IN THE SUPREME COURT OF ZAMBIA APPEAL NO.71/2010
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

TOBACCO ASSOCIATION OF ZAMBIA **APPELLANT**

AND

KAYANJE FARMING LIMITED **1ST RESPONDENT**

RINTOUL LIMITED T/A TOBACCO LEAF BROKERS LIMITED **2ND RESPONDENT**

STANCOM TOBACCO SERVICES LIMITED T/A ALLIANCE ONE INTERNATIONAL **3RD RESPONDENT**

Coram: Chibomba, JS, Hamaundu and Kaoma, AJS

On 8th April, 2014 and 31st August, 2018

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

For the 1st respondent : Mr C.P. Chuula, Messrs Chibesakunda & Company

For the 2nd & 3rd respondents: No appearance

JUDGMENT

HAMAUNDU, JS, delivered the Judgment of the Court.

Cases referred to:

1. **Attorney General v Achiume (1983) ZR1**
2. **Communications Authority v Vodacom Zambia Limited (2009) ZR 196**
3. **Machilika v The People (1978) ZR,** reprint, **61**
4. **Wilson Masauso Zulu v Avondale Housing Project (1982) ZR 172**
5. **Eagle Charalambous Transport Limited v Phiri (1993/1994) ZR 180**

Legislation referred to:

Tobacco (Marketing and Licensing) Rules, Chapter 237 of the Laws of Zambia

Works referred to:

Clerk & Lindsell on Torts, 17th Edition (London: Sweet & Maxwell), page 219

The appellant appeals against a decision of the High Court which found the appellant liable to the 1st respondent in negligence over the sale of the 1st respondent's tobacco on the auction floor. The following is the background to this appeal:

The appellant is an Association which conducts sales and purchases of tobacco in Zambia. For this purpose, it maintains auction floors at which the transactions are conducted. The 1st respondent was at the material time one of the many tobacco growers in this country. The 2nd and 3rd respondents were buyers of

tobacco who, at different times, bought the 1st respondent's tobacco in 2006.

The tobacco sales which are the subject of this dispute were conducted in 2006 and were guided by the appellant's Tobacco Marketing Rules, 2006. We find it necessary to reproduce some salient features of the rules, which can be found at page 147 of the record of appeal and also page 409 thereof, because it is those rules that set out the roles and duties of all the participants in the sale of tobacco. These provided the following definitions:

> **"Contracted farmer– Is a farmer who is obliged to sell to a buyer due to having an established contract with them.**
> **Committed farmer– Is a farmer who does not have a contract or sponsorship with any Buyer, but he declares prior to his first sale, to sell to one or more buyers by mutual agreement on run of crop**
> **Independent farmer– Is a farmer who is neither contracted nor committed to any Buyer and has the right to offer his tobacco to any Buyer at any time"**

The rules provided for a Grower's Representative whose responsibilities and duties was assigned in the following terms:

> **" (b) Grower's Representative– This person has the responsibility of technically advising the farmer with regard to his sales. The Grower's Representative is the**

one authorized to represent the grower and everybody else has to work through him.

The Grower's Representative has the following rules to adhere to;

(i) Advise the grower on the sales process

(ii) Advise the grower on the quality, handling, and preparation of his crop

(iii) Advise the grower as to whether there is reason for appealing and the possibility of getting their appeals agreed to

(iv) Any agent has to work through the Grower's Representative and will act as a farmer

(v) Only the Growers Representative can write on the ticket

(vi) The Grower's Representative and or Buyer will report the farmer/ Agent to the Floors Management if he feels there is disruption to orderly marketing."

The rules also provided for an Arbitrator whose role and duties were stated as follows:

" (c) Arbitrator– he has the responsibility of settling disputes that arise during sales, and the following rules guide the work of the arbitrator;

(i) The Arbitrator does not re-classify tobacco, or put his own class on the tobacco, but rather adjudicates between the classes of the farmer and Buyer only

(ii) The Arbitrator will operate in a designated and quarantined area during sales"

We pause here and explain, as was revealed by the evidence on record, that the process of selling tobacco on the auction floors demanded that the prospective buyers advertise the price indeces or matrices, showing the prices which they were offering to pay for the different grades of tobacco. It was on the basis of the different prices offered by the several buyers that a grower would select the particular buyer that they would sell their tobacco to. So that, on the day of the sale, the only dispute that would arise between the buyer and the grower was with regard to the grade which the buyer attached to a particular bale of tobacco. Of-course, the grade of the tobacco would have a bearing on the price offered.

