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

SCZ/JUDGMENT NO. 21/2016
APPEAL NO. 143/2013
SCZ/8/157/2013

BETWEEN:

LAFARGE CEMENT PLC **APPELLANT**

AND

AFRICAN BROTHERS CORPORATION LIMITED **RESPONDENT**

Coram: Chibomba, Muyovwe and Hamaundu, JJS.

On 12th August, 2015 and on 8th July, 2016.

For The Appellants : Mr. N. Nchito, S.C. and Mrs. S. N. Kateka, both of Nchito and Nchito.

For The Respondent : Mr. M. M. Muchende of Dindi and Company.

J U D G M E N T

Chibomba, JS, delivered the Judgment of the Court.

Cases referred to:-

1. *Martineau v Kitching (1872) LR 7 QB 436.*
2. *Galaunia Farms Limited v National Milling Company Limited and National Milling Corporation Limited (2004) ZR 1.*
3. *Lyons Brooke Bond (Zambia) Limited v Tanzania Road Services Limited (1977) ZR 317.*
4. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172.*
5. *Konkola Copper Mines PLC v Jacobus Keune - SCZ Appeal No. 29 of 2005.*
6. *National Airports Corporation Limited v Zimba and Another (2000) ZR 154.*
7. *Attorney General v Marcus Kampumba Achiume (1983) ZR 1.*
8. *Giogio Fraschini and Motor Parts Industries (Copperbelt) v Attorney-General (1984) Z.R. 29*
9. *Khalid Mohamed v the Attorney-General (1982) ZR 49*

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Legislation and other materials referred to:-

1. *The Sale of Goods Act, 1893.*
2. *Atiyah, P.S. "The Sale of Goods", (4th Edition),London: Pitman Publishing, 1971 at page 53.*

The Appellant appeals against the Judgment of the High Court at Lusaka, in which the learned Judge awarded to the Respondent the sum of K278,462.19 (after rebasing) comprising the sum of K240,565.50 and K37,896.69 being respectively, refund of the money paid by the Respondent to the Appellant for the cement which the Appellant did not deliver to the Respondent and as loss incurred by the Respondent as a result of buying alternative cement at higher prices from local retailers/vendors. The learned Judge also awarded interest on the sums due at short term deposit rate from date of Writ to date of judgment and thereafter at the average lending rate as determined by the Bank of Zambia up to date of full payment.

The facts leading to this Appeal are that the Respondent is a construction company which was building schools at Mwandi, Sesheke, in Western Province and Niko, Namwala, in Southern Province on behalf of the Government of the Republic of Zambia while the Appellant Company manufactures and sells cement to the public. The Respondent's case at trial was that between 13th April and 13th September, 2010 it entered into several agreements with the Appellant whereby the Appellant was to sell

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and the Respondent to buy 661.6 tonnes of cement equivalent to 13,232.50 Kg bags of cement valued at K425,965,499.32. (before rebasing). Pursuant to the said agreements, the Appellant delivered some of the cement but however, the Respondent claimed that in breach of the said agreements, the Appellant failed, ignored or neglected to deliver all the cement paid for and that despite various complaints and demands, the Appellant did not do so as only 150 tonnes of cement, equivalent to 3000 x 50kg pockets of cement valued at K154,500,000.00 had been delivered as of September, 2010 leaving a balance of K271,465,499.00 worth of cement undelivered and that despite demands for a refund, the Appellant failed to do so. The Respondent therefore, by Writ of Summons, commenced an action in which the following reliefs were sought:-

> "(a) **Account and refund of K271,465,499.00 for failure on the part of the Defendant to deliver cement ordered on divers invoices by the Plaintiff between 13th April, 2010 and 13th September, 2010.**
>
> (b) **Damages and loss occasioned by the Plaintiff as a result of the said failure by the Defendant to deliver cement to the Plaintiff.**
>
> (c) **Interest thereon.**
>
> (d) **Costs."**

The Appellant disputed liability in the Defence filed claiming that it supplied cement valued at K667,335,311.29 (before rebasing) to the Respondent on an 'own-collect' basis as the Respondent collected the cement from the Appellant's premises on its own or by its independent

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arrangements and that there was no agreement between the parties for the Appellant to deliver cement to the Respondent. Hence, cement valued at K667,335,311.29 was collected by the Respondent. The Appellant therefore, denied the allegation that it failed, ignored or neglected to deliver the cement as claimed and that in fact, although the Respondent was supplied with the cement valued at K667,335,311.29, it only paid the sum of K426,055,499.32 leaving a balance of K241,269,811.97 unpaid which the Appellant sought to recover in the Counter-claim.

The learned Judge heard evidence from the parties which he considered and analysed together with the pleadings, submissions and filed skeleton arguments. The Judge found that the Appellant had only delivered five truckloads of cement worth K154,500.00 to the Respondent's project sites at Mwandi and Niko out of the thirteen truckloads that were laden with cement destined to the Respondent; that the unaccounted for loads of cement were diverted and delivered surreptitiously to third parties and that the person who played a central role in having the cement delivered to third parties who did not pay for it was Brian Banda, the Appellant's Sales Representative, who was eventually dismissed for dishonest conduct relating to the cement in question. The learned Judge also found that in order to mitigate its loss, the Respondent bought cement from third parties. His conclusion was that the issue for

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determination was whether the Appellant was liable for the cement that was not delivered to the Respondent and whether the Appellant could succeed on its Counterclaim.

