

HOLDEN AT LUSAKA

*(Civil Jurisdiction)*

2 DEC 2021

**BETWEEN:**

**COLLINS SICHULA  
TANGANYIKA COMMERCE ZAMBIA**

**1<sup>ST</sup> APPELLANT  
2<sup>ND</sup> APPELLANT**

**AND**

**ELLAN PERRY**

**RESPONDENT**

**CORAM: Chashi, Ngulube and Siavwapa, JJA**

**ON: 19<sup>th</sup> October and 22<sup>nd</sup> December 2021**

*For the 1<sup>st</sup> and 2<sup>nd</sup> Appellants: N. Mbuyi (Miss), Messrs Paul Norah  
Advocates*

*For the Respondent: R. Musumali, Messrs SLM Legal  
Practitioners*

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## **J U D G M E N T**

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**CHASHI JA, delivered the Judgment of the Court.**

**Cases referred to:**

- 1. The Law Association of Zambia and Another v The Attorney General – 2019/CCZ/0013**
- 2. Salomon v Salomon & Co. Ltd (1897) AC, 22**

3. **Kapembwa v Maimbolwa and Attorney General (1981) Z.R. 127**
4. **Nkhata and 4 Others v The Attorney General of Zambia (1966) Z.R. 147**

**Rules referred to:**

1. **The Court of Appeal Rules, Statutory Instrument No. 65 of 2016**
2. **The High Court Rules, Chapter 27 of the Laws of Zambia**

**1.0 INTRODUCTION**

1.1 This appeal emanates from the Judgment of Honourable Justice W.S Mweemba, High Court (Commercial Division) delivered on 21<sup>st</sup> May 2021. In the said Judgment, the learned Judge granted the Respondent who was the plaintiff in the court below, the sum of US\$727,415.00 together with interest at the average US Dollar lending rate.

**2.0 BACKGROUND**

2.1 The Respondent, a national of Israel, a businessman and partner in AL Aliaz Jewelry Limited, director in Top Point Civil Engineering (Z) Limited and ISNR Trading and

Logistics Limited, was also a representative of all the three companies in Zambia. The 1<sup>st</sup> Appellant was a director and shareholder in the 2<sup>nd</sup> Appellant company.

2.2 Initially, the Respondent appointed the 1<sup>st</sup> Appellant as an agent for arranging shipping documents for gold copper and tantalite, (the minerals) once the Respondent sourced the same. In reality however, the 1<sup>st</sup> Appellant claimed to source the minerals and represented the sellers of the minerals.

2.3 The 1<sup>st</sup> Appellant collected monies from the Respondent and directed other monies to be paid to the 2<sup>nd</sup> Appellant and several other 1<sup>st</sup> Appellant's nominees via money gram and western union. The **modus operandi** being that, the 1<sup>st</sup> Appellant would source the minerals and the Respondent would finance the export and shipping of the minerals out of Zambia. The Respondent was expected to make full payment for the minerals upon their arrival at the designated destination.

2.4 The Respondent paid for all purported customs, export tax and shipping costs. However, the 1<sup>st</sup> Appellant never

delivered any minerals. When the Respondent discovered that he was being defrauded by the 1<sup>st</sup> Appellant, he reported the matter to the police, who in turn arrested the 1<sup>st</sup> Appellant. Upon his arrest, the 1<sup>st</sup> Appellant made an undertaking in writing to pay the Respondent all the monies he had expended.

2.5 When the 1<sup>st</sup> Appellant failed to honour his undertaking, the Respondent commenced an action by writ of summons claiming the following reliefs:

- (i) Damages for breach of contract
- (ii) Repayment of the sum of US\$638,415.00 paid between August 2013 and November 2014 to the 1<sup>st</sup> Appellant through his Barclays Bank account and numerous persons appointed by the 1<sup>st</sup> Appellant and paid through western union and money gram, for which consideration had wholly failed
- (iii) Repayment of the sum of US\$89,000.00 paid into the 2<sup>nd</sup> Appellant's Standard Chartered Bank Account between March 2014 and May 2014 for which consideration had wholly failed.