As regards the sale process, the rules provided:

"3. ORDER OF SELLING

(a) Buying– the process of agreeing the purchase price of a sale of tobacco between the Buyer and the Grower.

The buying process will follow the procedure below:

(i) The Buyer will start the sale by placing his offer for the sale on the ticket

(ii) **The Grower's Representative in the company of the farmer/Agent will follow close behind and agree or not with the offer made by the Buyer. If the Grower's Representative/Agent disagrees he will propose an alternative grade**

(iii) **The Buyer will have a second look. If he is in dispute and cannot negotiate the difference with the Grower's Representative, then the following will apply:**

- **Where the total number of bales in dispute is 5% or less of the farmer's consignment, then they will all be automatically sent for arbitration free of charge.**
- **Where the total number is greater than 5% and both parties agree, then the bales can be sent for immediate arbitration (a charge of US$2.00 per bale to the loser applies). Otherwise the bales will be sent for re-offer to the same Buyer. Any further disputes arising from these re-offered bales will then go to arbitration and attract a charge of US$2.00 per bale to the loser of the dispute.**

(iv) **Arbitration is final**

(v) **The provisions mentioned under (iii) will apply to farmers who are committed or contracted to identified Buyers from the beginning of the season, and all small-scale farmers.**

(vi) **However; for any independent farmer that chooses to exercise his right to change buyers as and when he wishes, the floor**

operating system will be as stipulated above, except that he will have no access to arbitration at any stage unless as agreed with the buyer.

(vii) The farmer has a right to RTG his sales at any stage of the selling process prior to arbitration.

Finally, another salient feature of the rules was the following provision:

> **"8. Any grievances to the above should be submitted in writing by the complainant and a response must be given within 14 days by the recipient. All such correspondence to be copied to the chairman of this committee."**

In June, 2006 the 1st respondent put for sale on the appellant's auction floor 974 bales of tobacco. They were bought on the 26th June, 2006 at the price of US$223,082.23 by the 2nd respondent who took delivery of the tobacco. A few days later, on or about the 29th June, 2006 the 2nd respondent informed the 1st respondent that it was unable to pay for the tobacco that it had bought. The 1st respondent allowed the 2nd respondent to take the tobacco back to the appellant's auction floor for sale to other buyers. The 1st respondent, then, placed a further 796 bales of

tobacco on the appellant's auction floor; bringing the total number of bales offered for sale to 1,741. These bales were sold between the 18th August, 2006 and the 31st August, 2006. It is not in dispute that, over this period, the tobacco was sold in batches of 200 metric tonnes. The 3rd respondent bought all the tobacco at the total price of US$288,151.51.

In December, 2006 the 1st respondent commenced this action. As against the 2nd respondent, the claim was for breach of contract regarding the first sale. As against the 3rd respondent, the claim was for inducing the breach by the 2nd respondent of the contract between it and the 1st respondent regarding the first sale. As against the appellant, however, the claim was for negligence in the manner in which the appellant conducted the second sale. According to the 1st respondent, the negligence led to the underpricing of its tobacco; resulting in a loss of US$85,091.73.

After hearing witnesses from the 1st respondent and the 2nd respondent, the learned judge, with regard to the claim against the appellant and the 1st respondent which gave rise to a duty of care owed by the former to the latter. According to the judge, the

appellant's employee, who acted as the growers' representative, did properly exercise his duty of care during the first sale to the 2nd respondent by securing the correct classification of the tobacco. However, the judge went on to hold that the same grower's representative breached his duty of care during the second sale to the 3rd respondent by undervaluing the crop in spite of the fact that the tobacco that was being sold included that which had been sold in the first sale and which had fetched a good price.

The judge went on to lament that the goings on at the appellant's trading floor, during the second sale, left much to be desired. According to the judge, the 1st respondent or its agent was prevented from being present during the second sale under the threat that if the 1st respondent or its agent attended the sale, there would be no sale. The judge said that this evidence was not challenged.

The judge went on to find that there was non-disclosure of a particular fact on the part of the appellant. According to the judge, up until the second sale was concluded, the 1st respondent was unaware that the 3rd respondent was the third party that had rejected the 974 bales of tobacco which the 2nd respondent had

bought on its behalf from the 1st respondent in the first sale. Yet, said the judge, the appellant knew this fact but omitted to disclose it to the 1st respondent.