The Judge held that negligence was proved as the Appellant owed the Respondent a duty of care to ensure that the cement was delivered to the Respondent due to the proximity of their relationship. He, therefore, held the Appellant vicariously liable for the dishonest and fraudulent conduct of its employee, Brian Banda. He also dismissed the Appellant's counter-claim on the basis that cement valued at K240,465.50 was in fact not delivered to the Respondent as it had instead been diverted. He then entered judgment in favour of the Respondent on the above stated terms.

Dissatisfied with the judgment by the court below, the Appellant has appealed to this Court advancing five grounds of appeal as follows: -

"1. **The court below erred in law and fact in determining that delivery was to be at the Respondent's premises contrary to the agreement between the parties and the evidence on record.**

2. **The court below erred in law and in fact in holding that the Appellant had a *prima facie* duty to see to it that the cement was delivered to the Respondent contrary to the agreement between the parties and evidence advanced by the Appellant which evidence was unchallenged and shows that the cement was duly collected from the Appellant's premises.**

3. **The court below erred in law and fact when it found that there was overwhelming evidence that Brian Banda was at the centre of a scheme to defraud the Appellant using the credit facility availed to the Respondent which finding was perverse as it was not supported by the evidence on the record.**

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4. **The court below erred in law and fact when it decided the matter before it without properly analysing the evidence on the record thereby making findings of fact which were perverse and unsupported by any evidence.**

5. **The court below erred in law and fact in dismissing the Defendant's Counter-claim on the basis that the cement had been diverted contrary to the evidence on record that the Respondent received and acknowledged receipt of the cement for which payment was not made."**

The learned Counsel for the Appellant, Mr. Nchito, S.C., and Mrs Kateka, relied on the Appellant's Heads of Argument filed which they augmented with oral submissions.

Grounds one and two were argued together. In support of the two grounds of appeal, it was submitted that under the **Sale of Goods Act, 1893** (**the Act**), there is no duty on the seller to dispatch the goods to the buyer. As authority, Section 29 of **the Act** was cited which provides that:-

> "**Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case, on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business**." (Underlining ours for emphasis only).

As to the meaning of 'delivery', Counsel quoted from the book by the learned author Atiyah titled, "**The Sale of Goods**", in which it is stated that:-

> "**It should be noted that the legal meaning of 'delivery' is very different from the popular meaning. In law delivery means 'voluntary transfer of possession' which is a very different thing from the dispatch of goods.**

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There is in fact no general rule requiring the seller to dispatch the goods to the buyer." (Underlining ours for emphasis only).

It was contended that the Respondent was an 'own collect' client which means that the client was responsible for making its own transport arrangements to collect the cement. Therefore, that transfer of property in the cement was at the point where the cement was ready for collection. And as such, the Appellant had no duty of care to see to it that the cement was delivered to the Respondent as the Respondent was responsible for collecting the cement from the Appellant's premises and that the Appellant had no control over the cement once it left the Appellant's premises.

It was further submitted that there is a rule that risk passes with property as was stated by Blackburn, J., in **Martineau vs Kitching**[1] in which he stated that risk follows property. Therefore that the question whether or not property has passed is of relevance where the goods are lost, damaged, destroyed, etc.

State Counsel also relied on Section 20 of **the Act** which provides that:-

"Unless otherwise agreed, the goods remain at the seller's risk until property in them is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not."

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It was submitted that there was no contract, express or implied between the parties herein for the Appellant to deliver the cement to the Respondent at the Respondent's premises as the contract between the parties was for the Respondent to take delivery of the cement at the Appellant's premises. As such, property transferred from the Appellant to the Respondent at the point where the cement was ready for collection.

It was contended that the Respondent did not produce any evidence in the court below to prove that there was a contract to deliver the cement to the Respondent's premises. And that the invoices produced are clear evidence in that they show that the Respondent was using its own transporters. And that the Respondent in fact, conceded that it did not pay any transport charges to the Appellant. The case of **Galaunia Farms Limited vs National Milling Company Limited and National Milling Corporation Limited**[2] was cited in which it was held that a plaintiff must prove his case and that if he fails to do so, the mere failure of the opponent's defence does not entitle him to judgment. It was argued that in view of this authority, it was the duty of the Respondent to prove that they were a delivered customer but that it did not. Further, that the Respondent's statement of account with the Appellant indicates that the Respondent had acknowledged receiving some cement but denied receiving other consignments. State Counsel submitted that it was the

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same information that the Appellant used in dispatching all the cement which was collected by drivers whose details were provided by the Respondent.

Further, State Counsel quoted part of the judgment whereunder the learned Judge put it this way:-

> **"The evidence also shows that thirteen truckloads laden with cement left the Defendant's premises destined for the Plaintiff but cannot all be accounted for."**

It was argued that it was not the duty of the Appellant to deliver cement to the Respondent or to ensure that the cement once collected by the transporter was delivered to the Respondent as the Appellant's duty ended at ensuring that the cement was loaded in the vehicle whose details appeared in the supporting documents as the Respondent arranged its own transporter to collect the cement from the Appellant's premises. That PW2, a subpoenaed witness, did confirm in his evidence that he had collected cement from the Appellant's Plant on the invoices in the name of African Brothers (the Respondent) where his names and truck details were appearing.

