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IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NOs. 166**
HOLDEN AT LUSAKA **AND 174/2017**
(CIVIL JURISDICTION)

BETWEEN:

ELIAS MUSONDA **APPELLANT**

AND

LUANSHYA MILLING COMPANY LIMITED **1ST RESPONDENT**

CHAT BREWERIES LIMITED **2ND RESPONDENT**

GOODWARD MULUBWA **3RD RESPONDENT**

CHAT BEVERAGES LIMITED **4TH RESPONDENT**

CBS MILLING COMPANY **5TH RESPONDENT**

CORAM: **Mulongoti, Sichinga and Ngulube, JJA**

On 23rd May, 2018 and 27th September, 2018

For the Appellant: *Ms. Hampungani of Milner & Paul, Legal Practitioners*

For the Respondent: Mr. M. Haimbe of Sinkamba Legal Practitioners.

J U D G M E N T

MULONGOTI,JA, *delivered the Judgment of the Court*

Cases referred to:

1. **Zambia Bata Shoe Company v Vinmas Limited (1993-1994) ZR 136**

2. **Bank of Zambia v Chibote Meat Corporation Limited (1999) ZR 103**

3. **National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie (2000) ZR 154**

4. **Chombe v Chombe (1951) 1 ALL ER**

5. **Mundanda v Mulwani and others (1987) ZR 30**

6. **Shelter for All, Evans Makula Chaomba v Kingfred Rumsey and Precious Rumsey SCZ Appeal NO. 192/2009**

7. **South Australian Corporation v York Montague Limited (1996) UK HL 10**

8. **Peter Militis v Wilson Kafulo Chiwala (2009) ZR 34**

9. **Valentine Webster ChansaKayope v Attorney General SCZ Judgment No.18 of 2011**

10. **Wilson Masauso Zulu v Avondale Housing Project Limited (1982) ZR 172**

11. **JCN Holdings Limited v Development Bank of Zambia SCZ Judgment No. 87 of 2013**

12. **Kingfarm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen (executrix and administratrix of the estate of Agit Baran Sen) (2008) 2 ZR 72**

13. **General Nursing Council of Zambia v Mbangweta (2008) 2 ZR 105 (SC)**

14. **Collet v VanZyl Brothers Limited (1966) ZR 65**

15. **Lombe Chibesakunda v Rajan Mahtani SCZ Judgment No.11 of 1998**

16. **Rajan Patel v Attorney General SCZ Judgment No. 14 of 2002**

17. **YB & F Transport v Supersonic Motors Limited SCZ Judgment No. 3 of 2000**

18. **Emmanuel Mutale v Zambia Consolidated Copper Mines Limited (1993-1994) ZR 96**

19. **Snook v London and West Riding Investments Limited (1967) 2 QB 786,802**

20. **Way v Latilla (1937) 3 ALL ER 759**

21. **Scarisbrick v Parkinson (1869) Ex Chequer**

22. **Justin Mbita Silumbe v Barclays Bank Zambia Ltd SCZ Selected Judgment No. 40 of 2017**

Other works referred to:

1. **Bryan A. Garner (editor), Black's Law Dictionary, 10th edition, Thomson Reuters, 1437**

2. **Halsbury's Laws of England, Volume 27 (1) paragraph 258**

This appeal arises from the decision of the High Court at Lusaka which ordered that the appellant be paid as terminal benefits, the value of the property known as stand number 1395, Luanshya (the property) as at the date of the agreement in 2002 with interest at short term deposit rate from the date of the writ to Judgment and thereafter at the rate of six percent per annum until full payment and condemned the respondents to costs.

The background to this appeal is that the appellant was engaged as an engineer for three years by the 2nd respondent (Chat Breweries

Limited). The nature of his contract was not in the ordinary sense of employer and employee as he provided services but was not remunerated regularly or at any fixed rate. The appellant built three brewing plants for Chat Breweries Limited. Goodward Mulubwa, (the 3rd respondent) who is a director in Chat Breweries verbally promised to pay the appellant handsomely or build him a dwelling house and pay him K150,000.00 cash. Goodward Mulubwa later promised to make good his promise by giving the appellant property and machinery in lieu of cash. This culminated into an agreement signed between the appellant as retiree and the 2nd respondent (Chat Breweries Limited) dated 14th December, 2002. Good Mulubwa signed the agreement on behalf of the 2nd respondent. The agreement contained the following terms:

> "***1. In consideration of (3) years of service rendered by the retiree to the company, the company shall do the following:***
>
> ***(a) Cause transfer of title or interest in property known as CBS Milling Company Limited (the 5th respondents, herein) situated in Luanshya in the Republic of Zambia to the retiree free from any encumbrances.***
>
> ***(b) Provide to the retiree the following:***
>
> ***(i) Steam boiler and multistage pump***
>
> ***(ii) Cooling tower and pressure pump***

(iii) Cooker

(iv) Convertor and transfer pump

(v) Two storage tanks

(vi) Mixing vessel with pump

(vii) Product pump

(c) Cause transfer of title or interest in motor vehicles AAN 2700 Toyota Camry and AAX 4577 Mercedes Benz to the retiree.