The judge also said that the appellant, through its employee, one Phonto Mumbi, had assured the 1st respondent that the buyer was a licensed one; and yet it turned out that the 3rd respondent was in fact not a licenced buyer. According to the Judge, had the appellant done its homework, the 2nd respondent should have been barred from operating on the floor.

The Judge also held that the appellant lacked a hands-on control of the trading on the floor. According to the Judge, this was demonstrated by the 1st respondent's 29 bales of tobacco that went missing while in the appellant's custody.

All these lapses, according to the Judge, contributed to the appellant's breach of its duty towards the 1st respondent. Consequently, judgment was entered in favour of the 1st respondent in the sum of US$82,209.

The appellant filed four grounds of appeal. These read as follows:

1. **The learned trial judge erred both in law and in fact when she disallowed an adjournment and dispensed with the examination of the respective witnesses for the second defendant and third defendant.**
2. **The learned trial judge erred both in law and fact when she made the following findings—**
   - **(i) That the second defendant threatened and prevented the plaintiff or its agent from being present during the sale of the plaintiff's tobacco to the third defendant;**
   - **(ii) That the second defendant undervalued the plaintiff's tobacco in the sale to the third defendant; and**
   - **(iii) That 29 bales of the plaintiff's tobacco went missing whilst in the custody of the second defendant**
3. **The learned trial judge erred both in law and in fact when she made the following findings:**
   - **(i) That the second defendant knew that the first defendant was purchasing the plaintiff's tobacco for the third defendant and should have disclosed the same to the plaintiff; and**
   - **(ii) That the third defendant was not a licensed buyer and the first defendant should thus have been barred by the second defendant from operating on its trading floor.**
4. **The learned trial judge erred both in law and in fact when she found that the second defendant breached its duty of care to the plaintiff resulting in a loss of US$82,209 by the plaintiff.**

The first ground of appeal is on an interlocutory issue. If it were to be the only ground that succeeds, we would only send this matter back for retrial. The second and third grounds deal with findings of fact which have a bearing on the lower court's conclusion; which, in turn, is the subject of appeal in the fourth ground. For its part, the fourth ground deals with the substantive aspect of this matter. Therefore, we will leave the first ground until the end whereupon we shall decide whether or not it will be necessary to consider it.

We will deal with the second and third grounds of appeal together since they are both appeals against findings of fact. The first finding which is under attack is the finding that the appellant threatened and prevented the 1st respondent and its agent from being present at the auction floor when the tobacco was being sold to the 3rd respondent.

Submitting on this issue, learned counsel for the appellant pointed out that in its pleadings and witness statements, the 1st respondent claimed that the appellant prevented the 1st respondent's representative from being present during the sale. Counsel then referred us to the testimony of the 1st respondent's

Chief Executive Officer. Particularly, we were referred to the portion where in cross-examination, that witness said:

> **"I personally witnessed the sale on the floor"** (page 592 of the record of appeal).

Counsel submitted that that testimony tallied with the statement contained in the witness statement of the appellant's witness, which stated that the sale was conducted by the 1st respondent's representative and employee of the appellant and witnessed by the 1st respondent's agent. Counsel, therefore, argued that it came to him with a sense of shock that in the light of that testimony, the court below could make a finding of fact such as the one under attack. Citing our decisions in **Attorney General v Achiume**[1] and **Communications Authority v Vodacom Zambia Limited**[2] counsel argued that the above finding was perverse and ought to be set aside.

In response to the arguments on this issue, learned counsel for the respondent submitted that there was evidence on record which clearly showed that the 1st respondent's witness (that is, the Chief Executive Officer) and the 1st respondent's agent were not allowed to be present at the time of the second auction of the 1st

respondent's tobacco. According to counsel, the evidence is contained in the witness statement of Christopher James Thorne. With that evidence on record, counsel argued, the finding of fact cannot be said to have been perverse; and must, therefore, not be set aside.