It was State Counsel's contention that the delivery was made to the carrier, and that ownership therefore, passed to the Respondent upon delivery. And that it is curious that the Respondent claims that the

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Appellant was responsible for the delivery of the cement when in actual fact, the invoices were marked 'own' under the transport column and the Respondent was responsible for providing the vehicle and driver details.

Furthermore, it was contended, the Appellant cannot be held liable as there was already a transfer in property once the cement was collected from the Appellant's premises. And that the maxim '*res perit domino*' (the thing is lost to the owner), applies to this case as when the cement was lost or destroyed, it was lost to the person who had ownership at the time. It was therefore, submitted, the Respondent had ownership at the time the cement went missing. The case of **Lyons Brooke Bond (Zambia) Limited vs Tanzania Road Services Limited**[3] was cited in which the High Court held that as a general rule, the delivery of goods by a seller to a carrier for conveyance to the buyer places the goods at a consignee's risk and therefore, the consignee is the proper person to sue in the event of loss or damage.

Thus, it was submitted, even assuming that the Respondent was a delivered customer, the assertion the Appellant refutes, then based on the principle in the above case, the Appellant would still not be liable for the alleged missing cement as the proper person or party to sue was the carrier of goods as the property in the goods had already been transferred and the buyer placed the risk in the consignee's hands and not the seller's.

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Grounds three and four were also argued together. Counsel began by recasting a portion of the Judgment in the court below wherein the learned Judge stated that:-

> **"There is overwhelming evidence which shows that Brian Banda was at the centre of a scheme to defraud his employers using the credit facility availed to the Plaintiff and it was well orchestrated."**

State Counsel submitted that the Judge erred in law and in fact when he held that there was overwhelming evidence that Brian Banda was at the centre of a scheme to defraud the Appellant using the Respondent's credit facility when there was no evidence on record supporting such a finding. We were urged therefore, to set aside this finding of fact. As authority, the cases of **Wilson Masauso Zulu vs Avondale Housing Project Limited**[4] and **Konkola Copper Mines PLC vs Jacobus Keune**[5] were cited in which we respectively, held that:-

> **"The appellate court will only reverse findings of fact made by a trial court if it is satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon misapprehension of the facts."**

And that:-

> **"On the authority of Masauso Zulu vs. Avondale Housing Project Limited and many other authorities, this is a proper case that this appellate court can set aside a finding of fact as being based on a misapprehension of facts or that it was a finding which on a proper view of the evidence, no trial court acting correctly could reasonably make."**

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It was submitted that the evidence of the Respondent's witnesses, PW2 and PW3 who were drivers from Beene & Brothers, a business owned by Alfred Banji and Natural Valley Limited, respectively and who both loaded truckloads of cement at the Appellant's premises which were invoiced to the Respondent, was that they were not aware of the business transactions of their employers as they were merely acting on their employers' instructions.

Further, that the Respondent failed to prove that it was a delivered customer as no evidence was produced to support such allegation. That the court below found that the Appellant was responsible for ensuring that cement was delivered to the Respondent but that to the contrary, the Appellant's evidence shows that the Respondent was an 'own collect' customer as evidenced by the invoices produced. And that it was the Respondent which supplied the motor vehicle and driver details and that all the dispatched cement, some of which the Respondent confirmed having received, was dispatched in exactly the same manner, that is to say, the Respondent provided the Appellant with the motor vehicle and driver details.

It was contended that the evidence clearly shows that the Respondent was responsible for its own delivery. As an illustration, Counsel for the Appellant pointed out item number 21 of the statement of

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account prepared by the Respondent which shows that the Respondent acknowledged receipt of the cement by a driver named Daniel but at item number 14 the Respondent claimed not to have received cement delivered by the same driver who used the same motor vehicle. It was reiterated that the Appellant dispatched all the cement in exactly the same way, that is, using the transporter details provided by the Respondent. Therefore, that the learned Judge did not properly analyse the evidence on record and thereby made findings of fact that are unsupported by the evidence.

Furthermore, it was contended, despite the learned Judge finding and ordering that the Respondent was entitled to K240,565.50 from the Appellant for the cement that was allegedly never delivered by the Appellant, the Respondent did not produce any proof of payment. In contrast, the Respondent made no payments for cement procured on credit basis as can be seen on the statement of account and that the only payments the Respondent made were cash payments that were made when it was still a cash customer. Therefore, that the learned Judge ought not to have found that the Respondent was entitled to a refund. It was thus submitted, this is a proper case for this Court to interfere with findings made by the Court below as per laid down principles in the case of **Konkola Copper Mines PLC vs Jacobus Keune**[5] cited above.

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In support of Ground five, Counsel again begun by quoting from the judgment by the court below relating to the Appellant's Counter-claim as follows:-

> **"The Defendant has counter-claimed the sum of KR241,269.81 being the balance due in respect of cement sold and delivered to the Plaintiff. Having found that cement valued at KR240,465.50 was in fact not delivered to the Plaintiff but had instead been diverted, the Defendant's counter-claim cannot succeed."**

It was submitted that the above finding by the court below was erroneous as all the cement for which the Respondent acknowledged receipt, was obtained on credit and the Respondent has not made payments for it as can be seen from the Appellant's statement of account. Therefore, that the court below erred when it dismissed the Appellant's Counter-claim on account that the cement was diverted contrary to the Respondent's own evidence that it had received the cement. It was contended that the court below failed to address its mind to the question whether the Respondent had produced proof of payment for the cement for which it acknowledged receipt thereof.

