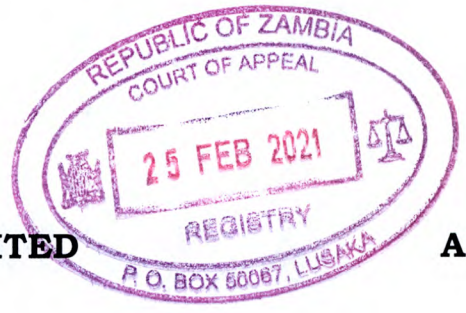
IN THE COURT OF APPEAL OF ZAMBIA **APPEAL NO. 194/2019**

HOLDEN AT NDOLA

(Civil Jurisdiction)



BETWEEN:

TOUCHWOOD ESTATES LIMITED **APPELLANT**

AND

RDO EQUIPMENT AFRICA LIMITED **RESPONDENT**

CORAM: ***CHASHI, LENGALENGA AND NGULUBE, JJA.***
On 18th February, 2021 and 25th February, 2021.

For the Appellants: *Mr. S. Chisulo SC, of Messrs Sam Chisulo and Company.*

For the Respondent: *Mrs. J. Mutemi, of Messrs Theotis Mutemi Legal Practitioners.*

J U D G M E N T

NGULUBE, JA delivered the judgment of the Court.

Cases referred to:

1. *Kabwe International Transport Limited and Madison Insurance Company (Zambia) Limited vs Mathews Njelekwe (1998) ZR 68.*
2. *Rosemary Chibwe vs Austin Chibwe (2001) ZR 1.*
3. *Sithole vs State Lotteries Board (1975) ZR 106.*
4. *Majory Mambwe Masiye vs Cosmas Phiri (2008) 2 Z.R 56.*
5. *Wilson Masauso Zulu vs Avondale Housing Project Limited (1982) Z.R 172*
6. *Phillip Mhango vs Dorothy Ngulube and Others (1983) Z.R. 61.*

7. *Khalid Mohammed vs The Attorney General (1982) Z.R 49.*
8. *Long vs Lloyd (1958) 1 WLR 753.*
9. *Zambia Safaris Limited vs Jackson Mbao, S.C.Z Judgement No. 8 of 1984.*
10. *Lambert vs Lewis (1981) ALL ER 1185.*
11. *Fisher, Reeves and Co. vs Armour & Co. (1920) 3 KB 614.*
12. *Wilson Masauso Zulu vs Avondale Housing Project Ltd (1982) ZR 172.*

Legislation referred to:

1. The *Sale of Goods Act 1893.*

Other works referred to:

1. *Atkin's Court Forms, 2nd Edition, Volume 27, 1995 issue.*
2. *Halsbury's Laws of England, 4th Edition, Volume 31.*
3. *Chitty on Contracts, 28th Edition, Volume 1.*

INTRODUCTION

1. This is an appeal against a Judgment of the Commercial Division of the High Court, delivered on 27th August, 2019, by Honourable Mr. Justice Sunday B. Nkonde SC. The appeal is challenging the decision of the court to dismiss the appellant's counter-claim, and to enter judgment in favour of the respondent.
2. For the sake of clarity, we shall refer to the appellant as the defendant and the respondent as the plaintiff, which is what they were when the matter was before the court below.

BACKGROUND

3. The background to this case is that the plaintiff commenced an action against the defendant in the court below, claiming a sum of US$20,234.55 as being the outstanding balance of the purchase price for a second hand combine harvester and accessories, which were supplied by the plaintiff at the request of the defendant. The plaintiff also claimed for interest on the outstanding amount, other reliefs that the court could deem fit to award, as well as costs.

4. The combine harvester which was valued at US$92, 164.32, was delivered to the defendant on 22nd April, 2017. There is no dispute that approximately three weeks after it was delivered, the defendant phoned the plaintiff to advise that the engine had malfunctioned while the defendant was driving it. The plaintiff sent a mechanic who went to inspect the machine and discovered that the engine seized due to a mixture of oil and water from the water pump.