(d) Provide K25,000,000.00 cash to be paid on or before the 23rd day of December, 2002 and the balance on commencement of production at the Luanshya brewing plant.

2. The retiree shall do the following:

(i) Provide services as and when requested by the company in relation to the vegetable oil plant and the brewing plant at a fee to be agreed upon by the parties.

(ii) Ensure that all information relating to the operation of the company shall be kept in a confidential manner to the benefit of the company.

(iii) Any dispute arising out of this agreement shall first be referred to mediation failing which the same shall be referred to arbitration".

The appellant was given vacant possession of the property in 2003. He was later in 2012, approached by Brian Mulubwa, a director acting on behalf of Chat Beverages Limited, (the 4th respondent) to

rent the property. This resulted into a lease agreement between Chat Beverages Limited and the appellant.

Unknown to the appellant, the property he was given by the 2002 agreement was actually registered in the name of Luanshya Milling Company Limited, the 1st respondent to this appeal.

Differences arose between the appellant and Brian Mulubwa over failure to transfer title to the property to the appellant as agreed in the lease agreement. On 22nd November, 2013 Luanshya Milling wrote to Chat Beverages demanding that Chat Beverages should stop paying rent to the appellant and start paying Luanshya Milling being the registered owner of the property and to execute a fresh lease with them. On 3rd December 2013, the 2nd respondent, being Chat Breweries through Goodward Mulubwa wrote to the appellant explaining that it had erroneously entered into the agreement of 2002 as a result of mutual mistake of fact and law as it did not own the property he was given. However, the 2nd respondent acknowledged that it was still owing the appellant benefits for the three years he worked there.

Aggrieved with the state of affairs, the 1st respondent, Luanshya Milling which was the plaintiff in the court below instituted an action under cause number 2013/HP/1774 against the appellant. The 1st respondent's case was that it had no hand in the agreement of 14th December 2002 and that the appellant was owed by Chat Breweries Limited. It, therefore, sought a declaration that it is the registered owner of the property in dispute known as stand number 1395, Luanshya and a declaration that the agreement of 14th December 2002 between Chat Breweries Limited and the appellant was *null* and *void ab initio*.

The appellant entered appearance and filed a defence and counter-claim. The appellant alleged that the 1st respondent, was aware of the transfer of the property to him together with the machinery as gratuity through its directors who are also directors of Chat Breweries Limited, Chat Beverages Limited, and CBS Milling Company Limited. The appellant subsequently applied for joinder of parties. By a ruling of the High Court dated 28th May, 2014, Chat Breweries Limited, Goodward Mulubwa, Chat Beverages Limited

and CBS Milling Company Limited were joined to the proceedings as 2nd, 3rd, 4th and 5th defendants now the respondents.

The appellant averred that the 2nd, 3rd, 4th and 5th respondents are one and the same. He averred that according to the printout from PACRA the directors and shareholders in Luanshya Milling Company Limited are Lubebe Chatyoka and Brian Chatyoka Mulubwa. The directors for Chat Breweries Limited are Goodward Mulubwa, Brian Chatyoka Mulubwa, Melody Mulubwa, Naomi Mulubwa, Yvonne Mulubwa and Sydney Lubebe Chatyoka. The directors and shareholders in Chat Beverages Limited are Goodward Mulubwa and Brian Mulubwa. The directors and shareholders in CBS Milling Limited are Lister Mulubwa and Goodward Mulubwa, all owned by the same family.

He sought an order that the 1st, 2nd and 3rd respondents should transfer ownership of the property to him. He also sought damages for breach of contract, inconvenience and traumatic stress. The appellant also counter-claimed, in the alternative, that he be paid the current value of the property as his benefits.

The respondents filed a defence to the counter-claim stating that the agreement of 14th December 2002 was executed by mutual mistake of fact and law as the 3rd respondent was never the proprietor of the property in question and that the agreement was signed under duress.

The 4th respondent stated that it tried to comply with the agreement but the 1st respondent declined to ratify it and denied having committed fraud, dishonesty or deceit.

Meanwhile, the 2nd respondent acknowledged that it owed the appellant terminal benefits but opted to put the appellant to strict proof as to quantum.

On 9th March 2016, the 1st respondent wholly discontinued its action under cause number 2013/HP/1774. The appellant proceeded to prosecute his counter-claim, on which the Judgment now sought to be impugned is based.

The trial Judge found that the 2nd respondent being Chat Breweries did not own the property it gave to the appellant as confirmed by the Lands Register. The Judge further found that the 3rd respondent Goodward Mulubwa is neither a shareholder nor director in the 1st respondent being Luanshya Milling Company Limited and had no basis to act on its behalf. The Court pointed out that knowledge of the transaction by Brian Mulubwa on ground that he is director and shareholder in both the 1st and 2nd respondents is not a basis for concluding that the 2nd respondent gave the property to the appellant as the companies are separate legal entities.