As such, the Appellant's Counter-claim should not have been dismissed as the Respondent acknowledged receipt of the cement but failed at the same time to prove that it had paid for it. Thus, the Appellant is entitled to its Counter-claim as it had proved on a balance of probabilities that the Respondent had not paid for the cement amounting

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to KR241,269.81 which it collected on credit. Hence, based on the principle outlined in the **Wilson Masauso Zulu vs Avondale Housing Project Limited**[4] case, this is one case in which the Court should reverse the findings of fact made by the court below. And that the decision by the court below should be reversed with costs to the Appellant.

In augmenting the written submissions, Mrs Kateka more or less repeated the arguments advanced in the filed Heads of Argument. She, however, added that had the learned trial Judge read Section 27 together with Section 29 of **the Act**, he could have concluded that the place of delivery of the cement was the Appellant's place of business as the Respondent was an 'own-collect' customer and was responsible for making its own arrangements to collect the cement from the Appellant as shown by the invoices on record.

Counsel further submitted that if at all the Appellant's employee was a mastermind of any fraudulent schemes, then fraud needed to have been pleaded and specifically proved by evidence but that the Respondent did not do so. She, however, stated that it was on the premise of the allegations of fraud and other dishonesty transactions that the Appellant's named employee had to be dismissed.

In opposing this Appeal, the learned Counsel for the Respondent, Mr. Muchende, also relied on the Respondent's Heads of Argument filed

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which he augmented with oral submissions. Counsel responded to all the five Grounds of Appeal together.

It was contended that the kernel of the Respondent's case is the failure by the Appellant to deliver some consignments of cement worth K271,465.50 to the Respondent owing to the negligence on the part of the Appellant's servants coupled with a fraudulent scheme of things involving the Appellant's own sales representative, one Brian Banda, who was pilfering the cement meant for the Respondent.

It was submitted that the contractual arrangements between the parties were explained by the Respondent in its letter dated 15th September, 2010 (at page 124 of the Record of Appeal) wherein its Director explained that the Appellant's Sales Representative, one Brian Banda, had assured the Respondent on behalf of the Appellant that cement would be delivered to the Respondent's project sites at Mwandi High School in Sesheke and Niko Girls High School in Namwala. And that the complaint of the Respondent is that it paid the Appellant the sum of K425,965.49, which represented 13 by 30 tonnes truckloads of cement but that it only received four truckloads, two of which were delivered at Mwandi High School and the other two at Niko Girls High School, respectively. That based on the said complaint, the Appellant investigated and reported the matter to the police and the police managed to impound

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one truckload of cement with a driver hired by the Appellant's Sales representative as the truck was leaving the Appellant's premises. The impounded truckload was later handed over to the Respondent which brought the total number of truckloads received by the Respondent to five. That since thirteen truckloads of cement worth K425,965.49 were bought by the Respondent but it only received five of them valued at K154,500.00, the Respondent commenced an action in the High Court.

It was contended that the Appellant did not dispute receiving the sum of K425,965.50 from the Respondent and in fact, it stated that it received K426,056.00 as reflected under paragraph 4 of the Defence. And that the Respondent had demonstrated that it was a customer of the Appellant on 'cash basis' and not on 'credit facility' as the alleged credit facility was a scam orchestrated by the Appellant's own Sales Representative, one Brian Banda. That as per the evidence of PW2, Deka Muchimba and PW3, Moses James Gondwe, the two were hired by Brian Banda to collect cement issued out in the name of the Respondent but instead of delivering it to the Respondent, the two drivers were instructed to deliver the cement to other third parties in Choma and Kalingalinga. And that according to the evidence of DW1, Brian Banda was found guilty of dishonest conduct by the Appellant for the missing cement which was meant for the Respondent. It was submitted that the Respondent fell short of proving his

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whole claim of K271,465.50 simply because one truckload of cement worth K30,900.00 was said to have been delivered to the Respondent's premises at Mwandi by PW3, one Moses James Gondwe.

It was further submitted that Section 27 of **the Act**, makes it clear that it is the seller who has a duty to deliver the goods while the buyer has a duty to accept the goods and pay for them in accordance with the terms of the contract of sale. Counsel contended that to 'deliver' means to transfer possession of goods from the seller to the *bona fide* purchaser or his duly appointed agents. And that if for reasons of negligence or a fraudulent scheme of things involving the Appellant's employees the cement meant for the Respondent was handed to charlatans pretending to be agents of the Respondent, the statutory duty of the Appellant to deliver cannot be said to have been effected. And that the seller is obliged to put up measures at his own premises to prevent pilfering in default of which the seller should assume the risk in the goods which have not been handed over to the rightful buyer.

Regarding the contractual obligation to dispatch, Counsel for the Respondent disputed the Appellant's submission that there was no contract, express or implied between them for the Appellant to deliver the cement at the Respondent's premises. It was contended that the Appellant's Sales Representative, one Brian Banda, made an undertaking

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to be delivering the purchased cement to the Respondent's premises. And that pursuant to this undertaking, Brian Banda hired drivers, including PW2 and PW3, to collect the cement meant for the Respondent and delivered some consignments at the Respondent's premises and could not deliver other consignments because he diverted them to Choma and Kalingalinga.

