IN THE SUPREME COURT OF ZAMBIA **APPEAL NO.162/2010**
HOLDEN AT KABWE
(CIVIL JURISDICTION)

REPUBLIC OF ZAMBIA
SUPREME COURT
19 JUL 2018
COURT REGISTRY 1
P. O. BOX 50067, LUSAKA

BETWEEN:

QUICK PACK REMOVALS LIMITED **APPELLANT**

AND

SOBI INDUSTRIES LIMITED **1ST RESPONDENT**
AMIGO FOODS LIMITED **2ND RESPONDENT**

CORAM: Hamaundu, Wood and Kaoma, JJS
On 9th April, 2014 and 11th July, 2018

For the Appellant : Mrs. L. Mushota, Messrs Mushota & Associates

For the Respondent : Mr. D. Mazumba, Messrs Douglas & Partners (Standing in for Messrs Mambwe, Siwila & Lisimba Advocates)

JUDGMENT

Hamaundu, JS delivered the Judgment of the court.

Cases referred to:

1. **Royal British Bank v Turquand [1856] 5 C and B 348**
2. **Kapembwa v Maimbolwa and Attorney General [1981] ZR 127**
3. **Zulu v Avondale Housing Project [1982] ZR 172**
4. **Nkhata & Ors v Attorney General [1966] ZR 24**
5. **Khalid Mohammed v Attorney General [1982] ZR 44**
6. **Kenmuir v Hatting (1974) ZR 162**

Works referred to:

1. **Cross and Wilkins: Outline of Evidence, 7th edition, Butterworths, London: 1996**
2. **Chitty on contracts, 30th edition, 2008, London: Sweet & Maxwell**

This appeal is against a judgment of the High Court which dismissed the appellant's claim for breach of contract and other consequential losses.

The dispute herein appears to have its origin in the dealings of two employees; one belonging to the appellant and the other belonging to the two respondents. The dispute started thus: In 2006, the appellant's Managing Director wrote to the Managing Director of the two respondents for payment of duty on some consignment belonging to the respondents which the appellant had cleared on their behalf. In the demand letter, the appellant's Managing Director went on to state that, because of the non-payment, the Zambia Revenue Authority had temporarily suspended the appellant's licence to clear goods. The respondents' Managing Director's response was one of surprise. He stated that he was not aware that the respondents had engaged the appellant to clear goods for them and that, since the respondents were on self-clearance status, it did not make sense for

them to incur extra costs by engaging the appellant. An exchange of correspondence ensued, flowing mainly from the appellant to the respondents. Some meetings were held between the appellant, the respondents and the Zambia Revenue Authority. It was established at those meetings that, indeed, the Zambia Revenue Authority had suspended the appellant's licence. It was also found that some cheques which the respondents had issued to clear their consignments had been used to clear consignments belonging to the appellant's other customers. The meeting did not resolve the dispute; mainly because the respondents on one hand maintained that they had never engaged the appellant to clear goods on their behalf and that whatever may have happened was a connivance by the two employees and some Zambia Revenue Authority officers to swindle the parties and the Authority, while the appellant, on the other hand, still maintained that the parties' respective employees had entered into a contract on their behalf.

The appellant brought the dispute to court, claiming breach of contract, loss of business and payment of the customs duty. At the trial, the appellant sought to prove that the parties had entered into an oral contract; while the respondents denied that any contract was

entered into. The appellant adduced evidence through two witnesses; its Chief Executive Officer and also, the employee who was at the centre of the controversy, Jack Phiri.

The court below found Jack Phiri not to be an honest and credible witness. The court found it difficult to believe that Jack Phiri, a very junior employee in the appellant company would have had authority to bind the appellant. The court also found that there was nothing to show that Chanda Kanjesheko, the respondents' employee who was also involved in the saga, had authority to bind the respondents; or that Jack Phiri ever believed that Chanda Kanjesheko had such authority. The court went on to hold that even the pleading in the writ of summons negated the appellant's claim that its employee Jack Phiri had authority to enter into contracts of that nature; or bind his employer in contract. The pleading read:

> **"damage for breach of contract for having cleared the defendant's goods under the plaintiffs' licence without proper authority by the plaintiff"**

The court observed that it was a serious contradiction for the appellant to claim that there was an oral contract, on one hand, and at the same time plead that there was no proper authority to use its

licence. In the court's view, this contradiction went to the root of the case. The court then surmised that Jack Phiri and Chanda Kanjesheko may have connived among themselves to defraud their respective employers. Hence, the appellant's claim was dismissed.