5. The plaintiff undertook to repair the engine at no cost to the defendant, after which the machine was up and running again. The defendant thereafter made part payments towards the purchase price on 30th May, 2017 and 23rd June, 2017, leaving

an outstanding balance of US$20,234.55 for which the plaintiff sued.

6. The defendant filed a counterclaim in which the defendant denied liability for the full value of the combine harvester contending that there was a total failure of consideration due to the plaintiff's breach of warranty as to fitness of purpose for which the combine harvester was purchased. The defendant claimed to have bought the combine harvester for purposes of harvesting 260 hectares of seed soya bean in May, 2017 which was to be sold as a seed crop to MRI/SYNGENTA Zambia, and also for the harvest of a wheat crop later in the year.

7. The defendant accused the plaintiff of having made false representations that the combine harvester had only done 2207 engine hours and 1580 drum working hours, by reason of which the machine may have had only one previous owner. The representations were allegedly untrue as the machine had four previous owners, one of whom had used it on a commercial scale. The historical data for the machine allegedly showed that it was not true that the machine had only done 1580 drum working hours.

8. The plaintiff had undertaken to repair the engine within a week, but it was only re-delivered and fitted after approximately three weeks. The defendant complained that the machine had since then had a number of other major breakdowns which allegedly costed the defendant large sums of money as well as harvest down time. Therefore, the defendant was unable to obtain full use of the machine during the seed soya harvest.

9. One of the defendant's grievances was that it was awarded a contract to produce soya bean seed for MRI Seed Zambia Limited, for the 2017 farming season, in respect of which the defendant required the machine to harvest the soya bean crop at the right time for seed production. But the defendant could not use the machine due to the engine failure and the prolonged time that the plaintiff took to have the engine fixed.

10. The defendant claimed to have attempted to mitigate its losses by hiring a combine harvester from neighboring farmers but this was only done after the said farmers had harvested their own fields. This caused a delay in the harvest of the defendant's seed soya bean, as a result of which 530 metric tonnes of the yield was rejected as a seed crop and it had to be sold as commercial

grain crop. The defendant therefore suffered loss and damage, the particulars of which were as follows:

(a)	***The 530 metric tonnes of the seed soya bean which was sold as grain seed at the price of US$375 per metric tonne, instead of the price of US$550 per metric tonne as seed crop, due to delayed harvest. Losses due to the difference in price being:***	
	(US$550 – US$375) x 530 metric tonnes =	***US$92,750***
	Cost of hiring combine harvester from neighbors:	***US$12,000***
	Total:	***US$104,750***
(b)	***Cost of repairing combine harvester:***	***US$8,900***

11. The defendant was therefore seeking the following reliefs:

(a) An order rescinding the contract of sale of the Combine Harvester between the parties and restitution of the parties;

(b) An order for the repayment of the purchase price of the Combine Harvester paid the appellant so far;

(c) An order for damages in the sum of US$8,900 being damages incurred in the repair of the Combine Harvester;

(d) An order for damages in the sum of US$104,750 being the losses of profit incurred by the appellant caused by the sale of its seed soya bean as a commercial grain crop and costs associated with the harvest of the soya bean crop caused by the actions of the respondent;

(e) An order for damages for misrepresentation;

(f) An order for damages for breach of warranty as to fitness for purpose by the respondent

(g) Any other relief the court may deem fit;

(h) Interest on all amounts found due; and

(i) Costs.

12. In the defence to the counter-claim, it was averred that when the combine harvester was brought to Zambia, the plaintiff assembled

the machine and run tests twice in the presence of the defendant to ensure that it was in good condition. The plaintiff said there were no defects which were detected until after approximately three weeks. The engine malfunctioned due to the failure of the water pump seal, which was a latent defect and there was no way the plaintiff could have known about it when examining the machine. After the plaintiff repaired the engine, it received no complaint from the defendant.