We have considered the arguments on this finding of fact. In the statement of claim, the 1st respondent averred that the appellant did not allow it to place its representative on the auction floor and that, instead, the appellant said that such move would result in the buyer not buying the crop. Again, in his witness statement, Mr Christopher James Thorne, the 1st respondent's Managing Director, stated that the appellant, through its floor manager, did not allow either him or Mick Kennedy (also known as Michael Shane Kennedy), the 1st respondent's agent, to attend the sale on the ground that the buyer, the 3rd respondent, would walk away from the sale if either of them attended it. Now, we must say that in our view, the statement by the 1st respondent's Chief Executive Officer that he personally witnessed the sale on the floor, as quoted by the appellant, was most likely recorded out of context. This is because, when one reads the rest of the testimony, it is clear

that the 1st respondent's Chief Executive Officer did not attend the second sale of the 1st respondent's tobacco. However, there is testimony which contradicts the 1st respondent's averment, as well as its Chief Executive Officer's statement, that the appellant's floor manager did not allow the 1st respondent's agent to be present. The contradictory testimony is found in the oral testimony of Mr Michael Shane Kennedy, a witness whom the appellant called.

That witness's responses in cross-examination were as follows:

> **"I am aware of the sale concerning plaintiff but I was not the representative. It was not a sale I was representing. It went I suppose as a sale would go. I had represented the plaintiff in the previous season. I was contacted by Mr Thorne telling me that he would not require my services that is why I did not represent 1st plaintiff in this transaction. I speak to Mr Thorne whenever I see him on the floor. He never gave me instructions to represent him in 2006. I was not aware of any impediment to Mr Thorne instructing me in 2006."**

He went on to say:

> **"I was not aware of any instruction from 3rd defendant. (Buyer) not to represent (the plaintiff) that if I was present the 3rd defendant (Buyer) would not buy."** (words in brackets ours for clarity).

In re-examination, the witness said;

> **"I was aware of the sale but not the intricacies of the sale"**

These responses are on pages 602 and 603 of the record of appeal.

This testimony shows that Mr Michael Shane Kennedy was present at the sale, but not on behalf of the 1st respondent. It, therefore, contradicts the averment in the 1st respondent's statement of claim and Mr Thorne's witness statement on this issue in a very material particular. In fact, since Mr Thorne adopted his witness statement when he testified on oath, it follows that on this issue, Mr Thorne lied on oath. There is another fact which seems to confirm that the 1st respondent was not truthful on this issue. One of the clauses of the auction rules which we have set out above provided that any grievance concerning the procedure regarding the auction was to be submitted in writing to the appellant. The latter was then obliged to respond within 14 days. The 1st respondent did not, at any time, complain to the appellant about being denied the right to be present at the auction.

In **Machilika v The People**[3], we held that once a witness is shown to be untruthful in very material respects, their evidence can carry very little weight. The court below accepted the assertion by the appellant on the ground that it was not challenged. We think that that assertion did not need to be challenged because it was inherently untruthful. Had the court below examined the evidence and found the untruthful aspect of the 1st respondent's allegation on this issue, we do not think that it would have made the finding of fact that is being challenged. We have, in several cases, set out the grounds upon which an appellate court may reverse findings of fact made by a trial court. One such case is **Wilson Masauso Zulu v Avondale Housing Project**[4] where we said that before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse, or made in the absence of any relevant evidence, or upon a misapprehension of the facts, or that they were findings which, on a proper view of the evidence, no trial court acting correctly could reasonably make. We certainly think that the last ground applies to the finding of fact in issue. The finding, therefore, ought to be reversed.

The second finding of fact that the appellant is challenging is the finding that the appellant undervalued the 1st respondent's tobacco during the sale to the 3rd respondent. We would like to say that this was not a finding of fact; rather, the court below used the reduced price to form a conclusion, based on what appeared to be the doctrine of *res ipsa loquitur*, that the appellant had breached its duty to the 1st respondent. This issue will be dealt with in the fourth ground of appeal.

The third finding of fact being challenged is the finding that 29 bales of the 1st respondent's tobacco went missing whilst in the custody of the appellant. Although the court did make this finding of fact, its purpose was for the court to demonstrate that the appellant was guilty of a series of lapses which, in turn, went to show that the appellant was in breach of its duty to the 1st respondent. We do not think that the issue, standing alone, was even material to the trial. We certainly do not think that it is relevant to this appeal.

The fourth finding of fact that is being challenged is to be found in the third ground of appeal; and is the finding that the appellant knew that during the first sale, the 2nd respondent had

purchased the 1st respondent's tobacco for the 3rd respondent and, therefore, that during the second sale, the appellant should have disclosed that the new buyer was the same buyer who had caused the failure of the first sale.