The trial Judge considered whether there was ground upon which to pierce the corporate veil. She found that the companies involved could not be considered as operating as one entity even though the companies were owned by the Goodward Mulubwa and his family. She concluded that the only way the 2nd respondent could have legally transferred ownership of the property was by having the 1st respondent pass a resolution through its directors in accordance with its articles of association. Accordingly, the appellant was not

entitled to the property as the 2nd respondent could not pass good title to him because it did not own the property.

However, the trial Judge allowed the appellant's claim which was in the alternative. However, she found that he was entitled to be paid benefits at the value of the property in 2002 and not the current value as claimed.

Consequently, it was ordered that the appellant be paid the value of the property at the time of the agreement in 2002 with interest. The respondents were all ordered to pay the costs of both the discontinued action and the counter-claim, to be taxed failing agreement.

Dissatisfied with the Judgment, the appellant launched an appeal to this Court, on seven grounds framed as follows:

1. The learned Judge in the Court below misdirected herself in law and fact by holding that knowledge of the transaction by Brian Mulubwa, a director and shareholder in both the plaintiff (Luanshya Milling) and the 2nd defendant companies cannot be a basis for concluding that the plaintiff knew of the transaction in

issue as incorporated companies are separate legal entities; overlooking the principle that a company as a legal entity operates through its directors.

2. ***The learned Judge in the Court below erred in law and fact by failing to put into consideration the overwhelming evidence on record which proves that the plaintiff company (Luanshya Milling) had sanctioned or ratified the decision to have property number 1395, Luanshya transferred to the 1st defendant.***

3. ***The learned Judge in the Court below erred in law and fact when she ordered that the 1st defendant be entitled to the value of Stand number 1395, Luanshya at the date of the agreement without considering the implications of inflation and devaluation of the Kwacha on the value of the property then and now.***

4. ***The learned trial Judge misdirected herself in law and fact by ordering that the matter proceeds for assessment of the value of the property in issue at the time of the agreement when the developments made by the 1st defendant to the said property have altered the unexhausted improvements at the time and it would be difficult to value the same.***

5. ***The learned trial Judge misdirected herself in law and fact by holding that damages for mesne profits cannot succeed as the 1st defendant did not acquire any rights in stand Number 1395, Luanshya when the 2nd defendant had expressly admitted having given the property to the 1st defendant who consequently put the property on rent and was gaining income with a legitimate expectation that the property was his.***

6. ***The learned Judge in the Court below misdirected herself in law and fact when she directed that the value of all other items that were given to the 1st defendant as part of his benefits which he did not receive ought to be assessed andthe value should be that at the time of the agreement when in fact the value of the said materials at that time cannot buy the same materials now going by the rate of inflation and the devaluation of the Kwacha from 2002.***

7. ***The learned Judge in the Court below erred in law and fact by failing to pronounce herself with regard to other reliefs being sought by the 1st defendant, the same being damages for inconvenience and damages for traumatic stress suffered by the 1st defendant as a result of the breach of the agreement.***

Later, the respondents instead of cross appealing, filed a separate appeal under appeal number 174/2017 which is mainly against the order of costs as follows:

i. ***The learned Judge in the Court below erred in fact and in law when she held that "the defendants on the counterclaim submitted that the 1st defendant should bear the costs of the proceedings as they were made to incur unnecessary legal costs in defending the counter-claim when the 2nd defendant had admitted owing the 1st defendant money as terminal benefits", contrary to the evidence on record to the effect that it was the plaintiff, 3rd, 4th and 5th defendants who argued that they incurred unnecessary costs as a result of the admission and should consequently be granted costs***

especially since no evidence was ever led to show their complicity in the agreement of 2002.

ii. ***The learned Judge erred in law and in fact when she held that the plaintiff, 2nd, 3rd and 4th and 5th defendants did not come to equity with clean hands merely on the grounds that they were represented by the same advocates by consequence of which costs against them were awarded in the discontinued action and counter-claim despite the fact; save for the 2nd defendant; none of the parties were privy to the agreement of 2002.***

iii. ***the learned Judge erred in fact and in law when she held that it is trite that a successful party should not be deprived of their costs as against the plaintiff, 3rd, 4th and 5th defendants as a consequence of which she granted costs in favour of the 1st defendant despite evidence clearly showing that the former was unsuccessful against them as he failed to prove his case against them.***

This Judgment therefore relates to both appeals. For convenience we will continue to refer to the appellants in Appeal No. 174 as respondents and the respondent as the appellant throughout this Judgment.

The appellant's counsel filed heads of argument in support of the appeal. Grounds one and two have been argued as one. In that regard, it has been argued that from the outset, the issue of the

need for a special resolution to dispose the property does not arise because the 2nd respondent, being Chat Breweries Limited, admitted liability. Counsel relied on the case of **Zambia Bata Shoe Company v Vinmas Limited**[1] to support that assertion.