The appellant filed four grounds of appeal. These are:

> **"(1) The trial judge erred in law and fact when she said that PW2 had no authority to enter into a contract on behalf of the plaintiff and that Chanda Kanjesheko had no authority to appoint clearing agents on behalf of the defendants.**
>
> **(2) The trial judge erred in law and in fact when she said that the appellant did not produce evidence to prove that they cleared the defendant's goods, when the evidence on record did not support that.**
>
> **(3) The trial judge erred in law and fact when she said that the appellant did not call Chanda Kanjesheko as a witness, when he was an employee of the respondent and should have been called by the respondent.**
>
> **(4) The trial judge erred in law and fact when she speculated that PW2 and Chanda Kanjesheko may have had their own private agenda and may have connived among themselves to defraud their respective employers, when cheques were issued by the respondents in the names of specific companies".**

On behalf of the appellant, it was argued in the first ground that there was unchallenged evidence that the appellant and the respondents had been doing business transactions for a considerable period of time in the past and that the respondents honoured some of the assessments by the Zambia Revenue Authority emanating from the transactions entered into by Jack Phiri and Chanda Kanjesheko. It was further argued that there was evidence on record that Chanda Kanjesheko had authority from the respondents to liaise with all the respondents' clearing agents and that the said Chanda Kanjesheko was the respondents' overall superior and sole agent at the customs office. Counsel went on to argue that, in those circumstances, third parties were not on notice of any restriction and were entitled to believe that the sole agent who was the overall boss at the Port had authority to bind the companies for which he worked. It was also the argument on behalf of the appellant that, by paying some of the assessments made by the Zambia Revenue Authority, the respondents had ratified Chanda Kanjesheko's actions.

Counsel went on to argue that a contract can be entered into by word of mouth; and that what is important in considering its validity is the intention of the parties who have agreed on the terms that shall

bind them. We were referred to the works of Lord Denning in a book titled *"The Discipline of Law"* to support the argument. The publisher's details were not provided to us.

We were also referred to the rule in **Royal British Bank v Turquand**[1] to support counsel's argument that whether or not a person purporting to act on behalf of the company has authority is an internal matter for the company and that a person dealing with the company is entitled to assume that the company's internal regulations have been complied with. Counsel argued further that the appellants' Chief Executive Officer recognized the contract entered into on behalf of the company by its officer at ports of entry and that the respondents, likewise, acted on the agreements entered into by their officer. According to counsel, this was evidence that the respective superiors had ratified the contracts entered into by their officers at the port.

In the second ground of appeal, the appellant said that the arguments in the first ground covered the second ground as well.

In the third ground of appeal, the appellant's argument was that it was wrong for the court below to fault the appellant for not calling Chanda Kanjesheko, an employee of the respondents, as a witness.

Counsel for the appellant argued that, as an employee of the respondents, Chanda Kanjesheko had an interest to save his job, as well as the reputation of his employers. If the appellant had called him to testify on its behalf, it was argued, he would have turned either into an unfavourable or a hostile witness. For the meaning of unfavourable or hostile witness, we were referred to the works; **Cross and Wilkins, Outline of Evidence, 7th edition, 1996 Butterworths, London**.

In the fourth ground, the appellant argued that there was no evidence to support the lower court's conjecture that the respective employees may have connived to defraud their employers. It was pointed out that the respondents, for example, never reported their employee to the police while the appellant did take the matter to the police and its employee was cleared.

On the strength of the foregoing arguments counsel for the appellant urged us to allow the appeal

Responding to the appellant's arguments in the first ground of appeal, the appellant argued that the court below came to the holding that the appellant's employee and the respondents' employee had no authority to enter into contracts on behalf of their respective

employers after considering the honesty and credibility of the appellant's employee; and, also, after disbelieving the evidence of the appellant's chief executive officer. It was also argued that the lower court found the contradictory pleading of the appellant's case as lending further support to its view that there had not been any contract between the parties. We were referred to the following cases where we have held that an appellate court should be slow to interfere with findings of fact made by a trial court; **Kapembwa v Maimbolwa and Attorney General[2], Zulu v Avondale Housing Project[3]** and **Nkhata & Ors v Attorney General[4]**.

Counsel for the respondents also went further to refer to us in the record of appeal correspondence by the appellant which tended to support the lower court's holding that there was no contract between the parties. In that regard, we were referred to a letter written by the appellant on 13th August, 2007, where it accused the respondents of having used the appellant to clear their goods without the appellant's consent. Another letter by the appellant dated 17th December, 2007, was referred to us where the appellant accused the respondents of leaving their in-house clearing agency and using the appellant to clear their goods without requesting or seeking

authorization to engage in business with the appellant. Another portion of the said letter stated that the appellant had never had any intention to contract the respondent in any business engagement in the past; and that it had no such intentions in the future, either.