DECISION OF THE HIGH COURT

13. After evaluating the evidence before it, the court below expressed the view that the defendant did not adduce any compelling evidence to prove that the representations which had been made by the plaintiff were false. Therefore, there was no misrepresentation on the part of the plaintiff regarding the working hours that had been done by the combine harvester at the time it was purchased.

14. It observed that even though the combine harvester was inspected by the defendant before it was purchased and there were no defects which were detected, it malfunctioned not long after it was purchased. This was because the machine had latent defects which could not be detected upon mere inspection.

15. The court below held that the combine harvester was not of merchantable quality and was not fit for the purpose for which it was purchased, as it malfunctioned soon after it was purchased even before it could be used to harvest the seed soya bean.

16. According to the lower court, ***Section 4 of the Sale of Goods Act***[1] which bars the condition as to merchantable quality from applying when goods have been examined does not apply to this case because the defect on the combine harvester was a latent defect which could not be perceived upon mere examination. It was therefore the court below's opinion that the defendant had the right under ***Section 11 of the Sale of Goods Act***[1], to reject the combine harvester within a reasonable time after delivery and discovery of the defect and to treat the contract as repudiated.

17. The court below expressed the view that the defendant's email to the plaintiff dated 27th September, 2017, constituted a rejection of the combine harvester. The said email was an attachment the defendant's email of 5th February, 2018, in which the defendant complained that the combine harvester was not working in accordance with the terms of the contract.

18. It however reasoned that the defendant had lost the right of rejection within a reasonable time. This was because the

combine harvester malfunctioned soon after it was commissioned but the defendant acquiesced to having it repaired by the plaintiff at no cost to the defendant. The defendant had also continued to make payments towards the combine harvester and the remaining balance of the purchase price was US$20,234.55. It further observed that the defendant continued using the machine and the engine hours stood at 2, 602, as at 7th May, 2018.

19. The court below found that the defendant only intimated rejection of the combine harvester on 5th February, 2018, which was approximately ten months after the combine harvester was delivered. The court below held that the defendant accepted the combine harvester and lost its right of rejection.

20. The court dismissed the defendant's counter-claim and entered judgment in favour of the plaintiff for the sum of US$20,234.55, which was the outstanding balance on the combine harvester and the accessories. The said amount was awarded with interest at 8% per annum from the date of the writ until payment.

GROUNDS OF APPEAL TO THIS COURT

21. Dissatisfied with the decision of the court below, the appellant appealed to this Court advancing the following grounds of appeal–

1. ***That the court below misdirected itself in law and in fact when it dismissed the appellant's counterclaim and awarded the respondent its entire claim of US$20,234.55 after holding that:***

   "I find that the Combine Harvester was not of merchantable quality owing to the fact that it malfunctioned soon after it was purchased... the Combine Harvester malfunctioned even before it could be used to harvest the soya seed thus making it unfit for the purpose for which it was purchased";

2. ***That the Court below misapprehended the facts and evidence relating to the e-mail the appellant sent to the respondent's representative Andrew Mower and the RDO Team on Wednesday 27th September, 2017, four months after the Combine Harvester was delivered and commissioned by the respondent for use by the appellant. As a consequence, the subsequent findings of fact by the trial court regarding the said e-mail, that the appellant had lost its right of rejection and that the appellant only attempted to reject the machine after inquiries were made on the outstanding balance, ten months after the Combine Harvester was delivered and commissioned, are perverse;***

3. ***That the Court below erred in law and in fact when it failed to consider an award of damages to the appellant for misrepresentation by the respondent on the general mechanical and technical status of the combine harvester; for breach of warranty as to fitness for the purpose for which the machine was bought; loss of profit incurred by the appellant when the soya seed***

crop, due to down time caused by the faulty Combine Harvester, was ultimately sold as ordinary grain crop;

4. ***That the trial judge was wrong in principle to ignore evidence of a second engine fault on the 9600 Combine Harvester communicated to the respondent by the appellant by way of an e-mail dated Monday, May 7th 2018. The evidence contained in the said e-mail together with the factual assertions in the witness statement for the appellant suggest poor workmanship on the part of the mechanics hired to attend to the initial engine attend to the initial engine overhaul by the respondent.***

22. The parties filed heads of argument in support of their respective positions. When this appeal came up for hearing on 18th February, 2021, counsel for the parties relied on the parties' respective heads of argument which they augmented with oral submissions.