Learned counsel for the appellant argued that a review of the material that was before the court below; that is, the pleadings, the bundles of documents, the witness statements and the testimony of witnesses, did not reveal any basis for imputing knowledge on the appellant of the fact that the 3rd respondent was the entity behind the failed sale to the 2nd respondent. Counsel submitted that in those circumstances, it was absurd, if not unfair, to have expected the appellant to disclose a fact which was not within its knowledge. In the alternative, counsel argued that in any event, according to the **Tobacco (Marketing and Licensing) Rules** which are in the **Tobacco Act, Chapter 237** of the **Laws of Zambia**, the duty is on the buyer to disclose any interest that he may have, other than as a buyer.

The 1st respondent's response to the appellant's submissions was simply that the issue was one of negligence and, therefore, the particular findings of fact were of no consequence.

The passage of the lower court's judgment where the finding in this issue was made read as follows:

> **"Moreover, there was also the issue of non-disclosure of a fact within the peculiar knowledge of the 2nd defendant (the appellant), here I refer to the fact that the 3rd defendant (3rd respondent) was in fact the 3rd party who had rejected to purchase the plaintiff's (1st respondent's) tobacco when it was sold to the 1st defendant (2nd respondent). PW1's evidence was not contradicted on the fact that at the time the plaintiff's (1st respondent's) crop was sold to the 3rd defendant (3rd respondent) he was unaware of the fact that the 3rd defendant (3rd respondent) was the third party who had rejected to purchase the tobacco from the 1st defendant (2nd respondent) earlier. The evidence on record is to the effect that at no point during the sale of the tobacco to the 3rd defendant (3rd respondent) until after the sale did the plaintiff (1st respondent) become aware that the 1st defendant (2nd respondent) was buying the tobacco on behalf of Alliance One (3rd respondent). There was, therefore, as alluded above, an issue of non-disclosure by the 1st defendant (2nd respondent) and the 2nd defendant's (appellant's) Floor Manager, Phonto Mumbi, as to who was actually buying the tobacco."**

This passage is at pages 15 and 16 of the record of appeal.

Three related findings are brought out in this passage; first, that the 1st respondent was not aware that in the first sale, the 3rd respondent was the party for whom the 2nd respondent had purchased the tobacco and who, later, refused to buy it; secondly, that the 1st respondent, again, was not aware that in the second sale, the buyer was the same 3rd respondent who had refused to buy the tobacco in the first sale; and, thirdly, that the appellant was aware about the above two facts but chose not to disclose them to the 1st respondent. Contrary to the submission on behalf of the 1st respondents that theses findings are immaterial, it is actually necessary to resolve them because they appear to have formed the basis upon which the lower court held the view that the appellant, the 2nd respondent and the 3rd respondent were guilty of a conspiracy whereby the 3rd respondent induced the 2nd respondent to breach its obligations under the first sale in order for the 3rd respondent to subsequently come and buy the same tobacco at an inferior price. This view is apparent in the portion of the lower court's judgment where the court deals specifically with the 1st respondent's claim as against the 3rd respondent. We think also that the view had a huge bearing on how the court below

approached the 1st respondent's claim as against the appellant; which, otherwise, was a straight forward case of establishing what, if any, duties the appellant owed to the 1st respondent in that particular relationship and whether the 1st respondent had adduced sufficient evidence to show that the appellant had breached one or several of those duties. We shall consider these findings together.

We think that it is important to note that the picture that the 1st respondent's Chief Executive Officer painted at the trial was that during the second sale, the buyer was some mysterious person or entity who was only known to the appellant's employee, Phonto Mumbi; and that the said buyer did not want the presence of the 1st respondent and/or its agent at the sale, otherwise the buyer would walk away from the sale.

