

IN THE HIGH COURT FOR ZAMBIA
AT THE COMMERCIAL REGISTRY
HOLDEN AT KITWE
(CIVIL JURISDICTION)

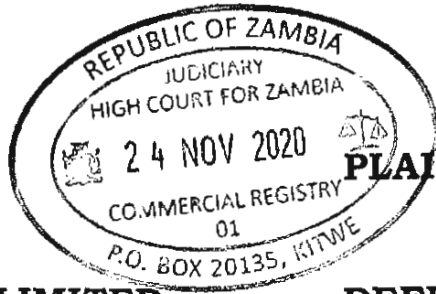
2019/HKC/039

BETWEEN:

ROY BWALYA

AND

EDENVALE INVESTMENTS LIMITED



PLAINTIFF

DEFENDANT

Before Hon. Lady Justice Abha Patel, S.C.

For the Plaintiff: Ms. S. Mutamina

Messrs. Katongo & Company

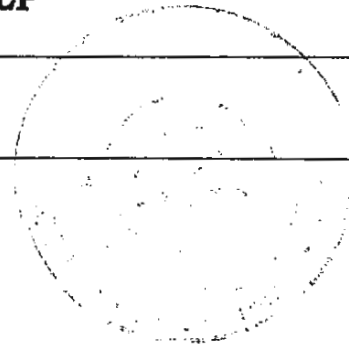
For the Defendant: Mr. L. Linyama

Messrs Eric Silwamba, Jalasi and Linyama LP

JUDGEMENT

List of Authorities

- 1. The Partnership Act 1890.**
- 2. The Companies Act No. 10 of 2017.**
- 3. Halsbury's Laws of England 4th Edition.**
- 4. Cheshire, Fifoot and Furmston's Law of Contract 11th edition at page 480.**



Cases Referred to:

- 1. Salomon v Salomon and Company (1895-1899) ALLER 33.**
- 2. Associated Chemicals Limited v Hill and Delamain Zambia Limited; (1999) Z.R 99.**
- 3. Base Chemicals Zambia Limited Mazzonites Limited v Zambia Air Force and the Attorney General SCZ Judgment No. 9 of 2011.**
- 4. ZCCM and Ndola Lime Company Limited vs Sikanyika and others.**
- 5. Datong Constructions vs Fraser Associates (As A Firm) Appeal No. 163 of 2019.**
- 6. Royal British Bank vs Turquand (1856) E & B 32**
- 7. Madison Investment, Property and Advisory Company Limited and Peter Kanyinji Selected Judgment No. 48 of 2018**

1. Introduction

1. The Plaintiff commenced this action by way of a Writ of Summons and Statement of Claim filed in this Court on 20th day of August, 2019, claiming the following:
 - 1.1 Payment in the sum of ZMW429,272.00 being moneys due in the form of commission from transactions facilitated by the Plaintiff;
 - 1.2 Interest at the average short-term deposit rate per annum from the date of Writ of Summons to date of Judgment; and at the current commercial bank lending rate as determined by the Bank of Zambia from date of judgment until final payment;
 - 1.3 Damages for breach of contract;
 - 1.4 Damages for loss of use of money;
 - 1.5 Damages for inconvenience;
 - 1.6 Any other relief the Court may deem fit; and
 - 1.7 Costs of and incidental to those proceedings.

2. Facts and Background

2.1 The Plaintiffs contention is that this action arose from transactions that were the subject of an oral agreement between the Plaintiff and the Defendant for the execution and performance of the contracts awarded to the Defendant by ZESCO Limited under contract numbers ZESCO-116-14 and ZESCO-061-2016 (hereinafter referred to as the '*ZESCO contracts*'). It is the Plaintiffs further contention that he had agreed with the Defendant to use the Defendant Company in order to execute the said contracts. The Plaintiff further maintains that he did spearhead the contracts and in the process dealt with several third parties. It was his evidence as per his Witness Statement filed into Court on 24th April 2020 that the agreement between the Parties was that the Plaintiff was entitled to a commission for the delivery of the work contracted to the Defendant. It was also his evidence that this action arose as a consequence of the Defendant failing to pay the Plaintiff the commissions due to him as per the oral agreement between the Parties.

3. The Defendant's contention

3.1 The Defendant has denied the existence or at all of any oral agreement between the Plaintiff and the Defendant company. The Defendant has maintained that any or all errands that the Plaintiff performed, were simply errands, and performed by the Plaintiff due to his personal relationship with one Raymond Walubita, a Director in the Defendant Company.

