs incurred by the defendant have been incurred unnecessarily."

6.12 The case of ***Anderson Mazoka and Others v Mwanawasa and Others***[6] was cited for its holding that:

"As regards burden of proof, the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity."

6.13 For emphasis on the burden of proof, the case of *Galaunia Farms Limited v National Milling Company Limited and Another*[7] was cited for holding that:

"...a plaintiff must prove his case and if he fails to do so, the mere failure of the opponents defence does not entitle him to judgment."

6.14 And *Phipson on Evidence*[4] at paragraph 6-06 was referred to where it states:

"So far as the persuasive burden is concerned, the burden of proof lies upon the party who substantially asserts the affirmative of the issues. U when all the evidence is adduced by the parties, the party who has this burden has not discharged it, the decision must be against him. It is an ancient rule founded on considerations of good sense and should not be departed from without strong reasons."

6.15 The general submission is that the appellant did not discharge *its burden of proof.* *Wilson Masauso Zulu v Avondale Housing Project*[8] was referred to.

6.16 On the ***Stallion Motors case,*** relied upon by the appellant, it was submitted that it emanated from an inquiry into the applicability of VAT on the transactions and routes in issue by the Tax tribunal. That in casu, the appellant invited the court below to consider a different question.

6.17 We were urged to dismiss the appeal with costs.

7.0 Decision of the Court

7.1 We have given this appeal our due consideration. We have evaluated the grounds of appeal, the arguments by counsel, authorities cited, the evidence on record and the impugned Judgment. We shall address both grounds together as they are interrelated.

7.2 The issue on this appeal as we see it, is whether the appellant is entitled to a reimbursement, from the respondent, of the amount of Value Added Tax it settled with ZRA on the transaction between the parties.

7.3 In considering the respondent's arguments, first that the appellant's claim in the court below was confined to the

alleged outstanding sum being VAT, which was not proved as in fact the VAT was admitted to have been paid, we looked at the pleadings. As correctly observed by counsel for the respondent the main relief sought by the appellant in its statement of claim was for the sum of K509,789.50 being the outstanding Value Added Tax payable on the transportation services provided by the appellant to the respondent. We note that the fact that the said sum had actually been settled with ZRA was not in dispute. We say so because the respondent in its defence, testimony or arguments never raised the issue that the VAT was not outstanding as it had already been settled by the appellant to ZRA.

7.4 The learned judge was of the view that the issue before her was one of misrepresentation. In fact a large portion of the impugned judgment is dedicated to the concepts of misrepresentation and representation on the basis of the appellant's averment in paragraph 4 of its statement of claim that the respondent misrepresented to the appellant that it was exempted from paying VAT by ZRA. And in turn the

respondent pleaded in its defence that it did not intend to nor did it know that the appellant would rely on its advice. The learned judge went on to agree with the respondent's position that the respondent is not a tax advising authority, and as such the appellant failed to prove the misrepresentation. Further, that the appellant was not entitled to the payment of K509, 789.50 from the respondent for VAT, penalties and levies chargeable on the said sum.

7.5 Looking at the evidence, we find that the matter as presented to the lower court was further from the issue of outstanding VAT to ZRA than the pleadings let on. We find that this is a classic case of misuse of words which parties should at all costs avoid as it defeats the function of pleadings. The Supreme Court has upheld this in a number of cases *including* ***Lyons Brooke Bond (Zambia) Limited v Zambia Tanzania Road Services Limited***[9] **and** ***Clement Mweempe v Attorney General and Others***[10]**.**

7.6 Turning to the real issue in contention, from the evidence, the parties entered into a contract by which terms the appellant

would provide transportation services to the respondent to ferry its copper concentrates from and to specified points within Zambia. The contract was confirmed by the respondent in a letter dated 1st July, 2015 which reads as follows:

> ***"IMPALA***
> ***GASS TRANSPORT***
> ***NDOLA***
> ***ZAMBIA***
>
> ***1st July, 2015***
>
> ***Dear Sir,***
>
> ***RE: NCHELENGE TRANSPORT RATE CONFIRMATION LETTER, 1ST JULY, 2015***
>
> ***This letter serves as a confirmation for the transporting of copper concentrate from Nchelenge to KCM Chingola based on the four routes below.***
>
> ***Route 1***
>
> ***Nchelenge - Pedicle - KCM Chingola @ USD60/MT***
>
> ***Route 2***
>
> ***Nchelenge - Pedicle - Ndola - KCM Chingola @U5D65/MT***
>
> ***Route 3***
>
> ***Nchelenge - Kapiri - Ndola @ USD80/MT***

Route 4

Nchelenge - Kapiri - Ndola -KCM Chingola (I

85USD/MT

Special Note: Untilfurther notice, all trucks must use either route 2, route 3 or route 4. Trucks to report to Impala customs yard (Crafter parking), to undergo customs clearance prior to delivery to KCM Mine.