APPELLANTS' CONTENTIONS

23. In support of the first ground of appeal, the defendant's counsel anchored on the findings of the court below that the combine harvester was not of merchantable quality and that it was unfit for the purpose for which it was purchased. State Counsel Chisulo argued that these findings should ordinarily have attracted an award of damages or an order for assessment of damages by the Registrar. He referred to the case of ***Kabwe***

International Transport Limited and Madison Insurance Company (Zambia) Limited vs Mathews Njelekwe[1], where the Supreme Court said:

> ***"The Deputy Registrar's hazardous guess of funeral expenses was not unreasonable; it was an intelligent guess. We uphold it."***

24. State Counsel submitted that the defendant made a counter-claim for damages, among other reliefs, which were supported by a quotation showing the total number of hectares harvested from the defendant's farm by named neighboring farmers, during down time due to the combine harvester engine failure in 2017. It was his contention that the court below should not have *"shut off"* the defendant's claim by insisting on receipts from the neighbouring farmers. State Counsel Chisulo submitted that a reasonable assessment of the time it took the farmers to clear the 50 and 70 hectares attributed to each of the farmers and the hire cost per hour, could have been reasonable to recompense the defendant.

25. On the second ground of appeal, it was submitted that the defendant's email to the plaintiff dated 27th September, 2017 was included in the defendant's bundle of documents as a forwarded email to the defendant's advocates, which email was dated 5th

February, 2018. According to State Counsel, the court below misapprehended the actual date when the e-mail was sent to the plaintiff and wrongly concluded that the e-mail was sent on 5th February, 2018, ten months after the combine harvester was delivered to the defendant. Therefore, the subsequent findings of the court based on this error were perverse.

26. Mr. Chisulo SC emphatically argued that there is no evidence to show that the defendant either expressly or through other means attempted to reject the combine harvester ten months after it was delivered and commissioned. He referred to the case of ***Rosemary Chibwe vs Austin Chibwe[2],*** where the court said:

> ***"Also, both the Local Court and the Magistrate Court made certain findings of fact which were not supported by evidence. It is a cardinal principle supported by a plethora of authorities that Court's conclusions must be based on facts stated on record."***

27. State Counsel further cited the case of ***Sithole v. State Lotteries Board[3],*** where it was held that:

> ***"The problem in truth only arises in cases where the judge has found critical facts on his impression of the witnesses; many, perhaps most cases, turn on the inferences from facts which are not in doubt or on documents; in all such circumstances the appellate***

Court is in as good a position to decide as the trial judge."

28. It was his submission that this court is in as good a position as the court below to draw inferences from facts which are not in doubt and the documents, to deliver its own decision based on those inferences in substitution of those of the court below.

29. In respect of the third ground of appeal, Mr. Chisulo SC stated that his submissions under the first ground of appeal were applicable to this ground with equal force. He however stressed that the oral warranties given to the defendant by the plaintiff were binding and the defendant's parol evidence in the witness statement were also binding. For this argument, State Counsel referred to the case of ***Majory Mambwe Masiye vs Cosmas Phiri***[4] where the court held that:

"Parol evidence may be admitted to show that a written agreement is subject to a collateral oral warranty."

30. According to State Counsel, the case cited above had similar facts with this case and the trial judge equally handled the case in a similar manner in that the evidence had been misapprehended, ignored or not considered at all; without giving any reasons. He submitted that the Supreme Court reversed the findings of the trial judge and decided the appeal in favour of the

appellant. We were also implored to reverse the findings of the court below because the defendant's evidence had established that the plaintiff gave wrong oral warranties to the defendant, as revealed by the inspections of qualified mechanics on the combine harvester.