The appellant contends that the issue to be resolved is whether the 1st respondent can rightfully claim ignorance of the decision to dispose of the property in view of the evidence on record which shows that the 1st respondent was in fact aware and sanctioned the disposal of the property to the appellant. The evidence depicts that there was communication between the 1st and 2nd respondents regarding disposal of the property such that the issue as to whether the 1st respondent's directors had authority to sanction the decision is immaterial. Counsel has placed reliance on the cases of **Bank of Zambia v Chibote Meat Corporation Limited**[2] and **National Airports Corporation Limited v Reggie Ephraim Zimba and Saviour Konie**[3] that matters of internal procedure in the management of a company are not the concern of third parties and that outsiders dealing with a company cannot be concerned with

authority when dealing with representatives of appropriate authority or standing for the type or class of transaction involved.

Additionally, counsel referred us to the case of **Chombe v Chombe**[4] in which Lord Denning held that:

> ***"The principle, as I understand, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then once the other party has taken him at his words and acted on it, then the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations as if no such promise or assurance had been made by him."***

In view of the authorities cited, counsel has argued that the 1st respondent ought to be estopped from denying the fact that it sanctioned the decision to have the property transferred to the appellant. Our attention was drawn to a declaration prepared by the 1st respondent and signed by the appellant and a letter written by Messrs Makala & Company where according to counsel, the 1st respondent was fulfilling the contents of the said declaration.

As regards grounds three, four and six it is submitted that the agreement of 2002 between the appellant and the 2nd respondent discloses that the appellant was given the whole plant known as CBS Milling Company inclusive of the equipment to continue running the business. The appellant developed the property and purchased additional equipment to boost operations.

Citing the case of **Mundanda v Mulwani and others**[5], counsel submits that damages cannot adequately compensate a party for breach of contract of sale of land. The Supreme Court decision in **Shelter for All, Evans Makula Chaomba v Kingfred Rumsey and Precious Rumsey**[6] is cited as authority there can be no reasonable quantum of damages other than the current value of the land to place the appellant in the position he would have been in had the contract been performed. In *casu*, it is impractical to only assess unexhausted improvements at the time of the agreement because the appellant developed the property and land appreciates year by year.

In addition that since the intention of the parties was to give the appellant a fully operational brewery, the value of the property and items given to him at the time of the agreement cannot purchase the property and items of the like at present. As such, the holding of the court below was erroneous because the date of the agreement is not the date of the loss. The date of the loss is when the affected party becomes aware that they are being deprived of property, which is the date of the action.

To support the argument on the intention of the parties, counsel referred to the case of **South Australian Corporation v York Montague Limited**[7] where the Court held that the calculation of damages is bound to be affected in cases ***"where the court, having looked at the contractual background, can decide that the standard approach will not reflect the expectation or intention reasonably to be imputed on the parties."***

In ground five the appellant contends that at the time of the lease agreement between the appellant and the 4th respondent, the issue of ownership of the property was not in dispute as both the

appellant and the 2nd respondent properly believed that the property had been given to the appellant free from encumbrances and the appellant took possession after the agreement was signed. Counsel has argued that even if the appellant had no interest that could be registered, he had acquired equitable rights in the property which entitled him to the proceeds realized from the property. The appellant should thus be paid rental arrears as his equitable right in the property entitles him to it especially that there was a lease agreement signed by the same director of the 1st and 2nd respondents who knew or ought to have known the true status of the property, that it belonged to the 1st respondent and not the 2nd respondent.

The appellant's counsel also made reference to the cases of **Peter Militis v Wilson Kafulo Chiwala**[8] and **Valentine Webster ChansaKayope v Attorney General**[9] and a passage at **paragraph 258 of Halsbury's Laws of England, volume 27(1)** on *mesne* profits to the effect that a landlord may recover in an action for *mesne* profits damages which the landlord has suffered through being out of possession of the land. Thus, the appellant is entitled

to *mesne* profits for being out of possession of the property because he had an equitable interest in the land at the time of the lease agreement thereby making him a proper landlord. Allowing the 4th respondent to escape liability to pay rentals would be unjust enrichment to the company at the appellant's expense who refurbished the property into a fully operational brewery. And more so that Brian Mulubwa, a director in the 1st, 2nd and 4th respondents who promised to transfer the property into the appellant's name knew the true status of the property.

As regards ground seven, the appellant's contention is that the trial Judge erred by not pronouncing herself on the reliefs sought for damages for inconvenience and traumatic stress suffered by the appellant as a result of the breach of the retirement agreement.

The case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[10] is relied on that a trial court has a duty to adjudicate upon every aspect of the suit between parties so that every matter in controversy is determined in finality. In addition, counsel referred to the case of **JCN Holdings Limited v Development Bank of**

Zambia[11] and argued that this Court cannot turn a blind eye to the miscarriage of justice that occurred in the court below relating to the reliefs the court omitted to adjudicate upon.

At the hearing of the appeal Ms. Hampungani, who appeared for the appellant, submitted orally that in accordance with the Supreme Court decision in **Kingfarm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen (executrix and administratrix of the estate of Agit Baran Sen)**[12] if companies, though having distinct corporate personalities, decide to operate as one in their dealings, they cannot resort to rely on their separate identities after they have messed up in their dealings.