In his witness statement, which he adopted at the trial as his evidence in chief, this is what the appellant's Chief Executive Officer said:

> **"Mr Rusche visited me at the plaintiff's (1st respondent's) farm and expressed an interest in the purchase of the plaintiff's (1st respondent's) tobacco on behalf of the 1st defendant (2nd respondent) and which I later came to know he was to onward sell to the Third Party Stancom Tobacco**

> **Services Limited Trading as Alliance One International (3rd respondent) as an end user of the plaintiff's tobacco crop."**

In the same statement the witness went on to say:

> **"at around 13:45 hours on the 29th June, 2006 I received an SMS from Mr Rusche requesting me to phone him urgently, which I did, and he informed me that he was unable to pay for the tobacco purchased by the 1st defendant (2nd respondent) because his 'sponsors had pulled the rug on him'."**

In another portion of the same statement, the witness said:

> **"During the whole of July and half of August, 2006 there was no tobacco sold by the plaintiff (1st respondent) and the amount of bales that had now accumulated on the 2nd defendant's (appellant's) tobacco floor was one thousand seven hundred and forty bales. I did make various complaints to the 2nd defendant (appellant) over the fact that the plaintiff (1st respondent) was being subjected to unfair treatment by their recognized and registered buyers."**

Finally, the witness said:

> **"After the events referred to above I received a call from Mr Phonto Mumbwe the Floor Manager of the 2nd defendant company (appellant) and he informed me not to worry as Alliance One the Third Party in this matter (3rd respondent) had agreed to buy the**

> **tobacco. I was informed by Mr Phonto Mumbwe that Alliance One (3rd respondent) would buy on condition that I had to accept their price matrix and must not question the differences in prices for the different grades between other buyers' matrixes, which I accepted provided that the rules of the floor were complied with. I was advised and assured by the Floor Manager that the Rules of the floor would be complied with and that they would monitor the sale process and assist in fair play. He further confirmed that the arbitration process, (part of the rules of the floor), would be accepted by the Third-Party Alliance One (3rd respondent)."**

These statements are on pages 481, 482 and 483 of the record of appeal. What becomes apparent from these statements is that when the 1st respondent's tobacco went back on the auction floor, there were other buyers who considered buying it, but, in the end, the sales failed; and that it was against that background that the 3rd respondent was persuaded to buy it on condition that the 1st respondent would accept the 3rd respondent's price matrix; which condition the 1st respondent accepted. That acceptance was exhibited in the form of an e-mail which the 1st respondent's Chief Executive Officer sent to Jewette Masinja, and copied to Phonto Mumbi. The e-mail read as follows:

"Gentlemen

I shall commit the remainder of my tobacco crop + 200mt to A1 on condition that the sales are conducted in terms of the 'rules of the floor' and that arbitration will be recognized and accepted by A1 based upon the perception of grade against the A1 matrix currently in use to other growers."

That e-mail is at page 348 of the record of appeal.

In arriving at these findings, the court below said that the appellant's Chief Executive Officer was not contradicted in his contention that he was not aware that the 3rd respondent was the buyer who had earlier rejected the tobacco that was bought in the first sale. The foregoing statements show that the appellant's Chief Executive Officer was lying again. It is clear that the 1st respondent knew, right from the first sale, that the tobacco which the 2nd respondent had bought was intended for onward sale to the 3rd respondent; and that the latter is the one that had declined to buy it. It is also clear that before the second sale took place, the 1st respondent was informed that the buyer who had agreed to buy the tobacco was the 3rd respondent; and the 1st respondent even went on to commit its tobacco crop to the 3rd respondent. Surely, at that point, knowing what had happened in the first sale, the 1st

respondent should have refused to sell its tobacco to the 3rd respondent. It did not. Therefore, the three findings by the court below were in conflict with the statements that we have quoted above and ought to be set aside.

Now, as we have said, all these findings of fact which we have found to be in contradiction of the evidence on record were the foundation upon which the court below held the view that the 3rd respondent connived with the appellant and the 2nd respondent so that it would refuse to buy the tobacco during the first sale in order to come back later and buy it at reduced prices in the second sale. Since those findings were made wrongly, the basis for the view was wrong as well; and, therefore, the court below was wrong to entertain that view.

From the foregoing, we find merit in the second and third grounds of appeal.

As we have said, earlier, the action as against the appellant, fell to be resolved as a straight forward case on the tort of negligence. This is what we shall now consider as we turn to the fourth ground of appeal.

The fourth ground faults the court below for holding that the appellant breached its duty of care to the 1st respondent, resulting in a loss of US$82,209 to the 1st respondent.