3.2 The Defendant relied on two Witness Statements sworn by one Mushala Mudenda, who was the Accountant of the Defendant Company for a period of ten (10) years, and the second, filed by Raymond Walubita both filed in Court on 24th April 2020.

3.3 The gist of the Defendants evidence as tendered by its Witnesses is that there was no agreement between the Plaintiff and the Defendant that would entitle the Plaintiff to any claims for commission or any other claims from the Defendant. Both witnesses confirmed that the Plaintiff was known to them both and who was a personal friend to Raymond Walubita, and for whom he ran errands and attended to other matters on his behalf. They both maintained that the Plaintiff was not known to the Defendant Company and there had been no formalisation of any engagement of the Plaintiff that

would entitle him to present a claim for commission such as the one *in casu*.

4. The Evidence of the Plaintiff

4.1 The *Plaintiff Roy Bwalya*, relied on his witness statement and Plaintiff's Bundle of Documents filed on 24th April 2020, and 23rd March 2020 respectively, which were admitted into evidence and marked *Plaintiff's Witness Statement 1. And the Plaintiffs Bundle of Documents*. Both have graced the record of the Court, and in the interest of brevity, the Court will make specific reference to them in the course of its Judgment.

4.2 The Plaintiff *in casu*, has testified that he and Raymond Walubita, DW2, entered into an oral agreement whereby the Plaintiff was entitled to a 20% share in the profits to arising out of 2 contracts awarded to the Defendant by ZESCO for the installation and mounting of billboards ("*The Zesco contracts*") . The Plaintiffs evidence centred around the fact that he was responsible for the award of the *Zesco contracts*") and that he was the person known to all relevant third parties in the performance and execution of the said Zesco contracts.

4.3 *Paragraphs 8 to 11* of his statement of claim showed the Plaintiffs entitlement to the sum now outstanding in the

sum of K429,272.00 having received the sum of K341,500.00.

- 4.4 Under cross examination, the *Plaintiff* confirmed that he was not an employee of the Defendant but was more like an agent. He could not point to any document in his Bundle of Documents to prove this relationship as he said it was based on an oral agreement made sometime in 2013. He also confirmed that he had a long standing relationship with *Roy Walubita*, which relationship he confirmed was of a personal nature and spanned in extent of 20 years.
- 4.5 When asked to point to a document in his Bundle of Documents to prove any formal communication between the Plaintiff and the Defendant, he referred to *page 2* of the bundle of Documents. He was asked as to the nature of his relationship with the defendant company and he maintained that it was oral. He also had no document wherein he had been introduced as an Agent of the Defendant to any third party.
- 4.6 He confirmed under cross examination that he always received cash from *Raymond Walubita* and that it was part of the commission that he was entitled to. When questioned as to where he had tabulated the amounts

due to him less the amounts he had received, he maintained that it was verbal. He however referred to paragraph 10 of his Statement of Claim to prove the account between him and the Defendant.

4.7 He maintained that prior to commencing the action in Court, he had sent an initial demand to the Defendant claiming the monies that he was entitled to but that he had not produced a copy of that mail before the Court.

4.8 Under re-examination, the Plaintiff attempted to clear that he was appointed as the contract Manager for the Defendant and that the medical card that he was issued was issued with the authorisation and consent of the Defendant.

4.9 This marked the close of the case for the Plaintiff.

5. Evidence of the Defendant

5.1 The Defendants first witness was *Mudenda Mushala DW1*. He produced his witness statement which was admitted into evidence and marked *Defendants Witness Statement 1*.

Under cross examination, he was referred to several *pages in the Plaintiffs Bundle of Documents*, and was

shown several e-mails which appeared to have been sent by the Plaintiff and related to the award of the ZESCO contracts to the Defendant Company. He was also shown a quotation at *page 5* from a company called Factory On Design and several other documents which all related to the ZESCO contract and were sent to or received by the Plaintiff. He was also shown a cheque deposit slip on *page 9* which showed that a cheque drawn on the Defendant was deposited by the Plaintiff into the account for Factory One design.

- 5.2 The witness was questioned at length about the contents of e-mail correspondence on *page 10* of the Plaintiffs Bundle of Documents which refers to the Plaintiff as the project manager, and to *page 22* being the membership card at Kitwe Central Hospital in the name of the Plaintiff.
- 5.3 Under re-examination, he clarified that the earlier e-mail from ZESCO on *page 3* was copied to the Defendant company while the e-mails appearing on *pages 10 and 11* were not, and maintained that the Plaintiff may have been running personal errands for *Raymond Walubita* and did not represent the Defendant in any way.