In respect of the respondents' appeal against costs, Ms. Hampungani, argued in relation to ground one that the court below observed at page 48 of the Record of Appeal lines 24-28 that:

> ***"The defendant's on the counter-claim submitted that the 1st defendant (plaintiff on the counter-claim) should bear the costs of the proceedings as they were made to incur unnecessary legal costs in defending the counter-claim, when the 2nd defendant had***

admitted owing the 1st defendant (plaintiff of the counter-claim) money as terminal benefits."

According to counsel, the respondents were caught up in the confusion of who should have been referred to as plaintiff and defendants after they discontinued their action but the appellant continued with his counter-claim. The Court was on firm ground to have stated as it did as that was the prayer by the respondents in regard to costs despite them losing track on who they should have called plaintiff or defendant. If anything, they should have applied for review regarding the terminology instead of appealing.

In relation to grounds two and three, it is contended that it is wrong for the respondents to assert that they were condemned in costs merely because they were represented by the same advocates. Rather, the trial Judge observed that they had not come to court with clean hands and had not properly instructed counsel as they ought to have known the status of the property in question.

Counsel submitted orally that an award of costs is in the Court's discretion and such discretion should be exercised judiciously,

considering the circumstances of each case. The Supreme Court decisions in **General Nursing Council of Zambia v Mbangweta**[13] and **Collet v Van Zyl Brothers Limited**[14] were cited to support this position of the law. The trial Judge herein acted judiciously considering the circumstances of the case.

In response to the appeal, (No. 166) the respondents' counsel also filed heads of argument. In relation to grounds one and two, Mr. Haimbe, who appeared for the respondents submitted that there is no evidence on record that Brian Mulubwa knew about the appellant's agreement with the 2nd respondent as the agreement was entered into with the 2nd respondent through the 3rd respondent who the appellant directly dealt with. The 3rd respondent disclosed in evidence that he was the only one who knew about the transaction as none of the other directors and shareholders of the 2nd respondent were aware of it. It is not enough that just because Brian Mulubwa is a shareholder in the 1st and 2ndrespondents then he knew of the transaction and thereby bound the 1st respondent.

In addition, no deed or resolution was signed to ratify or affirm the transfer of the property to the appellant by the 1st respondent.

In response to grounds three, four and six, counsel contends that the trial Judge was on firm ground in holding that the assessment of damages should be based on the value of the property at the date of the agreement. The appellant is entitled to the value of the property at that date with interest to date and not the current market value of the property. This argument is based on the case of **Lombe Chibesakunda v Rajan Mahtani**[15].

It has been argued that contrary to the appellant's submission that the appellant proceeded to develop the property, there is no evidence on record whatsoever that the appellant developed the property. Similarly, the appellant's argument for loss of bargain ought not to be entertained since the agreement relating to the property is unenforceable for want of title by the 2nd and 3rd respondents as well as the fact that the appellant neglected to conduct a search at the time to ascertain the status of the property.

On the argument for *mesne* profits, the respondents' contention is that the trial Judge was correct in finding that the appellant had not acquired any rights in the property especially that it is not disputed that the 1st respondent is the registered proprietor. Since the appellant was never the registered proprietor, he could not be the landlord. Goodward Mulubwa, the 3rd respondent conceded that the property was given to the appellant by mistake such that the appellant did not acquire good title as was stated in the case of **Rajan Patel v Attorney General**[16]. Therefore, the cases cited on *mesne* profits do not apply on the facts of this case. The fact that the appellant was mistakenly given the property meant that he acquired no rights or title in it. There is, therefore, no basis upon which he should be paid rent. The appellant did not acquire any equitable interest in the property either because he is deemed to have had notice by not conducting a search to establish the status of the property.

There would be no unjust enrichment to the 4th respondent as alleged as there is no evidence of the purported refurbishments by the appellant. If the unjust enrichment were to occur, it would be if

the appellant was paid rent as the rightful landlord when he was not.

It is the further submission of counsel that the undertaking by Brian Mulubwa in the lease agreement to facilitate transfer of the property into the appellant's name was made in his capacity as director in the 4th respondent's company and cannot be binding on the 1st respondent because the 1st respondent was not a party to that agreement.

In relation to ground seven, Mr. Haimbe has argued that the fact that the trial Judge did not pronounce herself on the claim for damages for inconvenience and stress does not entitle the appellant to them and it is not an indication that there was no consideration of those issues. There was no breach of contract as the agreement pursuant to which the claims arose is unenforceable due to the 2nd respondent's incapacity to pass title. Counsel placed reliance on **Rajan Patel v Attorney General**[16] case to support this argument.

Therefore, the appellant had himself to blame as he did not carry out the necessary search before executing the agreement with the 2nd respondent. Had he done so, he would have discovered the truth and avoided any injury he may have suffered.

With respect to their appeal against the award of costs, it has been submitted in ground one that the trial Judge essentially absolved the 1st, 4th and 5th respondents of any liability when due consideration is made to the pleadings. It was wrong for the trial Judge to bundle the 1st, 4th and 5th respondents with the 2nd respondent when awarding costs. According to Mr. Haimbe costs should have been ordered against the 2nd respondent who admitted owing the appellant.