It was argued on behalf of the appellant that there was no evidence of any specific trading rule which had been breached by the appellant in its dealings over the sale by the 1st respondent to the 3rd respondent. Counsel referred us to the ingredients required to be established in order to prove the tort of negligence. These were as laid down in the works entitled **Clerk & Lindsell on Torts, 17th Edition (London: Sweet & Maxwell) page 219**, namely:

> **(i) The existence in law of a duty of care situation:**
>
> **(ii) Careless behaviour by the defendant, i.e failure to measure up to the standard and scope set by law:**
>
> **(iii) A causal connection between the defendant's careless conduct and the damage: and,**
>
> **(iv) Foreseeability that such conduct would have inflicted on the particular plaintiff the particular kind of damage of which he complains.**

Counsel then argued that the court below found the appellant liable for negligence without addressing any of these ingredients. Counsel also argued that in any event, there was overwhelming evidence on record that the sale complained of was a product of

freedom of contract exercised between the 1st respondent and the 3rd respondent. In support of this argument, counsel referred us to the 1st respondent's e-mail which we have quoted earlier. With those arguments, counsel submitted that the lower court's finding of a breach of duty and liability for negligence was without basis and ought to be set aside.

In response, it was argued on behalf of the 1st respondent as follows:

The issue regarding the appellant's employee, Anthony Hill, was one of negligence in the grading of the tobacco. That Anthony Hill was the same person who had conducted the valuation of the tobacco in both sales; the only difference being that in the second sale, Anthony Hill now elected to down-grade the very tobacco which he had graded at the first sale. That it was that conduct that the court below considered in finding that the duty of care owed to the 1st respondent was breached.

We have considered the foregoing arguments. The tort of negligence can be proved by either of two ways; a party can provide particulars of omissions which establish the duty of care and its breach; or a party may plead the doctrine of *"res ipsa loquitur."* In

Eagle Charalambous Transport Limited v Phiri [1993/1994] ZR 180 we held:

> **"The doctrine of *res ipsa loquitur* is no more than a rule of evidence affecting the shifting of the burden of proof. It indicates that the plaintiff has no affirmative evidence of negligence. It is inappropriate for a plaintiff to assert and give particulars of negligence and at the same time, or in the alternative, rely on the doctrine."**

In this case, the 1st respondent's pleadings at page 29 of the record of appeal reveal that the 1st respondent sought to prove its assertion of negligence by providing particulars thereof. The following are the particulars of negligence which the 1st respondent set out in its statement of claim:

> **"(i) The 3rd defendant did on or around 31st August 2006 negligently and without due care fail to accept and determine a correct grade of the plaintiff's tobacco crop on its sale floor in the process of concluding the sale of the plaintiff's crop.**
>
> **(ii) The 3rd defendant on or around 31st August 2006 failed to determine that the crop which was on the sale floor had been classified by the 3rd defendant, on or around 26th June 2006 as being of a far superior grade than**

that grade which it accepted and determined in concluding the tobacco sale.

(iii) Having negligently concluded the classification and sale of the plaintiff's tobacco the plaintiff suffered loss and damage."

We must clarify here that initially, the appellant Association was sued through the name of its President. At that time, it was referred to as the 3rd defendant. However, after some amendments, the appellant was sued in its own name and it became the 2nd defendant.

In this case, the appellant could have only been negligent through Mr Anthony Hill who was the Grower's Representative at that time. The 1st respondent, in its particulars of negligence made the assumption that it was the appellant's or, specifically, the Growers Representative's role to determine the final grade that would be assigned to any particular bale of tobacco. This is also reflected in the 1st respondent's arguments before us. It would appear that that was the assumption that the court below adopted as well. The Tobacco Marketing Rules which we have set out at the beginning of this judgment do not support that assumption. The

bale procedure set out therein provided that the buyer would place his offer on a bale according to the price which was indicative of what he considered to be the grade of the tobacco in that bale. The Grower's Representative, in the company of the farmer or his agent, would follow close behind and either agree with the buyer's offer or not. Where the Grower's Representative disagreed with the buyer, then he would propose a grade that he thought the tobacco was worthy of. The buyer would then have a second look; and if he disputed the Grower's Representative's grade, then that sale would go for arbitration. And, as we have seen from the rules, the arbitrator would not put a grade of his own on the tobacco but would decide whether he agreed with the buyer's grade or the Growers Representative's grade. The arbitrator's decision would, however, be final.