Counsel called in aid the case of **National Airports Corporation Limited vs. Zimba and Another**[6] in which we stated that:-

> **"An outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction."**

Therefore, that the court below cannot be faulted for finding as it did that:-

> **"There is overwhelming evidence which shows that Brian Banda was at the centre of a scheme to defraud his employers using the credit facility availed to the plaintiff and it was well orchestrated. He had dealt with PW1 and knew him. PW1 had no reason to doubt that Brian Banda was not working in the interests of the defendant...The defendant in my view had a prima facie duty of care to see to it that the cement was delivered to the right party who in this case was the plaintiff due to the proximity of their relationship...The authorities I have cited all point to the fact that in the circumstances, the defendant cannot escape liability as it is liable for the dishonesty and fraud of its employee. It cannot also escape liability on the grounds of negligence as it had a duty of care to the plaintiff."**

It was further argued that even assuming that the Respondent was an 'own collect' customer, which is denied, the Appellant still remained with the inescapable statutory duty at their premises or depots to ensure that they handed over the cement to the *bona fide* purchaser or his duly appointed agents and not charlatans simply because it had no duty to

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dispatch. That although PW2 and PW3 went to the Appellant's premises to collect the cement issued out in the name of the Respondent, there is no evidence to suggest that the Appellant had requested for any note or letter from the Respondent nor did the Appellant verify with the Respondent's Director whether he was aware of PW2 and PW3 who had gone there to collect the cement. It was argued that this is the duty the Appellant failed to discharge to the Respondent resulting into many bags of cement landing in the wrong hands and causing serious inconvenience to the Respondent.

Accordingly, whichever way one looks at it, whether there was a contractual duty to dispatch the cement to the Respondent or not, the Appellant nonetheless, failed to deliver or transfer possession of the cement to the Respondent contrary to Section 27 of **the Act**. And that the Appellant's arguments have failed to address the legal consequences of the fact that cement meant for the Respondent was driven out of the Appellant's premises at the behest of its own Sales Representative, Brian Banda and taken to third parties (charlatans) instead of being handed over to the Respondent. That since there was no delivery of the cement worth K240,565.50 due to the Appellant's negligence and/or fraud of its servants, the risks in the undelivered cement remained a responsibility of the Appellant. As authority, Counsel referred to Section 20 of **the Act** and the

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case of **Martineau vs Kitching**[1]. And that the Appellant is vicariously liable for the negligence and/or fraudulent schemes which resulted in the loss of cement meant for the Respondent.

Further, in opposing the Appellant's submissions that this Court ought to reverse the findings of fact made by the court below, it was contended that the findings of fact made by the learned trial Judge cannot be said to be perverse nor made in the absence of any relevant evidence or upon misapprehension of the facts as guided in the cases of **Wilson Masauso Zulu vs Avondale Housing Project Limited**[4] and in **Attorney General vs Marcus Kampumba Achiume**[7]. Hence, we should uphold the judgment by the court below as the learned Judge properly directed his mind to the allegations of negligence and fraud which were pleaded and supported by evidence thereby justifying his conclusion that the Appellant was vicariously liable for the missing cement which, but for the negligence of its security personnel and a fraudulent scheme involving the Appellant's own Sales Representative, was never delivered by the Appellant to the Respondent at all. Thus, it was submitted that this appeal should be dismissed.

In augmenting the written Heads of Argument, Mr. Muchende began by responding to Mrs Kateka's oral submission that the Respondent was an 'own-collect' customer. Mr. Muchende referred us to the evidence of

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PW3, who told the court below that Brian Banda, the Appellant's Sales Representative, hired the truck from Natural Valley Limited which PW3 used to go and collect the cement from the Appellant's premises. Counsel argued that if Brian Banda hired trucks in order to deliver cement to the Appellant's clients, then he was doing that in his capacity as an employee of the Appellant. Mr. Muchende went on to submit that as shown by the Respondent's letter to the Appellant, the cement was supposed to be dispatched and delivered in Mwandi and Sesheke where the Respondent was constructing schools but the cement was not delivered. The Respondent's summary of what it received on site is on the Record ans shows that only five truck loads were received at the Respondent's construction sites.

It was submitted that the Respondent had paid K425,000.00 for thirteen truckloads but that only five truckloads valued at K154,000.00 were received, leaving a balance of K271,000 as the value of the cement paid for but not delivered. And that it was the Respondent's view that the Appellant's alter ego was responsible for the undelivered cement. Therefore, that the learned Judge was on firm ground when he awarded this sum to the Respondent as it was paying on 'cash basis' as shown by the Witness Statement of PW1 and not under a 'credit facility.'