Furthermore, that although it is trite that a successful party should not be deprived of costs. In this case the appellant was not successful as against the 1st, 4th and 5th respondents. The reliefs granted to the appellant were against the 2nd respondent. The case of **YB & F Transport v Supersonic Motors Limited**[17] was referred

to as authority that only the 2nd respondent against whom the appellant succeeded should pay costs.

In ground two, it is argued that the trial Judge was wrong in stating that none of the respondents came to court with clean hands. The respondents are incorporated companies and none of them were party to the agreement of 2002 apart from the 2nd respondent. The predicament the appellant finds himself in would have been avoided if he had instructed a lawyer to represent him at an early stage because he admitted that he did not conduct a search to find out the status of the property he was given by the 2nd respondent. Goodward Mulubwa also accepted that he gave the appellant the land by mistake or in error. Upon the admission of indebtedness and mistake by the 2nd and 3rd respondents, the appellant ought to have taken steps to secure his interest by applying to enter judgment on admission instead of causing other parties to incur expenses. Thus, the respondents did not come to court with dirty hands. They were dragged to court by the appellant who applied for joinder which was granted.

Additionally, there was no evidence of bad faith or malice on the respondents' part for the trial Judge to make a finding that they came to court with dirty hands. Counsel opined that, if anything, it is the appellant who should be condemned in costs as his claims against the 1st, 4th and 5th respondents were not successful. Counsel relied on the **YB & F Transport**[17] case together with **Emmanuel Mutale v Zambia Consolidated Copper Mines Limited**[18] that a successful party should not be deprived of his costs unless his conduct in the course of proceedings merits the Court's displeasure or they did something wrong in the action. Counsel concluded that the appellant is not entitled to costs given that he was unsuccessful.

In ground three, it is argued that of all the claims made by the appellant, he was only awarded the alternative remedy for which the trial Judge ordered should be paid by the 2nd respondent. The appellant hoped that the court below would order transfer of the property to his name after piercing the corporate veil which never happened. The trial court also rejected his claim for *mesne* profits and no other pronouncement was made for damages. There was no

relief sought against the other respondents. Therefore, no award against them should have been made, not even for costs. In addition, no evidence is on record to show that there was collusion or liability on the part of the 1st, 4th and 5th respondents. Thus, having failed to prove his case against them the appellant is not entitled to costs against them.

We have considered the arguments and submissions by counsel. The cardinal issue, the appeal raises is whether circumstances exist to warrant lifting or piercing the corporate veils of the respondent companies especially that of Luanshya Milling Company Limited the 1st respondent herein. This issue cuts across grounds one and two in which the appellant is contending that the respondent companies are one and the same such that the 1st respondent which was not a party to the 2002 agreement sanctioned it through Brian Mulubwa one of its directors.

It is clear to us that the agreement of 2002 was between the appellant and Chat Breweries being the 2nd respondent with Goodward Mulubwa signing on behalf of the 2nd respondent. By

that agreement the appellant was given the property which is situate at stand number 1395 Luanshya which piece of land belongs to the 1st respondent which was not a party to the agreement. The appellant is essentially asking us to pierce the corporate veil, to find that Brian Mulubwa who dealt with the appellant sanctioned the agreement when as director of both the 1st and 2nd respondents he entered into a lease agreement with the appellant. In the lease agreement which Brian Mulubwa signed on behalf of the 4th respondent, he promised to transfer title to the property to the appellant.

We note from the evidence on record that the respondent companies are separate and distinct entities. It is settled law that the corporate veil can only be pierced when a company is being used for wrong doing or as a sham or a mere façade concealing the true facts. In **Snook v London and West Riding Investments Limited**[19], Lord Diplock expressed the difficulty in piercing the corporate veil as follows:

"In answer to the question that the approach of the courts to the issue of piercing the veil is unprincipled, the real force, at least on the face of it, is the fact that it cannot be invoked merely where there has been impropriety'.

As Munby J put it in Ben Hashem paragraph 163-164, it is necessary to show both control of the company by the wrongdoer(s) and impropriety, that is, (misuse of the company by them as a device or façade to conceal their wrongdoing...at the time of the relevant transaction(s)."

Clearly, therefore it was encumbered upon the appellant to prove that the respondent companies were being used as a sham to conceal wrongdoing and that they were controlled by the wrongdoer(s) being Goodward Mulubwa and or Brian Mulubwa, in this case. This, the appellant failed to do. He even failed to show that the respondent companies are one and the same as he alleged. The evidence before the Court was such that the companies were separate and distinct with different shareholders and directors though all owned by the Mulubwas. Goodward Mulubwa was not a shareholder and a director of the 1st respondent. He could not meddle in that company's affairs let alone give its property to the appellant to offset terminal benefits. Only the company itself through resolutions can give away its property.

Therefore, we cannot fault the trial Judge's finding that it is the position of the law that an incorporated company is separate from its members and directors though it acts through its directors who are its agents.