All cargo transported in accordance with the GT&C's - Copy available on request.

No VAT applicable on all 4 routes. (Underlined for emphasis)

(signed) *(signed)*
Richard Mandona *Ernest Entsieh*
Operations & FWD Manager Sales & Administration"

7.7 Firstly, from what we decipher from this letter, VAT was not payable by the respondent as agreed by the parties. However, ***section 7(1)*** *of* ***the Value Added Tax Act supra*** provides as follows:

> *"For the purposes of this Act, any supply of goods and services made by a taxable supplier, in the course or furtherance of a business, that takes place in Zambia on or after the commencement day, other than an exempt supply, is a taxable supply."*

7.8 This provision, in our view, makes it mandatory for the taxable supplier to issue a tax invoice. Further, ***Regulation 3 of the Value Added Tax General Rules, 1997,*** made pursuant to ***Act No. 4*** *of* ***1995*** specifies the contents of the tax Invoice. That a tax invoice should include the following particulars:

> ***"(a) the registered supplier's name, address and VAT registration number;***
>
> ***(b) the time of supply;***
>
> ***(c) the number of the invoice taken from the consecutive series, and the date of the issue of invoice;***
>
> ***(d) a description sufficient to identify the goods and services supplied and which include the quantity of the goods or the extent of the services supplied;***
>
> ***(e) the total charge made, including tax:***
> ***and shall indicate either -***
>
> ***(i) the amount of the tax charged; or***
>
> ***(ii) the rate of tax, together with a statement of the tax included in the charge for the supply."***

7.9 Since the parties could not contract outside the provisions of the law, so as to waive the tax payable, the appellant was obligated to pay the tax on behalf of the respondent. Whilst parties may be at liberty as to agree on who should bear the tax obligation, the law will punish the person who is supposed

to account for the VAT and not necessarily the person who is supposed to pay the VAT.

7.10 The appellant's managing director testified to the court below that he was advised by the respondent that the latter was exempted from paying Value Added Tax on the routes on which the appellant was operating on. He stated that the respondent had made an undertaking to furnish a tax exemption certificate from ZRA but did not do so.

7.11 In response to the appellant's testimony, the respondent through its managing director's witness statement at pages 81 to 82 of the record of appeal, did not deny that the respondent ought to have paid the VAT. He simply stated that the respondent authorised payments for the transaction to the appellant as per the invoice presented. In cross-examination, from pages 130 to 136 of the record of appeal, the respondent's managing director did not directly answer the questions put to him regarding VAT. At the end of his examination, he was asked whether he would have a problem paying the VAT for the routes where the appellant operated as

VAT was applicable. And his response was that he would not have a problem. (Page 136 of the record of appeal refers).

7.12 The respondent's second witness, an accountant, equally did not directly answer questions on VAT. However, he admitted that a transporter operating in Zambia was liable to pay VAT. When asked who was to pay for the transportation services, his response at page 141 of the record of appeal was as follows:

> *"If* ***the transporter charges me VAT, I will pay the VAT. I will pay the full invoice of what the transporter will send.***"

7.13 What emerges from this evidence is that the invoices presented to the respondent ought to have included the component of the Value Added Tax payable. Whilst the actual invoices presented by the appellant to the respondent do not grace the record, it is clear at pages 55 to 64 of the record of appeal that the appellant suffered the loss of paying the VAT to the Zambia Revenue Authority on behalf of the respondent for the transportation services it provided. At page 55 of the record is a letter written by the appellant to ZRA regarding the

predicament it found itself in with the taxing authority. We *note that in* ***section 21 of the Value Added Tax Act supra,*** the Commissioner General of ZRA is empowered to raise an assessment on the taxable supplier who has failed to settle the tax payable. The tax payer in this instance was the appellant.

7. l4We find that the appellant proved, on a balance of probability, that it had paid the sum of K509,789.50 to the Zambia Revenue Authority for the services it provided to the respondent, which constitutes a debt repayable to the appellant with interest as per the ***Judgments Act***[4].

7.15 We hold that the action was properly commenced by writ of summons as the matter does not fall squarely under Order 30 rule 11 (C) of the High Court Rules. It is clear from both parties evidence on record that the claim was for a refund of the liquidated amount and not a declaration that the respondent is under a legal obligation to pay VAT. Therefore the respondent will not suffer prejudice by this judgment.

7.16 On the different considerations we have applied, we allow the appeal with costs to the appellant to be taxed in default of agreement.

C.K. Makungu
COURT OF APPEAL JUDGE

D.L.Y. iching, SC
COURT OF APPEA JUDGE

A.M. Banda-Bobo
COURT OF APPEAL JUDGE