Clearly, the Growers' Representative's role was only to propose an alternative grade and discuss with the buyer. If the buyer disagreed, then the matter was out of the hands of the Growers' representative; and the power now lay with the arbitrator. It is from those responsibilities placed upon the Grower's representative that the duty that the appellant owed to the 1st respondent was to be

defined. So, because the 1st respondent's particulars of negligence were based on the assumption that the Growers' Representative was the final authority on the determination of the grade of tobacco, the whole action had collapsed on its pleadings.

We have, however, examined the evidence on the record to see whether the 1st respondent had indeed adduced evidence showing that the Grower's Representative had failed to perform any of his proper duties. According to the allegations in this case, the 1st respondent's grievance was with the outcome of the second sale. So, the Grower's Representative's duties that are to be scrutinised are those that were assigned to him by the rules with regard to the actual process of selling. We have already shown that the Growers' Representative's key role on the day of the sale was to either agree or disagree with the buyer's grading of the tobacco. Therefore, in order to prove that the Grower's Representative had failed in his duty, the 1st respondent was required to adduce evidence to show that even where there was a good reason for the Growers' Representative to disagree with the buyer's grading of the tobacco, the Grower's Representative did not do so.

An examination of the record of appeal shows that such evidence was not adduced. The closest evidence that the 1st respondent adduced with regard to how the second sale was conducted was to be found in the testimony of its second witness, Mr Michael Shane Kennedy. We have already quoted some of his statements above. We repeat the following statement:

> **"I am aware of the sale concerning plaintiff (1st respondent) but I was not the representative. It was not a sale I was representing. It went I suppose as a sale would go."**

This statement is on page 602 of the record of appeal. The statement does not, in any way, say that the Growers' Representative failed to disagree with the buyer's grading of the tobacco even where there was good cause to do so. Therefore, in the absence of evidence to show that the Growers' Representative failed to perform that duty, there was no way in which the appellant could have been said to have breached its duty towards the 1st respondent. So, even if the 1st respondent's particulars of negligence in the statement of claim had correctly set out the proper duties of the Grower's Representative, the 1st respondent's action against the appellant would have failed.

Even though it is not necessary for us to consider the doctrine of *res ipsa loquitur*, owing to the fact that the 1st respondent sought to prosecute its case against the appellant by setting out particulars of negligence, we have still considered whether the 1st respondent's action against the appellant could have succeeded on that doctrine.

For an action to succeed on the doctrine, the conclusion or inference being drawn from the occurrence of an event must be the only one that can be drawn in the circumstances. In this case, the 1st respondent's, and indeed the lower court's, approach was to assume that since the tobacco which fetched a higher price during the first sale fetched a lower one during the second sale, then the Growers' Representative failed to determine the correct grade for the tobacco. In our view, the correct question that should be posed is this: Can the fact that during the second sale, the 1st respondent's tobacco fetched lower prices than those it fetched during the first sale lead to only one conclusion; that the Growers' Representative omitted to propose alternative grades which were favourable to the 1st respondent?

We have shown from the rules that where the Growers' Representative disagreed with the buyer's grade and proposed a

different one; which the buyer also disagreed with, then the sale went to arbitration. We have shown also that at arbitration, the arbitrator's decision was final. Therefore, the lower prices fetched during the second sale could also raise another inference; namely, that the Growers' Representative may have duly disagreed with the buyer's grading and proposed different ones which were favourable to the 1st respondent but was overruled at arbitration. In such a case, it cannot be said that the Growers' Representative had failed to perform his duty as defined by the rules. The point we wish to make, however, is that, since the lower prices that the tobacco fetched during the second sale raised more than one inference, the doctrine of *res ipsa loquitur* could not have succeeded; and, therefore, the 1st respondent's action, if prosecuted on that doctrine, would have failed.

The net result is that we find merit in the fourth ground as well. That means that the appeal has succeeded substantively. In the circumstances, there is no need for us to deal with ground one. This appeal is allowed. We set aside the judgment of the court below as against the appellant. However, notwithstanding that some of what we have said in this judgment may have a bearing on the

judgements that the 1st respondent obtained against the 2nd and 3rd respondents, those judgments still stand because the 2nd and 3rd respondents did not appeal against them.

The appellant shall recover from the 1st respondent costs, both here and in the court below.

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H. Chibomba

SUPREME COURT JUDGE

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E. M. Hamaundu

SUPREME COURT JUDGE

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R. M. C. Kaoma

SUPREME COURT JUDGE