(iv) Interest on all sums found due.

2.6 In the statement of claim, the Respondent alleged fraud. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Appellants, although it was not specially pleaded in their defence, at the trial, led evidence advancing the defence of privity of contract.

### **3.0 DECISION OF THE COURT BELOW**

3.1 Upon considering the evidence, documents on record and the submissions, the learned Judge formulated the following two issues for determination.

(i) Whether or not the Respondent should be allowed to sue and maintain an action against the Appellant in his personal capacity

(ii) If the answer to the first question is in the affirmative, whether the Respondent proved his case against the Appellants.

3.2 As regards the first issue, the learned Judge found that the contention by the Appellants that the Respondent was seeking to enforce the agreements alluded to by the Appellants was misconceived, as the Respondent was not claiming to be a party to those agreements and his claim

was not based on those agreements. According to the learned Judge a perusal of the statement of claim, witness statements, skeleton arguments and final submissions showed that the claim was based on an agreement entered into between the Respondent and the Appellants for the sourcing and supply of minerals, which agreement was between the Respondent and the Appellants.

3.3 The learned Judge also found that all the monies which were received by the Appellants came from the Respondent. That, the 1<sup>st</sup> Appellant did not adduce any evidence to show that the monies came from any of the companies in which the Respondent was shareholder or director

3.4 In light of the aforestated, the Judge found and held that the Respondent was entitled to sue and maintain the action against the Appellants. Consequently, the Respondent was found to have proved his case on a balance of probability and granted reliefs (ii) and (iii). It was on that basis that the learned Judge entered Judgment in the sum of US\$ 727, 415 with interest.

3.5 With respect to the claim for damages, the learned Judge found that the 1<sup>st</sup> Appellant breached the contract between the parties. He was however of the view that the award of interest will suffice for the damages

3.6 On non pecuniary losses, such as pain, suffering, physical inconvenience, discomfort and mental distress, which are recoverable in case of fraudulent misrepresentation, the learned Judge found that they were not pleaded and no evidence was led at the trial and as such were not granted.

#### **4.0 THE APPEAL**

4.1 Dissatisfied with the Judgment, the Appellants have appealed to this Court advancing five grounds of appeal couched as follows:

- (i) That the honourable court misdirected itself in law and fact when it allowed the Respondent (PW1) to testify via video link. The court and the other party were not able to tell if the witness was being coached or whether the video link was tampered with.
- (ii) That the honourable court misdirected itself in law and fact when it awarded the Respondent the sum of

USD727,415.00 plus interest at the average US Dollars lending rate charged by Commercial Banks in Zambia from 3<sup>rd</sup> February 2016 to date of full payment when the Respondent was not privy to the agreements between AL Aliz Jewelry Limited, Top Point Civil Engineering (Z) Limited or ISNR trading & Logistics Limited and the 2<sup>nd</sup> Appellant.

(iii) That the honourable court misdirected itself in law and fact when it adjudged that for the purposes of litigation herein the 2<sup>nd</sup> Appellant is identical to the 1<sup>st</sup> Appellant who controls that company as the 1<sup>st</sup> Appellant was at the center of the fraudulent conduct of swindling the Respondent, he is liable for the loss suffered by the Respondent when the 2<sup>nd</sup> Appellant is a separate legal entity from its shareholders and directors

(iv) That the honourable court misdirected itself in law and fact when it adjudged that the conduct of the 1<sup>st</sup> Appellant amounts to fraudulent misrepresentation when in fact not.



(v) That the honourable court misdirected itself in law and in fact when it awarded the Appellant the sum of USD727,415.00 plus interest at the average US Dollars lending rate charged by Commercial Banks in Zambia from 3<sup>rd</sup> February 2016 to date of full payment when the court did find as a matter of fact at page 36 and 37 of the Judgment that the Respondent is a businessman and partner in AL Alz Jewelry Limited an Israel based company. He is also a director in Top Point Engineering (Z) Limited and ISNR trading and logistic limited which are both incorporated in the Seychelles and the Respondent was the representative of all 3 companies in the Republic of Zambia and as such there was no privity of contract between the Appellants and the Respondents.