6. The Defendant's 2nd Witness was *Raymond Walubita* who produced his Witness Statement marked Defendants second witness statement filed in Court on 24th April 2020.

Under cross examination, he confirmed that the Plaintiff was a personal friend and whom he assisted by asking him to run errands and do odd jobs for him for which he paid him in cash.

6.1 He was referred to the same set of documents in the Plaintiffs Bundle of Documents as the first witness, and was referred to the quotation from a company called Factory One Design for the fabrication, supply and installation of Billboards in relation to the ZESCO contracts.

6.2 He confirmed receiving e-mails between the plaintiff himself and Factory One Design which related to the ZESCO projects but denied that the Plaintiff was acting as an agent of the Defendant. He was also referred to the exchange of e-mails appearing on *pages 12 and 13* of the Plaintiffs Bundle of Documents to show that people from ZESCO Limited were sending emails to the Plaintiff giving him instructions on behalf of the Defendant. He was also referred to other e-mails appearing on *pages 16,17* and

20 of the Bundle and confirmed that the Plaintiff was only acting in his capacity as a *henchman* for himself and was not acting for the Company.

- 6.3 He also confirmed that he authorised a medical card to be issued in favour of the Plaintiff only as a favour to him and that the card was issued by the Hospital.
- 6.4 He further confirmed under re-examination that he was constantly visited by the Plaintiff who had financial difficulties and who pleaded for assistance. He confirmed that he had used the Plaintiff to run other errands for various other projects before the ZESCO contracts and in all those, he simply paid cash to the Plaintiff for his time. He referred to the e-mail on *page 19* as proof of the fact that he used to pay the Plaintiff cash from time to time.
- 6.5 This marked the close of the case for the Defendant.
- 6.6 The Parties having filed written submissions, and although the Defendants submissions were late by two days, the Court, did in the exercise of its inherent discretion allow the same and duly considered all submissions on record. The Court also extends its gratitude to Counsel for their industry and diligence.

7. The Issues for determination

The Parties having failed to file a list of agreed issues in dispute for the determination by the Court, the Plaintiff submitted the following as its list of issues:

i. That there existed a contractual relationship between the Plaintiff and the Defendant created by an oral agreement;

ii. That the Plaintiff was presented to third parties who dealt with the defendant in the course of the delivery of the contracts with ZESCO Limited as a representative and/or agent of the Defendant;

iii. That the Plaintiff is entitled to commission under the agreement.

7.2 The Court is of the considered view that the whole action rests on the determination of the following issue:

Was the Plaintiff an Agent or Partner of the Defendant?

8. The Law

8.1 An opportune place for the Court to start to unravel the evidence of the Parties, is by reflecting on the law in relation to Registered Companies. *The Companies Act No. 10 of 2017* (hereinafter referred to as The Companies Act), regulates companies in Zambia.

A company is in law, regarded as a legal entity separate and distinct from its members. In terms of *section 11* of the Companies Act, a company is deemed incorporated on and from the date specified in the certificate of incorporation. By *section 22* of the Companies Act, a company is invested, subject to the Act, and to such limitations as are inherent in its corporate nature, the same capacity, rights, powers and privileges of a natural individual.

8.2 The celebrated case of **Salomon v Salomon & Co.**

settled the law on corporate personality. Because a company is distinct and separate from the persons making it up, it cannot be held liable for the acts of individuals in the company, nor can an individual claim a benefit due to the company, even if he holds a substantial interest in the company.

Lord Macnaughten in the *House of Lords* captured the corporate personality of the company in the following words:

“.....The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as it was before, and the same persons are managers, and the same hands receive the profits, the company is not in law the agent of the subscribers or trustee for them. Nor are the subscribers as members liable, in any shape or form, except to the extent and in the manner provided by the Act.”

Similar reasoning has been applied in the Commonwealth Jurisdiction. The Indian Supreme Court in the case of **Tata Engineering and Locomotive Company Limited vs State of Bihar**, in pronouncing on the concept of corporate status said as follows:

“The corporation in law is equal to a natural person and has a legal entity separate from that of its shareholders; it bears its own name and has a seal of its own; its assets are separate and distinct from those of its members; it can sue and be sued exclusively for its own purpose; its creditors cannot obtain satisfaction from the assets of its members; the liability of the members or shareholders is limited to capital invested by them; similarly the creditors or members have no right to the assets of the corporation. This position has been well established ever since the decision in the case of Salomon vs Salomon & co, which was pronounced in 1897 and indeed has been the well recognised principle of common law.”