The trial Judge further reasoned that even though a company acts through its directors, Brian Mulubwa could not be said to have given the property in question because he was a director and shareholder of both the 1st and 2nd respondents. It is paramount that Brian Mulubwa did not even sign the agreement in question.

The Judge also correctly stated the position of the law that an incorporated company can own property in its own name like the 1st respondent owned stand number 1395 Luanshya. Therefore, Goodward Mulubwa as the 2ndrespondent's agent could not give away stand number 1395 to the appellant. This in effect entails that the contract/agreement to give the plant at stand No. 1395 Luanshya was *null and void abinitio* and unenforceable as the 2nd and 3rd respondents could not give that which they do not own.

The trial Judge even distinguished the **Kingfarm Products Limited, Mwanamuto Investments Limited v Dipti Rani Sen** case supra, relied on by the appellant. The trial Judge correctly noted that there was no evidence in *casu*, that Goodward Mulubwa had actual or ostensible authority to act on behalf of all the respondent companies or that the companies were operating as one entity. She further observed that the fact that Goodward Mulubwa testified that he had a lot of companies was not sufficient evidence that the companies operated as one.

We further note that the appellant failed to adduce evidence before the High Court to prove that the 1st respondent ratified the decision to give him its property. The declaration at pages 151-153 of the Record of Appeal (Appeal No.166) to the effect that Luanshya Milling would write to Messrs Makala and Company the lawyers for Barclays Bank to release the title deed of the property to the appellant was made by the appellant himself. It was not prepared by the 1st respondent as alleged by the appellant but by Messrs Sinkamba Legal Practitioners, the lawyers of all the respondents to

this appeal. It is not revealed who among the respondents instructed the lawyers to prepare it. The appellant is the sole signatory to this declaration which was witnessed by a secretary, who does not state which company she worked for. There was no evidence from this secretary at trial.

The other evidence which the appellant contends is proof that Luanshya Milling sanctioned the agreement of 2002 is at page 153. This is the letter from Sinkamba Legal Practitioners to Makala and Company to the effect that the mortgage for which Barclays Bank was holding on to the title deed for stand number 1395 Luanshya had been fully liquidated, the title deed be released to the lawyers (Sinkamba Legal Practitioners) for onward transmission. The letter does not mention the appellant or the 2002 agreement or to whom the title deed was being transmitted.

As determined by the trial Judge, the only way Luanshya Milling could be said to have sanctioned the 2002 agreement is by resolution of the company, which was not done. Brian Mulubwa though a director and shareholder of Luanshya Milling dealt with

the appellant when he started renting the property as director and shareholder of Chat Beverages, a company which is separate and distinct from Luanshya Milling. As canvassed by Mr. Haimbe, the lease agreement where the 2002 agreement is acknowledged was signed by Chat Beverages and not Luanshya Milling.

In light of the foregoing, grounds one and two lack merit and are dismissed.

This brings us to grounds three and four in which the appellant contends the compensation or benefits should be the current value of the property and not the 2002 value as determined by the High Court. We hasten to state that the trial Judge was on *terra firma* when she ordered the 2nd respondent to pay what it owed the appellant using the value of the property in 2002 as the measure. On the evidence before her, she was entitled to do so even though the agreement to pay in kind with the property was unenforceable. We cannot fault her. It was not disputed that the appellant had worked for the 2nd respondent for three years and was owed gratuity or terminal benefits. Before the unenforceable 2002 agreement, this

money was already due and owing. As alluded to, the 3rd respondent acting on behalf of the 2nd respondent had verbally promised to handsomely reward the appellant after he built the three brewing plants for the 2nd respondent.

The appellant was therefore entitled to be paid on *quantum meruit.*

According to **Black's Law Dictionary** *quantum meruit* is a latin phrase for "**as much as he has deserved**" ***"the reasonable value of services, damages awarded in an amount considered reasonable to compensate a person who has rendered services in a quasi-contractual relationship."***

In the case of **Way v Latilla**[20] the appellant a consulting engineer with Ariston, a company with mining operations in Africa, met the respondent in England. The appellant was asked to seek options to acquire concessions the respondent might acquire. In return, he was promised a share. The appellant acquired concessions. The parties agreed no amount but only that the appellant would receive a share of the concessions and a substantial interest in the

respondent's new Trust company. When he was not paid the appellant sued for his remuneration. The Court found that he was entitled to payment on *quantum meruit.* Lord Atkin observed that "**the award was to be fixed by reference to the approach to remuneration adopted by the parties**".

The case of **Scarisbrick v Parkinson**[21] was followed in which it was decided that in fixing a salary basis, the Court may pay regard to the previous conversation of the parties. In that case, the terms of an agreement were held to be invalid under the Statute of Frauds but that they were admissible as evidence in a *quantum meruit.*

The question is, what then is the reasonable value for the benefits or gratuity for the service the appellant rendered to the 2nd respondent? We note that there was no evidence as to how much money was due as benefits. Going by the cases of **Way v Latilla**[20] and **Scarisbrick v Parkinson**[21], we are of the firm view that the terms of the 2002 agreement though unenforceable could be used in *quantum meruit.* Therefore, the trial Judge cannot be faulted for using the terms of the 2002 agreement by which the appellant was

given the property, to determine the value of the benefits. The previous conversations between the parties also discussed the benefits due. These revealed that the 3rd respondent promised to handsomely reward the appellant.