## **5.0 ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 At the hearing of the appeal Miss Mbuyi, Counsel for the Appellant relied on the Appellant's heads of argument filed into Court on 30<sup>th</sup> August 2021. In arguing the first

ground of appeal, Counsel submitted that, if a witness was allowed to testify via video link, the court and the other party would not be able to tell if the witness was being coached or whether the video link was tempered with. Counsel relied on the case of **The Law Association of Zambia and another v The Attorney General**<sup>1</sup> and contended that there is no law in Zambia that governs admission of evidence via video link and that therefore, the Respondent's only witness PW1 was not in order to testify via video link.

5.2 In arguing the second, third and fifth grounds of appeal together, Counsel submitted that in this case the doctrine of privity comes into play as the 2<sup>nd</sup> Appellant entered into agreements with the three companies in which the Respondent is managing director and shareholder, it was further submitted that the Respondent is not a party to those agreements in his personal capacity and he has not produced any power of attorney to prove that he has authority to bring this matter in his personal capacity. In emphasizing the principle of separate legal personality,

Counsel cited the case of **Salomon v Salomon & Co. Ltd**<sup>2</sup> and several other cases which subsequently dealt with this subject.

5.3 Counsel emphasized that the Respondent is clearly not a party to the contracts he seeks to enforce and he has therefore no right to sue on behalf of a body corporate. According to Counsel, the Appellants were merely agents, who were entitled to payments made to them as remuneration. It was contended that the Respondent failed to show the court that he entered into the contracts in his personal capacity with the Appellants.

5.4 From the onset, we note that the third and fourth grounds of appeal were not argued. We will therefore treat them as having been abandoned in accordance with Order 10/9/(8) and (10) of **The Court of Appeal Rules**<sup>1</sup> (CAR)

## **6.0 ARGUMENTS IN RESPONSE TO THE APPEAL**

6.1 In response to the first ground, Mr Musumali, Counsel for the Respondent, submitted that, the practice and procedure in the High Court, allows for reception of

evidence via audio visual technology. Our attention was drawn to Order 32/2 (8) of **The High Court Rules**<sup>2</sup> (HCR) which states as follows”

*“The Court may receive oral evidence from a source within and outside Zambia via audio visual technology and such evidence shall be recorded in the same manner as if the witness was physically present in Court.”*

6.2 It was submitted that, the court below had the legal basis to order the reception of evidence pursuant to Order 32/2 (8) **HCR**. That furthermore, the Appellants did not object to the audio visual presentation. It was on that premise also submitted that the Appellants in the court below did not raise any issues relating to whether or not the audio visual was tampered with or whether the witness was coached.

6.3 As regards **The Law Association of Zambia**<sup>1</sup> case cited by the Appellants, it was submitted that the case is distinguishable with this case as it related to the Constitutional Court and not the High Court, where the

rules expressly provided for reception of audio visual technology.

6.4 In response to the second and fifth grounds of appeal, Counsel drew our attention to pages 43 and 47 of the record of appeal (the record), where the learned Judge made findings of fact. According to Counsel, the findings of fact therein are crucial and instructive on what transpired between the Appellants and the Respondent to the extent that the 1<sup>st</sup> Appellant personally gave a guarantee for the money that he received. That the findings of fact are supported by evidence on record which the court below considered in arriving at its decision.

6.5 Counsel cited the case of **Kapembwa V Maimbolwa and Attorney General**<sup>3</sup> and submitted that the appellate court will not normally interfere with findings of fact and a losing litigant cannot appeal on plain findings of fact by a trial Judge

6.6 According to Counsel, the court below analyzed the evidence on record which revealed that the aggregate sum of US\$727,415.00 was sent by the Respondent in his

personal capacity to the 1<sup>st</sup> Appellant and his beneficiaries after the fraudulent conduct of the 1<sup>st</sup> Appellant. Further that there was no evidence on record that the three companies sent the monies. Counsel contended that, the Appellants failed to demonstrate grounds upon which Judgment of the court below should be interfered with.