31. On the fourth ground of appeal, it was argued that the court below glossed over the defendant's email to the defendant dated 7th May, 2018, which communicated a second engine fault on the combine harvester. This was because it appeared the trial judge was already carried away by his earlier findings which were erroneous. Mr. Chisulo SC submitted that the contents of the said email impute possible *mala fide* conduct or incompetence on the part of the mechanics who were hired by the plaintiff to attend to the initial engine overhaul.

32. It was his submission that the court below ought to have considered this evidence in accordance with the case of ***Wilson Masauso Zulu vs Avondale Housing Project Limited***[5] where it was held that:

> ***"The trial Court has a duty to adjudicate upon every aspect of the suit between the parties so that every matter in controversy is determined in finality."***

33. We were urged to remit this case back to the High Court for re-trial because the learned trial judge failed in his duty.

RESPONDENTS' CONTENTIONS

34. On behalf of the plaintiff, Ms. Mutemi opposed the first ground of appeal. She submitted that there was no evidence to support the defendant's claim for damages and even if the court could have made an intelligent guess, the defendant did not provide receipts or corroborative witness testimonies to support the claim. She referred to the case of ***Phillip Mhango v. Dorothy Ngulube and Others***[6], where it was held that:

> ***"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty."***

35. Ms. Mutemi spiritedly argued that a litigant has an obligation to prove his case, and for this proposition, she cited the case of ***Khalid Mohammed v. The Attorney General***[7], where it was held that:

> ***"A Plaintiff must prove his case and if he fails to do so the mere failure of the opponent's defence does not entitle him to judgement. I would not accept a proposition that even if a Plaintiff's case collapsed of its inanition or for some reason or other, judgement***

should nevertheless be given to him on the ground that a defence set up by the opponent has collapsed."

36. It was her argument that the first ground of appeal should be dismissed for lack of merit.

37. In response to the second ground of appeal, Ms. Mutemi submitted that this ground is misconceived and misleading because the defendant's email of 27th September, 2017, was delivered after the defendant received the plaintiff's final demand for payment on 23rd September, 2017. She argued that prior to that demand, the defendant never intimated rejection of the combine harvester or that it had broken down for the second time.

38. It was counsel's contention that by continuing to use the combine harvester and paying for it, the defendant accepted it and acted in a manner that was consistent with ownership. She relied on ***Section 35 of the Sale of Goods Act 1893*** which provides that:

"The buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a

> ***reasonable time, he retains the goods without intimating to the seller that he has rejected them."***

39. Ms. Mutemi also referred to the case of ***Long vs Lloyd***[8], which she said exemplifies the fact that if a contract is affirmed by a misrepresentee, rescission will be barred. She further cited ***Paragraph 13 of Atkin's Court Forms, 2nd Edition, Volume 27, 1995 issue, at Page 217***, which states that:

> ***"If having discovered the misrepresentation, the representee declares an intention of going on with the contract either by doing some act inconsistent with an intention to rescind he will be taken to have affirmed the contract and will lose the right to rescind."***

40. She urged us to dismiss ground two for lack of merit.

41. As regards the third ground of appeal, Ms. Mutemi submitted that there was neither a misrepresentation made by the plaintiff to the defendant nor was there an oral warranty given to the defendant by the plaintiff. She cited ***Paragraph 1044 of the Halsbury's Laws of England, Volume 31, 4th Edition***, which states that:

> ***"A representation is deemed to have been false and therefore a misrepresentation, if it was at the material date false in substance, and in fact."***

42. Counsel submitted that there could not have been any misrepresentation because the facts presented by the plaintiff to

the defendant were truthful and not false. She also argued that no oral warranty was given to the defendant that the combine harvester would not fail. Ms. Mutemi submitted that even if this court was to hold that there was an oral warranty, the defendant continued to use the combine harvester after it was fixed by the plaintiff and made payments, which showed a waiver of the purported oral warranty as to fitness for the purpose. She relied on ***Chitty on Contracts, 28th Edition at page 1158*** which says:

> ***"Where one party voluntarily accedes to a request by the other that he should forbear to insist on the mode of performance fixed by the contract, the court may hold that he has waived his right to require that the contract be performed in this respect according to the original tenor.... waiver (in the sense of "waiver by estoppel" rather than "waiver by election") may also be held to have occurred if, without any request, one party represents to the other that he will forbear to enforce or rely on a term of the contract to be performed or observed by the other party, and the other party acts in reliance on that representation."***

43. Counsel maintained that because the defendant allowed the plaintiff to fix the combine harvester after the initial breakdown and made payments, this also amounted to a waiver of the right to rejection. In support of her argument, she cited the case of ***Zambia Safaris Limited vs Jackson Mbao[9].***

44. Ms. Mutemi distinguished the case of ***Majory Mambwe Masiye vs Cosmas Phiri (supra)*** from this case contending that the relationship between the plaintiff and the defendant was not governed by a written contract and the issue of parole evidence does not arise.

45. It was her further argument that the defendant was not entitled to damages alleged for the alleged breach of warranty as to fitness for purpose because the combine harvester was in good condition both at the time of delivery and at the time of commissioning. She relied on the case of ***Lambert vs Lewis***[11], where Lord Diplock said that as to quality, the implied condition of fitness is not a continuing duty but is a once for all obligation which has to be satisfied at the time of delivery.

46. In response to ground four, Ms. Mutemi submitted the first breakdown of the combine harvester was an engine failure while the second one being referred to in the defendant's email of 7th May, 2018, was mechanical failure in respect of the clutch and the suspension. She argued that the two breakdowns were not same and could not be attributed to the incompetence of the plaintiff's mechanics. We were urged to dismiss this appeal with costs.

CONSIDERATION OF THE MATTER BY THIS COURT AND VERDICT

47. We have considered the evidence on record, the heads of argument filed by Counsel for the parties and the authorities to which we were referred. We intend deal with the first and third grounds of appeal together because they both revolve around the issue of whether the court below should have granted the reliefs which the defendant was seeking. Grounds two and four will be addressed separately.

48. The first and third grounds of appeal arise from the finding of the court below that the combine harvester was not of merchantable quality and was unfit for the purpose for which it was purchased because it malfunctioned not long after it was purchased, even before it could be used to harvest the seed soya bean. The thrust of the respondent's contention was that the defendant should have been granted to the reliefs sought in its counter-claim.

49. We wish to state that a buyer of faulty goods has two options. If done quickly enough, the buyer can reject the goods, terminate the contract, and demand a refund. Where too much time has passed, the buyer can seek compensation for the seller's breach of contract. These two remedies are provided for under the ***Sale of Goods Act 1893***. In this case, the court below threw out the

defendant's counter-claim because the defendant accepted the combine harvester. The law in ***Section 35 of the Sale of Goods Act 1893*** which Ms. Mutemi referred us to, sets out the following three situations in which a buyer is deemed to have accepted the goods:

> ***(a) Where the buyer intimates to the seller that the goods have been accepted ("intimation"), provided he has had a reasonable opportunity to examine them;***
> ***(b) Where the buyer does something with the goods which is inconsistent with the seller's ownership of the goods, provided he has had a reasonable opportunity to examine them ("inconsistent act"); and***
> ***(c) Where, after the lapse of a reasonable time, the buyer retains the goods without telling the seller that the goods have been rejected ("the lapse of a reasonable time").***

50. We hold the view that the defendant is deemed to have accepted the combine harvester its conduct neatly falls within last two situations we have enumerated above. This is because the evidence before us shows that the engine for the combine harvester developed a fault not long after it was commissioned, but the defendant acquiesced to having it repaired by the plaintiff and even continued to make payments towards the purchase price. The court below expressed the view that the combine harvester was not of merchantable quality and was unfit for the purpose for which it

was purchased, and the defendant had the right to reject the combine harvester.