- 8.3 The concept that a corporate entity is distinct and separate from its shareholders is well settled under Zambian Law and the Court has noted the cases of

**Associated Chemicals Limited v Hill and Delamain
Zambia Limited; Base Chemicals Zambia Limited
Mazzonites Limited v Zambia Air Force and the
Attorney General; and ZCCM and Ndola Lime
Company Limited vs Sikanyika and others.**

8.4 Section 1(1) of the Partnership Act, 1890

defines partnership as;

***“a business relationship which subsist between
persons carrying on a business in commons with
a view of profit”***

Further to the provision above, **Section 2(3)** provides
that:

***“Receipt by a person of a share of the profit of a
business is prima facie that he is a partner in the
business..”***

**8.5 Halsbury’s Laws of England, 4th Edition (reissue) at
page 5, at paragraph1 provides the definition of agency
as follows;**

***“ The word agency is used to connote the relation
which exists where one person has an authority or capacity***

to create legal relations between a person occupying the position of principal and third parties..... the relation of agency arises whenever one person called the agent has authority to act on behalf of another called the principal and consents so to act.... Whether that relation exists in any situation depends not on the precise terminology employed by the circumstances of the relationship, but on the nature of the agreement or the exact circumstances of the relationship between alleged principal and agent..."

8.6 The learned authors of **Cheshire, Fifoot and Furmston's Law of Contract** 11th edition at page 480 state that ;

" If an agent enters into a contract with a third party within the scope of his actual authority the result is to create contractual obligations between the principal and the third party. It is irrelevant that the latter was unaware of the existence of the authority, and irrelevant even that the agent acted with improper motives with desire solely to promote his own interests."

8.7 Further **Cheshire, Fifoot and Furmston's Law of Contract** at page 481 state that;

" an agent who is employed to conduct a certain business transaction is deemed to possess authority to do everything usually incidental to do business transaction of that type"

8.8 Actual Authority of an agent is defined at page 479 by the said authors of **Cheshire, Fifoot and Furmston's** as follows;

“.....a legal relationship between the principal and agent created by a consensual agreement to which they alone are parties.....”

9. Analysis and application of the facts to the law

9.1 Having discoursed the law and the attributes of corporate personality, and having stated the issue for determination, I must now escalate my enquiry by applying the law to the facts in *casu*.

Having heard the evidence of the Parties, in chief and undercross examination, and having considered the submissions of Counsel, the following facts are not in dispute:

- i. The Plaintiff, and one Raymond Walubita were old colleagues and have had a long standing personal relationship.
- ii. Raymond Walubita is a shareholder and director of the Defendant company.
- iii. The Plaintiff did attend to certain transactions in the performance of the Zesco contract.

iv. The third parties namely, Factory One Design and the relevant personnel at Zesco, did deal with the plaintiff in the course of his duties.

v. There was no issue raised by them as to the *status* of the Plaintiff and whether they treated him as an employee, *agent* or a *partner*, in the defendant company is immaterial, to the claims in this action, there being no claims made by the third parties.

9.2 Counsel for the Plaintiff has submitted in length and has argued that that the Plaintiff became an Agent of the defendant in the discharge of his duties and interactions with third parties and quoted extensively from the decision of the Supreme Court of Zambia in the case of **Datong Constructions vs Fraser Associates (As A Firm)** and has also relied on the **Turquand** rule, as the rule that governs the principle of the indoor management rule, which emanated from the celebrated case of **Royal British Bank vs Turquand**. It is the Plaintiffs submission that an outsider contracting with a party in good faith is entitled to presume that the internal regulations and procedures had been complied with and will not be affected by irregularities (in the appointment of the agent) of which they had no notice.

- 9.3 The plaintiff has submitted a host of other authorities, all dealing with the principle that a third party is not bound to look beyond the authority reposed in the agent and that such agent has the capacity to bind the company without regard to any defect in his appointment.
- 9.4 The Court raises no issue with the authorities submitted and is of the considered view that they are good law on the principle of Agents in the course of their conduct with third parties. However, and what is crucial, in *casu*, is that there is no challenge or claim made by any third party against the defendant. To that extent, the court is of the considered view that the authorities relied on by counsel are misplaced in the context of the dispute.
- 9.5 What is glaring in these proceedings is that *DW2*, *Raymond Walubita* has denied the existence of any formal engagement of the Plaintiff by the Defendant company. Counsel for the defendant has submitted at length and has pointed to the discrepancies in the Plaintiffs evidence as to his claim to be an agent and or a business partner. It is obvious that there was no documentation signed between the two, and Counsel has submitted that the Plaintiff is either entitled to a commission, if he was an agent, or to profits, if he was a partner, but that his evidence made the claims

interchangeably, without proof of either relationship. To this extent, Counsel has submitted that the action must fail for failure to adduce satisfactory evidence against the defendant.