## **7.0 CONSIDERATION AND DECISION OF THIS COURT**

7.1 We have considered the arguments and the Judgment being impugned. The first ground of appeal attacks the learned Judge in the court below for allowing the Respondent (PW1) to testify via video link. According to the Appellants, they and the court below were not able to tell if the witness was being coached or whether the video link was tampered with. In short, the Appellants are alleging that the court below misdirected itself.

7.2 In arguing this ground of appeal, the Appellants have heavily relied on the Constitutional Court case of **The Law Association of Zambia**<sup>1</sup>, in which case the court declined the use of video link as Order 8/1(1) of **The Constitutional Court Rules** does not expressly provide

for use of video link. It can therefore only be used with the agreement of the parties.

7.3 We totally agree with Counsel for the Respondent that **The Law Association of Zambia**<sup>1</sup> case is distinguishable from the present case in that in the High Court, Order 32/2(8) **HCR** expressly provides for use of video link

7.4 Furthermore, we note that the use of video link was not an issue in the court below. The Appellants did not object to its use. They agreed and actively participated during its use. In our view this ground of appeal is a complete afterthought which should not be entertained. In the view that we have taken, this ground has no merit and is accordingly dismissed.

7.5 In respect to the second and fifth grounds of appeal, these ground rehash the issue in respect to the doctrine of privity of contract. The Appellants attack the decision of the learned Judge in the court below for awarding the Respondent the sum of US\$727,415.00; arguing that the Respondent was not privy to the contracts between the Appellants and the three companies.

7.6 These grounds of appeal as rightly observed by Counsel for the Respondent, attacks findings of fact by the learned Judge. In arriving at the decision that the Respondent be allowed to sue and maintain an action against the Appellants in his personal capacity; the learned Judge made his finding in the face of abundant documentation and the personal undertakings which were made by the 1<sup>st</sup> Appellant. The finding was therefore supported by evidence.

7.7 The learned Judge opined that, the contention by the Appellants that the Respondent was seeking to enforce the agreements or contracts between the three companies and the Appellants was misconceived; as the Respondent was not claiming to be a party to those agreements or contracts and the Respondent's claim was not based on those agreements or contracts

7.8 In view of the aforestated, the learned Judge found that the Respondent's claim was based on an agreement entered into between the Respondent and the Appellants for the sourcing and supply of different types of minerals.



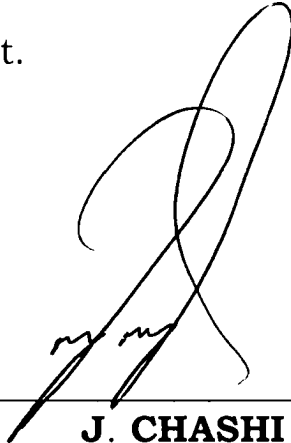
7.9 Furthermore, in arriving at its decision, the court below found that the funds were personally paid by the Respondent and that the monies did not come from any of the three companies. In addition, the court found that the Appellants did not adduce any evidence to show that the funds came from any of the three companies in which the respondent was shareholder or director.

7.10 In the case of **Nkhata and 4 Others v The Attorney General of Zambia**<sup>4</sup>, The Court of appeal held that the Appellate court should only reverse the court below on questions of fact, if the Judge erred in accepting the evidence, or assessing and evaluating the evidence. As earlier alluded to, the finding is supported by evidence which the learned Judge properly received, assessed and evaluated. We therefore find no basis on which to fault the Judge. In the view that we have taken, grounds two and five are accordingly dismissed.

## **8.0 CONCLUSION**

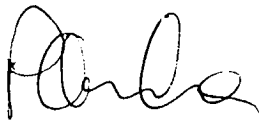
8.1 All the four grounds of appeal having failed, the appeal is dismissed for lack of merit. Costs of the

appeal are to the Respondent and they are to be paid forthwith. Same are to be taxed in default of agreement.

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**J. CHASHI**  
**COURT OF APPEAL JUDGE**

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**P.C.M. NGULUBE**  
**COURT OF APPEAL JUDGE**

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**M.J SIAVWAPA**  
**COURT OF APPEAL JUDGE**