51. In the case of ***Fisher, Reeves and Co. vs Armour & Co.***[11], Scrutton L.J. held that a buyer should exercise his right of rejection within a reasonably short space of time once the defect comes to his attention and is entitled during that time to make inquiries as to the commercial possibilities in order to decide what to do on learning for the first time of the breach of condition which would entitle him to reject. The defendant ought to have weighed its commercial possibilities the first time when it learnt about the engine defect.

52. The defendant instead continued to use the combine harvester and its engine hours increased to 2,602 as at 7th May, 2018. This effectively means that the combine had traversed close to 400 engine hours from the 2207 engine hours which the plaintiff intimated to the defendant when it was delivered. We therefore take the view that the defendant's conduct was inconsistent with the ownership of the seller and it amounted to an intimation of acceptance of the combine harvester.

53. From this evidence, we agree with the court below that even though the defendant had the right to reject the combine harvester within a reasonable time, the defendant accepted it and lost its

right of rejection. In our view, the defendant's claims for rescission of the contract, restitution and refund of the purchase price cannot succeed. State Counsel Chisulo conceded at the hearing of this matter the said remedies cannot be sustained.

54. Mr. Chisulo SC has nevertheless maintained that the defendant was entitled to damages and the court below ought to have made an intelligent guess on the quantum to be awarded to the defendant. We wish to state that we agree with Ms. Mutemi that a party claiming damages must prove the loss with evidence which should enable the court to determine the value of the loss. In case of ***Phillip Mhango v. Dorothy Ngulube and Others (supra)*** that she cited, it was held that:

> ***"Any party claiming a special loss must prove that loss and do so with evidence which makes it possible for the court to determine the value of that loss with a fair amount of certainty."***

55. In this case, the defendant's claims for damages are speculative and were not proved. It is for this reason that we are not surprised that State Counsel suggested that the court below should have made an intelligent guess and awarded damages to the defendant. In our considered view, there is no basis on which this court can award damages to the defendant because the

document which State Counsel relied on is a quotation which does not prove the claims. We therefore think that the defendant's claim for damages is frivolous and cannot be sustained.

56. This includes the claim that the defendant is entitled to damages for misrepresentation, because the court below found that there was no misrepresentation. In the case of ***Wilson Masauso Zulu vs Avondale Housing Project Ltd***[12], the Supreme Court held 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."***

57. On the evidence before us, there is no basis on which this court can reverse the findings of the court below. The lower court held that the defendant did not adduce any compelling evidence to prove that the representations which the plaintiff made to the defendant were false. We cannot therefore sustain the defendant's claim for damages for misrepresentation.

58. Coming to the second ground of appeal, it has been argued that the court below wrongly concluded that the defendant's email of

27th September, 2017 was sent on 5th February, 2018. This was the email which the court said constituted a rejection of the combine harvester. Mr. Chisulo SC has argued that the subsequent findings of the court below based on the said error were perverse.

59. In our view, the court below did not make any mistake regarding the date of that email because it specifically stated that the email of 27th September, 2017 was an attachment to the email dated 5th February, 2018. The 5th of February, 2018 was the date which the court below said the defendant rejected the combine harvester. We must add that even assuming there was an error on the part of the court below on the two dates, it is inconsequential because State Counsel maintained in his oral submissions that the defendant never rejected the combine harvester.

60. On the fourth ground of appeal, Mr. Chisulo SC contends that the court below ignored evidence of a second engine failure which the defendant complained about in an email dated 7th May, 2018. While we appreciate that the court below did not refer to that email in its judgment, that had no bearing because it spoke to a finding of fact which the court below actually made,

that the combine harvester was not of merchantable quality and was unfit for the purpose for which they were purchased. The fourth ground of appeal has no merit and it equally fails.

61. This appeal is hereby dismissed. We award costs to the respondent, to be taxed in default of any agreement.

J. CHASHI
COURT OF APPEAL JUDGE

F. LENGALENGA
COURT OF APPEAL JUDGE

P.C.M. NGULUBE
COURT OF APPEAL JUDGE