Counsel then argued that, in the light of that correspondence, no reasonable tribunal could hold that the two employees had the authority of their employers to enter into the alleged contract.

Reacting to the second ground of appeal which faulted the court below for saying that there was no tangible evidence to show that, indeed, the appellant had cleared the respondents' goods as claimed, learned counsel argued that in fact a reading of the portion of the judgment where that statement appeared showed that the main decision of the court was that the appellant had failed to prove that there was a contract between the parties; and that the statement about proof that the goods were cleared was only secondary to, or supportive of, the main finding. Counsel argued that the appellant did truly fail to prove that a contract existed and that, on the authority of **Khalid Mohammed v Attorney General**[5], the court below was on firm ground in dismissing the claim.

In response to the third ground, counsel for the respondents argued that it is not the defendant's responsibility to call a witness to prove the plaintiff's case. The case of **Khalid Mohammed v Attorney General**[5] was, again, referred to us.

Responding to the arguments in the fourth ground of appeal, counsel argued that there was a basis upon which the court below drew that inference. Counsel pointed to evidence such as the fact that certain cheques issued by the respondents were used to clear goods belonging to the appellant's customers as an example of the basis upon which the court below made its assumption.

With those arguments, we were urged to dismiss the appeal.

We have considered the record of appeal and arguments by the parties.

The appellant's contradictory pleadings aside, it is clear that the appellant's case in the court below was simply this: That the parties had entered into a contract through their respective employees and agents namely, Jack Phiri for the appellant and Chanda Kanjesheko for the respondents. That is the contention that the appellant has maintained in this appeal. A resolution of that question, in our view, will dispose of all the grounds of appeal.

The appellant's contention or argument implies that the actions of the said two employees should be attributed to, and be binding on, the companies that they worked for. Regarding attribution of acts to a company, the editors of **Chitty on Contracts, 30th edition**, discuss as follows:

> **"It is a trite observation that a company can only act through the instrumentability of individuals to, for example, enter into contracts. The question arises as to which individuals will bind the company so that it is liable under a contract. The answer to this question is provided by the rules of attribution whereby the acts of certain individuals are attributed to the company...**
> **First, there are the company's primary rules of attribution which are to be found normally in the company's constitution (the articles and memorandum of association) and which will determine who or which organ of the company can enter into transactions on behalf of the company. The primary rules of attribution may also be provided by the rules of company law, for example, the principle that the unanimous decision of all the shareholders of a solvent company, even though given informally, constitutes a decision of the company. Coupled with the company's primary rules of attribution are general rules of attribution, namely, the principles of agency and vicarious liability"** (para 9-007)

Now, with regard to the principles of agency the court below, after regarding the demeanur of the appellant's employee, Jack Phiri, found that that employee had been aware that the employee of the respondents, Chanda Kanjesheko, had no authority to enter into, and bind his employers in, contracts.

Issues of demeanur go to the credibility of witnesses. An opinion regarding the credibility of a witness, formed on the demeanur of such witness, is dependent on the observations which a trial court makes of that witness. In **Kenmuir v Hattingh**[6] we held:

> **"where questions of credibility are involved an appellate court, which has not had the advantage of seeing and hearing the witness will not interfere with the findings of fact made by the trial judge unless it is clearly shown that he has fallen into error."**

Although the appellant filed a ground of appeal challenging the court's finding that both Jack Phiri and Chanda Kanjesheko had no authority to enter into contracts on behalf of their respective employers, there was no ground challenging the finding by the court that Jack Phiri was not a credible witness. So, since the appellant did not demonstrate to us where the court below could have gone wrong in assessing the demeanur of Jack Phiri, we, not having had

the advantage of seeing and hearing Jack Phiri at trial, cannot interfere with the lower court's finding that Jack Phiri was aware that Chanda Kanjesheko had no authority to enter into contracts on behalf of his employers, the respondents. On that ground, the appellant's argument based on the rule in **Royal British Bank v Turquand**[1] does not hold water because the rule therein does not protect a person who is aware that the representative of a company that he is dealing with lacks authority to bind that company.

It is, therefore, our conclusion that the court below was on firm ground when it held that there was no contract that existed between the parties. As we have said, the conclusion disposes of all the grounds of appeal.

All in all, we find no merit in this appeal. We, consequently, dismiss it, with costs to the respondents.

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E. M. Hamaundu
SUPREME COURT JUDGE

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A. M. Wood
SUPREME COURT JUDGE

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R. M. C. Kaoma
SUPREME COURT JUDGE