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On the issue of negligence, Counsel submitted that negligence was pleaded and particulars itemised. That drivers were even brought to confirm that Brian Banda gave them instructions as to where to deliver the cement and the same person assured the Respondent that he would deliver the cement to the Respondent's site and this was done on four occasions except it was diverted on other occasions. Therefore, that the Respondent was not an 'own collect' client. Further, that Section 29 of **the Act**, brings in the issue of 'depending on the nature of a contract' which is akin to business transactions where parties agree. That in the current case, one Brian Banda, had assured the Respondent that he would deliver the cement on site and on four occasions, the cement was so delivered. And that this was the bespoken arrangement between the Appellant and the Respondent as alluded to under paragraphs 2 and 3 of the Witness Statement of the Respondent's Managing Director. And that according to the provision of Section 27 of **the Act**, delivery is done when goods are exchanged but that in this case, delivery was to be done when the cement is delivered to the Respondent's sites at Mwandi and Niko, respectively. And since the cement went elsewhere, there was no delivery.

In reply, Mr. Nchito, SC., submitted that there is no documentary evidence produced by the Respondent to support the submission that there was a 'bespoken arrangement' between the parties as to the place of

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delivery of the cement. Conversely, the Appellant has produced invoices which all indicate that the Respondent had to provide its own transport. That there is no invoice which shows that delivery was to be done at Mwandi in Sesheke or Niko in Namwala but they show that it was to be delivered to the Respondent with its own transporter. And that whatever the Respondent did with its transporter is not within the Appellant's knowledge. In support of this submission, Mr. Nchito, SC, cited the evidence of PW3 which, he argued, does not show on whose account or instructions the drivers were acting as the drivers' superiors/bosses were not called as witnesses as they are the ones who could have revealed who hired them.

Further, that what the Respondent is saying is that it pleaded negligence but it proved fraud. Mr. Nchito, SC, reiterated that the answer as to where delivery was to be done can be found in the invoices which show that the Respondent was to provide its own transport. That nowhere in the documents is it shown where the cement was to be delivered. If the Respondent chose to use the Appellant's employee as its agent, then it did so at its own peril. It was contended that after the Appellant delivered the cement to the driver with relevant documents, then its duty or obligation was discharged. Mr. Nchito, SC, argued that any 'bespoken' arrangement means that it was outside the norm and must be documented but that in

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this case, there is no single document on record to that effect. Hence, there was no such 'bespoken' arrangement in this case. It was submitted that the Appeal should, therefore, be allowed as the Appellant has made its case.

We have seriously considered this Appeal together with the arguments in the respective Heads of Argument and the oral submissions by the learned Counsel for the respective parties and the authorities cited. We have also considered the judgment by the learned Judge in the court below. The major question raised in this Appeal is whether the learned trial Judge was on firm ground when he held that the Respondent was entitled to the sum of K278,462.19 from the Appellant which comprises the sum of K240,565.50 and K37,896.69 being respectively, refund of the money paid by the Respondent to the Appellant for the cement which the Appellant did not deliver to the Respondent and as loss incurred by the Respondent as a result of buying alternative cement at higher prices from local retailers/vendors.

We shall deal with the Grounds of Appeal in the manner they were argued by the Appellant. We shall begin with Grounds one and two. The thrust of the Appellant's arguments in support of Grounds one and two of this Appeal is that the Respondent was an "own-collect" customer and was therefore, responsible for collecting the cement from the Appellant's

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premises as there was no contract, express or implied between the parties to the effect that the Appellant was to deliver the cement at the Respondent's project sites as alleged. The Appellant relied on the various invoices on record which all indicate on "transporter" as "own transport." It was further argued that the Respondent conceded not having paid any transport charges to the Appellant.

In opposing grounds one and two, the gist of the Respondent's arguments is that the Respondent was a "delivered" customer following a 'bespoken' arrangement made through Brian Banda in his capacity as an employee (Sales Representative) of the Appellant who made an undertaking to the Respondent that the cement would be delivered to its project sites at Mwandi High School in Sesheke and Niko Girls High School in Namwala. It was also argued that the Appellant cannot be said to have discharged its contractual/statutory duty to deliver in accordance with Section 27 of **the Act** as the cement was not delivered to the Respondent or its authorised agents but was instead diverted.

We have carefully considered the above arguments. It is our considered view that Grounds one and two of this appeal invite us to consider the nature of the agreement between the parties as to where delivery of the cement was to be made. According to Section 27 of **the Act**, it is the duty of the seller to deliver the goods and of the buyer to

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accept and pay for them, in accordance with the terms of the contract of sale. Section 29 (1) of **the Act** also provides that:-

> "**29 (1).** **Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.**" (Underlining is ours for emphasis only).

From the above provisions, it is clear that where delivery and/or possession of the goods is to be done, depends on the terms of the contract, express or implied between the parties.

Perusal of the Record of Appeal reveals that there is no written contract of sale between the Appellant and the Respondent which could have clearly spelt out where delivery was to be done. Therefore, only an inference can be drawn as to the nature of the arrangement between the two parties, either by custom or by other evidence on record. Although the Respondent has vehemently argued that there was a 'bespoken' arrangement made through the Appellant's sales representative to deliver the cement to its project sites in Sesheke and Namwala, there is nothing on record to confirm that this was expressly agreed to by the parties as there is no document on record from which such an inference can be

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drawn apart from the Respondent's own assertions. This is also compounded by the fact that the Appellant's employee, Brian Banda, who seems to have been at the centre of the said 'bespoken arrangement' was not called as a witness to attest to the assertion by the Respondent. In contrast, the Appellant produced several invoices which all show that the Respondent provided its "own-transport". It is thus, only logical to conclude that the Respondent was responsible for making its own transportation arrangements to collect the cement from the Appellant's premises. Hence, our conclusion on this issue is that the Respondent was an "own-collect" customer and not a "delivered" customer. We are fortified in so holding as none of the invoices or delivery notes on record shows that delivery was to be done at Mwandi in Sesheke or Niko in Namwala. Further, it is on record that the Respondent failed to show that the payments it made to the Appellant for the cement included transport charges from which an inference that the Respondent was a "delivered" customer could also have been drawn.