9.6 Counsel has referred the Court to **section 2** of the Partnership Act, in support of their submission that the Plaintiff having never received a share of the profits of the proceeds of the business of the defendant, is not and was not a partner of the defendant. At most, the plaintiff was executing instructions received from Mr. Raymond Walubita, in his personal capacity and not for the defendant company.

9.7 The defendant has submitted extensively on how Courts in Zambia have cases dealt with the unreliable evidence of parties and the Court will note and it is trite that the burden rests on the person that alleges, and will deal with the issue of whether the plaintiff in *casu*, has discharged that burden.

9.8 The Court has noted the evidence of **DW1**, Mushala Mudenda was consistent with the evidence of Raymond Walubita to the extent that the plaintiff was performing errands for Mr Walubita personally, and that he had

never been engaged as an employee or agent of the defendant company.

9.9 The Court has noted the several documents and trail of e-mail correspondence, relied on by the plaintiff in his bundle of documents, but is of the considered view that all that the documents prove, is the fact that the plaintiff was performing tasks and was known to third parties as someone who may have been representing the defendant. However, the opinion of a third party does not in itself constitute a legal status or relationship between the Plaintiff and the Defendant, in the absence of any proof to the contrary.

9.10 It is common place for someone to be a 'henchman' in the words of Mr. Walubita, being his explanation that the plaintiff was a personal friend and who had financial difficulties and that he would ask him to run errands for which he paid him on an *ad hoc* basis. To that extent, there is enough evidence to support that contention. The Plaintiff offered no evidence in writing, of his involvement with the defendant company and could not refer to any official demand he claims to have made against the defendant. Nor could he refer to any document showing that the defendant had paid him for any of the services he had rendered, nor show any payments that he claims

have been made as per his statement of claim referred to in **paragraph 4.3** above.

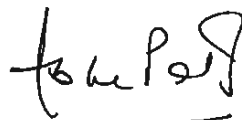
- 9.11 The defendant has submitted extensively on the doctrine of corporate personality and this Court does concur with the submissions and principles espoused by the several authorities referred to in the submissions of the defendant.
- 9.12 The Court was also invited to consider the well settled doctrine of privity of contract, in support of the defendant's submission that the defendant not being a party to any contract between it and the plaintiff, there can be no finding against the defendant. On this submission, Counsel has referred the Court to several celebrated cases and texts on Contracts, all of which are on record.
- 9.13 The Court has already noted that any and all documents relied on and produced by the plaintiff, are merely proof of his involvement in the Zesco contract, and do not lend any support to his claim of being an *agent*, *employee* or indeed *partner* of the defendant in the absence of any specific written authorisation of the defendant through its duly constituted Board of Directors or any other formal appointment.

9.14 I note and it may be probable that the Plaintiff may have been oblivious to the requirements of the Companies Act, and the Court is also minded that business men may in fact conduct business relations in an informal and not structured fashion. However, to arrive at any other finding, would render the Companies Act and the principle of corporate personality otiose and academic. The law is the law and must be applied with uniformity to he who seeks to come before it.

9.15 The Court takes further note of a seminal judgment of the Supreme Court of Zambia in the case of **Madison Investment, Property and Advisory Company Limited and Peter Kanyinji** wherein the Supreme Court said: "the basic notion of a corporate entity being distinct and separate from its owners provides the basis of the whole fabric of company law". Quoting from the decision in the case of **Ben Hashem v Ali Shayif**, the Court said: "There has always been a judicial concern not to create commercial uncertainty and undermine the benefits of incorporation. Having incorporated, the shareholders have a legitimate expectation, as do those who deal with the incorporated entity, that the courts will respect the status of the entity and apply the principle in **Salomon v Salomon** in the ordinary way."

9.16 Consequent to the findings above, and the Plaintiff not having discharged the burden of proof, this Court is left with no option but to conclude that there being no formal engagement of the plaintiff, it cannot succeed in its claims against the defendant. The Plaintiff himself having confirmed that he acted at all times on the personal instructions of Mr. Raymond Walubita, I hereby dismiss this action with costs.

Delivered in open Court, the 24th day of November, 2020.



Lady Justice Abha Patel, S.C.