We agree with the trial Judge's finding that the value of the property then in 2002 was reasonable value for the services he rendered to the 2nd respondent. On the facts of this case, we find this to be a fair figure and reasonable to both parties. Had the appellant been vigilant to conduct searches earlier as he later did with PACRA, he would have discovered that the 2nd respondent let alone the 3rd respondent did not own the property he was given. Therefore we cannot fault the trial Judge for ordering that he be paid benefits at the value of the property in 2002 and that the same be assessed. Awarding him the current value of the property would amount to unjust enrichment of the appellant.

There was no evidence that the appellant developed the property further from 2002. His testimony at page 479 of the Record of Appeal (No.166) was that after the agreement he travelled to

Luanshya with the 3rd respondent. He was introduced to the tenant a Mr. Jonathan Simfukwe as the new landlord. Then he moved his family to Luanshya and started running the plant. Then in 2012 Chat Beverages started renting the premises. We therefore, cannot fault the trial Judge for ordering that compensation of the equipment and machinery given to him to be at the value in 2002 as well. He benefitted from using them when he started running the plant.

We also find that the appellant did not lose out on a bargain neither was the agreement about sale of the property/land. Therefore, the arguments and cases on loss of a bargain and the case of **Mundanda v Mulwani and others**[5] do not apply to this case.

Accordingly, grounds three, four and six must fail and are dismissed.

With regard to ground five that the appellant is entitled to *mesne* profits, we note that title in the property did not pass to the appellant. Furthermore, having found that the agreement was *null*

and void ab initio, he cannot be entitled to *mesne* profits. He obtained the benefits of rentals on a void contract. Ground five fails and is equally dismissed.

We now turn to ground seven in which it is contended that the trial Judge did not adjudicate on the claim for damages for inconvenience and traumatic stress as a result of the breach of the agreement. The circumstances of this case are such that the 2nd and 3rd respondents admitted that the appellant was owed terminal benefits which they agreed to pay once assessed. The 3rd respondent also admitted that the property was given to the appellant in the 2002 agreement. However, it was later discovered that the property did not belong to the 2nd respondent which was owing the appellant. The agreement to give the property was therefore not breached but was *null and void ab initio*. The appellant benefitted from this void agreement through rentals and running the plant as owner for close to 10 years. As aforementioned had he conducted a search earlier, he would have known that the property did not belong to the 2nd respondent.

Even from the correspondence he exchanged with Brian and Goodward Mulubwa he could earlier have foreseen that the agreement was doomed to fail. Additionally, we have ordered that he be paid terminal benefits at the value of the property in 2002 on a *quantum meruit* basis. Thus, though the trial Judge did not adjudicate on these claims, we find that they were bound to fail. Ground seven therefore fails.

In the net result the appeal (No.166) lacks merit and is dismissed.

Regarding the appeal (No. 174) on costs, we note that the 1st respondent was the entity that first commenced the action in the High Court against the appellant. This action was discontinued after the appellant filed a defence and counter-claim which continued to its logical conclusion and culminated in the Judgment subject of this appeal. Later the 2nd to 5th respondents were joined to the action. There was no direct claim against them, they were joined because they could have been affected by the outcome had the Court decided to lift their corporate veils as sought by the appellant. It was therefore necessary for them to have been joined

as there was no way of predicting the outcome at that stage. In as much as the respondents may argue that they were not privy to the 2002 agreement, the outcome of the case in the court below could have affected them. The appellant alleged that the respondent companies were one and the same being owned by members of the same family and he cannot be said to have dragged them unnecessarily to court, moreso that his action was a counter claim to the 1st respondent's action. Ground one on costs therefore fails and is dismissed.

Having found that the joinder of the 2nd to 5th respondents was justified, we find merit in ground two that the Judge erred in law and fact when she held that they did not come to court with clean hands.

As regards the arguments that the appellant was not a successful litigant, it is clear that he was successful in part. Authorities abound, that costs are awarded at the discretion of the Court. See **Justin Mbita Silumbe v Barclays Bank Zambia Ltd**[22]. The discretion must of course be exercised judiciously. Being a

successful litigant is not the only consideration for the court when awarding costs. Seeing that the power is discretionary, the trial Judge was entitled to consider all the circumstances of the case and make an order judiciously.

After perusing the record and the peculiar circumstances of this case, we are of the considered view that the 2nd and 3rd respondents should have been the ones to bear the costs of the litigation and not the 1st, 4th and 5th respondents. The conduct of the 2nd and 3rd respondents necessitated the action. Ground three on costs equally succeeds. The appeal on costs therefore partially succeeds.

In the circumstances of this case, we order each party to bear own costs in this Court.

J.Z. MULONGOTI
COURT OF APPEAL JUDGE

D.L.Y.SICHINGA
COURT OF APPEAL JUDGE

P.C.M NGULUBE
COURT OF APPEAL JUDGE