As regards the transfer of risk in the cement, Section 20 of **the Act** provides that:-

> "20. **Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.**"

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The Appellant's conditions of sale of cement provides, on "buyer's risk," that:-

> "**The ownership of the cement and other materials will pass from the seller to the buyer:-**
>
> a) **In the case of collections at works or depots, when the cement or other materials have been <u>loaded into the collecting vehicle</u>.**
> b) **In the case of rail or through 'rail/road' deliveries, when the cement or other materials have been loaded into a railway truck at works or depots and accepted by the Railways.**
>
> **All transit and other risks shall be for the account of the buyer from the time and from the place at which the ownership of cement and other materials pass from the seller to the buyer as detailed in the preceding paragraph unless it can be shown that there has been negligence on the part of the seller."** (Underlining is ours for emphasis only)

From the above, our firm view is that once the Appellant loaded the cement onto the trucks supplied by the Respondent, the risk and property in the cement passed to the transporter and/or to the Respondent as the buyer. Whatever happened to the cement thereafter is/was not the Appellant's responsibility nor can the Appellant be blamed for that. We, accordingly, affirm the position taken by the High Court in **<u>Lyons Brooke Bond (Zambia) Limited vs. Tanzania Road Services Limited</u>**[3] that as a general rule, the delivery of goods by a seller to a carrier for conveyance to the buyer places the goods at a consignee's risk and therefore, the consignee is the proper person to sue in the event of loss or damage. We therefore, reverse the finding by the trial court to the effect that the Respondent was a "delivered" customer as that finding is not supported by

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the evidence on record. Grounds one and two of this Appeal therefore, have merit and we uphold them.

As regards Grounds three and four, the crux of the Appellant's arguments is that if Brian Banda, the Appellant's employee/sales representative, was the mastermind of fraudulent schemes, then fraud needed to have been pleaded and specifically proved. The kernel of the Respondent's arguments in response to the above argument was that the learned trial Judge was on firm ground when he found the Appellant to have been negligent because the Respondent had proved negligence and fraud in the sense that the Appellant ought to have put up measures to prevent pilfering before the cement was handed over to the Respondent as the rightful buyer. And that in the current case, it is clear that Brian Banda instructed drivers where to deliver the Respondent's cement and that it was delivered on five occasions but on other occasions it was diverted. Hence, the Appellant is vicariously liable for the negligence and/or fraudulent schemes by its employee, Brian Banda, which resulted in the loss of cement meant for the Respondent. And that because of his acts/schemes, Brian Banda was found guilty of dishonest conduct by the Appellant for the missing cement meant for the Respondent and was dismissed. DW1 confirmed this in his evidence when he said that claims were made against Brian Banda to the effect that he was involved with

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some clients or clients' accounts (including the Respondent) as he was said to have procured cement without the full sanction of the Appellant hence his dismissal from employment.

We have considered the above arguments under Grounds three and four of this Appeal. Although it was conceded by the Appellant that it dismissed its employee, Brian Banda, on account of dishonest transactions including those involving the Respondent, we agree with the Appellant that fraud was not pleaded nor was it proved in evidence. We say so as neither Brian Banda nor the drivers' employers who collected the cement meant for the Respondent were called to testify to ascertain the correct position as the nagging question of who instructed them to load the cement meant for the Respondent and to deliver it elsewhere still remains unclear and leaves lingering questions as to the dealings between the Respondent and Brian Banda and whether the latter's acts were of a private nature between him and the Respondent and not on behalf of the Appellant so that it can conclusively be said that he did this in the course of his employment with the Appellant.

Therefore, although the general principle is that the employer may be held vicariously liable for the employee's acts or omissions as was observed in **Giogio Fraschini and Motor Parts Industries (Copperbelt) vs. Attorney-General**[8], in the current case we are not satisfied that the

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'bespoken' arrangement that the Respondent had with Brian Banda was part of his duties with the Appellant or that it had the Appellant's approval. In the above cited case, we put it thus:-

> "(i) **If the servant is a servant of a particular class and the act complained of was one which would in ordinary course be within the scope of the employment of servants of that class, this is sufficient to establish a prima facie case that the act complained of was committed by the servant in the course of his employment, and the onus of proof then shifts to the owner to show that the employee was acting outside that scope.**
>
> (ii) **The true test whether or not a servant is acting in the course of his employment can be expressed in these words: was the servant doing something that he was employed to do? If so, however improper the manner in which he was doing it, whether negligent or fraudulent or contrary to express orders, the master is liable."**

The evidence on record further shows that the drivers who testified in the court below said that they were only directly seeing Brian Banda to collect loading authorities and not any other employees of the Appellant and it is not clear who referred them to Brian Banda. All these lingering doubts remain which means that the Respondent's evidence did not meet the threshold of rebutting the Appellant's claim that it was not a delivered customer or that the arrangement it had with Brian Banda was within the scope of his employment. In the circumstances, the only plausible conclusion to be drawn is that the party who referred these drivers to Brian Banda was the Respondent and whatever he did, he was doing so on behalf of the Respondent.

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In the case of **Attorney General vs Marcus Kampumba Achiume**[7], we made it clear that the appellate court may interfere with the findings of fact made by the trial court where such findings are based on misapprehension of the evidence. In the current case, as much as we agree that Brian Banda was at the centre of a scheme to defraud the Respondent using the credit facility availed by the Appellant, nevertheless, we are of the firm view that had the trial Judge properly analysed the evidence, he would have found that the 'bespoken' arrangement was a private arrangement between the Respondent and Brian Banda. The evidence on record does not show that the so called 'bespoken' arrangement between the Respondent and Brian Banda had anything to do with the Appellant. What seems to be apparent is the fact that the Respondent had made its own private arrangement with Brian Banda for him to handle all its deliveries and that the Respondent is now complaining because the so called 'bespoken' arrangement has gone bad as it turned out that the person whom they trusted to handle their deliveries was in fact a fraudster or a crook. In the circumstances, the loss resulting from Brian Banda's fraudulent conduct cannot be apportioned to the Appellant but to the Respondent itself for trusting a crook.

The effect of the above finding is that the award by the trial Judge in favour of the Respondent was erroneous and made upon a

misapprehension of the facts as it is apparent that the undelivered cement cannot and should not have been attributed to the Appellant but Brian Banda who hoodwinked the Respondent. This fact was admitted by the Respondent in its letter to the Appellant's Commercial Manager dated 15th September, 2010 wherein the Respondent's Managing Director (PW1) conceded that they discovered that they were provided with fake documents by Brian Banda when they followed up the issue of undelivered cement at the Appellant's head office. For the avoidance of doubt, all the cement which was loaded and meant for the Respondent but was diverted by Brian Banda is hereby deemed to have been delivered to the Respondent. There is therefore, merit in Grounds three and four of this Appeal. We uphold them.

As for Ground five of this Appeal, the gist of the Appellant's argument is that the Respondent did not produce any proof of payment for the cement it received despite the court below finding and ordering that the Respondent was entitled to K240,565.50 from the Appellant for the cement that was not delivered. That to the contrary, the Respondent acknowledged receipt of the cement which it did not pay for as a credit customer. Reference was made to the Appellant's statement of account for the Respondent. It was argued that the Respondent was not, therefore,

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entitled to any refund but rather, the Respondent should be ordered to pay the Appellant for cement received but not paid for.

The thrust of the Respondent's argument in response was that it was paying on "cash-basis" and not on "credit-basis" as evidenced by PW1's evidence that he was paying on cash basis and that cheques in the total sum of K425,965,499.32 were also issued in respect of 13 x 30 tonnes truckloads of cement out of which two truckloads were delivered at Mwandi, Sesheke and two at Niko, Namwala and the fifth was later released to the Respondent after the police impounded it following a complaint by the Respondent. And that the total value of the five truckloads was K154,500.00 leaving the balance of K271,465.50 as the value of the undelivered cement.

We have seriously considered the above arguments. Having found that the Respondent is not entitled to any refund(s) from the Appellant, the only issue to be determined under Ground 5 of the Appeal is whether the Appellant is entitled to its counterclaim.

In considering the counterclaim, the learned Judge stated that since the cement meant for the Respondent was diverted, then the Appellant was not entitled to the sum claimed in the counterclaim. Clearly, the learned Judge did not consider let alone analyse the parties' respective evidence in so far as it related to the counterclaim and the parties'

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Statements of Account. Otherwise, he could have found that the issue raised under Ground five was mathematical which involves calculations.

The appellant's evidence was that it delivered cement valued at K667,335,311.29 to the Respondent and that the Respondent only paid the sum of K426,065,400.32 leaving cement valued at K241,269,811.97 which the Appellant claimed in its counterclaim.

On the other hand, the Respondent's evidence was that it paid a total sum of K425,965,499.32 to the Appellant but that it only received cement valued at K154,500,000.95 leaving cement valued at K271,465,499.00 undelivered. This is the cement which the Respondent alleged was diverted by Brian Banda and delivered elsewhere.

The difference between what the Appellant claimed the Respondent paid, namely, the sum of K426,065,499.32 and what the Respondent said it paid, namely, K425,965,499.32, is K100,000.00 worth of cement. When the sum of K100,000.00 is deducted from the sum of K241,269,811.97 counterclaimed, it gives a balance of K241,169,811.97 being the value of the cement collected by the Respondent but not paid for.

We therefore, find that the Appellant is/was entitled to the sum of K241,169,811.97 (before rebasing) claimed under the counterclaim. We, accordingly, enter Judgment in favour of the Appellant in the sum of K241,169,811.97 (before rebasing) which will be paid together with

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interest at short term deposit rate from the date of the counterclaim up to Judgment date and thereafter, at the average lending rate determined by Bank of Zambia up to date of full payment.

All the five Grounds of Appeal having succeeded, the sum total is that this Appeal has succeeded. We accordingly set aside the awards made by the trial Judge.

Costs in this Court and in the court below are for the Appellant. The same are to be taxed in default of agreement.

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H. Chibomba

SUPREME COURT JUDGE

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E. C. N. Muyovwe

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE