IN THE COURT OF APPEAL FOR ZAMBIA **APPEAL NO. 15 OF 2016**
AT THE LUSAKA REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

JAMES CHUNGU **APPELLANT**

AND

GERALD MAKUNGU (***Suing in his capacity as Attorney for Roy Kirchner***) **RESPONDENT**

Coram: ***Chisanga, JP, Mulongoti, Sichinga, JJA***
On the 26th day of September, 2017

For the Appellant: *Mr. A. Tembo of Messrs Tembo Ngulube & Associates*
For the Respondent: *Mr. R. Mainza of Messrs Mainza & Company*

JUDGMENT

SICHINGA, JA, delivered the Judgment of the Court

Cases referred to:

1. *Zulu v. Avondale Housing Project Ltd (1982) ZR 172*
2. *The Attorney-General v. Aboubacar Tall and Another SCZ No. 5 of 1995*
3. *Zambia Revenue Authority v. Jayesh Shall (2001) ZR 60*
4. *Water Wells Limited v. Jackson (1984) ZR 98*
5. *Mwambazi v. Morrester Farms Limited (1977) ZR 108*

6. *Sablehand Zambia Limited v. Zambia Revenue Authority SCZ No. 20 of 2003*
7. *Simeza and Others v. Mzeche SCZ No. 87 of 2011*
8. *Imbwae v. Imbwae SCZ No. 12 of 2003*
9. *Khalid Mohamed v. Attorney-General (1982) ZR 49*
10. *Janki Vashdeo Bhojwani vs. Industrial Bank Ltd (2005) 2 SCC 217*
11. *Man Kaur vs. Kartar Singh Sangha (2010) ALL SCR 2511*
12. *Lufeyo Matatiyo Kalala v. The Attorney-General (1977) ZR 416*

Legislation and other works referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia – Order XXIV rule 1*
2. *The Rules of the Supreme Court 1999 Edition (White Book) - Order 18/12/18*
3. *Evidence Act Cap 43 Section 3, Laws of Zambia*
4. *Legal Practitioner's Act, Chapter 30 of the Laws of Zambia*

This is an appeal against the decision of the court below wherein it awarded the respondent his claim for the sum of K118, 800.00 being the kwacha equivalent of US$27,000.00 allegedly owed by the appellant to the respondent.

According to the statement of claim, the brief facts of the case are that the appellant and the respondent entered into a verbal

agreement between 27th and 29th May, 2005 by which the respondent advanced the appellant the sum of USD 27,000.00.

On or about 9th July, 2005, the respondent and the appellant then executed a written agreement whereby the appellant agreed to armortize the debt he owed to the respondent by way of five monthly installments of USD 5,400.00 each. The appellant defaulted on all the instalments rendering the full amount due at once. Upon the appellant's failure to settle the whole amount, the respondent took out an action by way of writ of summons claiming the aforestated amount, plus interest and costs.

In his defence as pleaded, the appellant denied entering into a verbal agreement with the respondent for the said sum of USD 27, 000.00. He denied executing a re-payment agreement but admitted that he had undertaken a business trip to South Africa with the respondent which was unsuccessful, and each party met his own expenses. The appellant further averred that the amounts claimed by the respondent were the expenses he had incurred on their foiled business trip to South Africa. The appellant did not attend trial.

The evidence in support of the claim was led by one Gerald Gift Makungu, the respondent herein by way of power of attorney. The gist of his evidence was that his principal, one Roy Kirchner, gave him instructions in November, 2015, to collect money in the sum of US$27,000 from the appellant. Consequently, he was given a document which was executed by the said Kirchner and the appellant. He said the document confirmed that the appellant agreed to pay Kirchner the sum of US$27,000 in installments of US$5,400 by November, 2005. Further, that he had not received any of the stated amounts from the appellant.

The court below found that the appellant's defence lacked merit and awarded the respondent the claims as pleaded.

Dissatisfied with the said awards, the appellant has appealed to this court advancing two grounds of appeal as follows:

1. ***That on the procedural aspect, the Honourable court erred in law, when it proceeded without hearing the appellant on the merit contrary to the established principle of law that dictates that cases should be decided on their substance and merit.***
2. ***That corollary to ground 1 herein, the Honourable court erred in law and fact in holding that the appellant's***

defence was without merit and that instead the respondent had proved his claim on a balance of probabilities.

At the hearing of the appeal learned counsel for the appellant, Mr. Tembo, relied on the appellant's Heads of Argument. Grounds 1 and 2 were argued together.

In support of the two grounds of appeal, it is contended that the trial court erred when it proceeded to determine the matter without hearing the appellant, whose counsel was in attendance although he was not robbed.

It is submitted that the court below further erred when it observed that the fact that the parties went on a business trip together gave credence to the alleged borrowing of the money by the appellant leading to the conclusion that the respondent had proved his case on a balance of probabilities. Citing the Supreme Court decisions in ***Zulu v. Avondale Housing Project Ltd,***[1] ***The Attorney-General v. Aboubacar Tall and Zambia Airways Corporation Limited,***[2] and ***Zambia Revenue Authority v. Jayesh Shah,***[3] it is submitted that the import of these authorities is that matters

should be determined on their merits so that there can be finality. That matters that are not determined on their merit owing to some technical omission which does not go to the root of the matter, thereby leaving room for further litigation are frowned upon by the courts of law.

Public policy considerations were raised by the appellant to the effect that justice is rooted in public confidence, and that public confidence is eroded if a party to litigation goes away feeling they have not had their day in court on account that they were not heard due to some technical omission which is merely regulatory.

On the issue of the hearing, it is submitted that the matter came up for trial on 18th July 2016, and that the appellant's advocate was in attendance and sought to make an adjournment in chambers as he was not robbed but the court opted to proceed to sit in open court to hear the matter. Counsel contends that the court should have condemned the appellant in costs for that day and adjourned the matter other than shut the appellant's door to justice. The appellant cited the case of ***Water Wells Limited v. Jackson***[4] and

Mwambazi v. Morrester Farms Ltd[5] where the Supreme Court respectively held that:

> ***"Triable issues should come to trial despite the default of the parties. It is not in the interest of justice to deny him the right to have his case heard."***

And that:

> ***"Although it is usual on an application to set aside a default judgment not only to show a defence on the merits, but to give an explanation of that default, it is the defence on the merits which is the more important point to consider."***

The thrust of the submissions in support is that in the absence of the appellant to defend the matter at trial, it could not be said of the respondent that he proved his claim.

The sum and substance of the submissions on behalf of the respondent is that the trial court was in order to proceed and determine the matter after the appellant deliberately elected not to attend court on the date of trial. We were urged to consider Order 35 rule 3 of the High Court Rules for this proposition.

It is submitted that the appellant was duly served with the Notice of trial through his advocates but elected not to appear before court and no reason was given for his absence.

It is further argued that the trial court was on firm ground when it held that the appellant's defence had no merit, and that the respondent had proved his case on a balance of probabilities because his oral and documentary evidence were not challenged.

It is also submitted that the appellant alleged fraud but did not expressly plead the facts, matter and circumstances relied upon to support the allegation and did not specifically adduce evidence to prove fraud to the required high standard as indicated in Order 18/12/18 of the Rules of the Supreme Court, 1999 Edition, and the case of ***Sablehand Zambia Limited vs. Zambia Revenue Authority.***[6] Hence the lower court's finding that the appellant's defence had no merit was made on firm ground.

We have considered this Appeal together with the arguments advanced in the respective Heads of Argument and the authorities cited therein. We have also considered the Judgment of the court

below. This Appeal raises the question whether or not the court below was on firm ground to proceed to trial in the absence of the appellant, who was the defendant, and to determine the matter in favour of the respondent, who was the plaintiff.

A perusal of the record shows that the respondent, suing in his capacity as Attorney for Roy Kirchner commenced action by way of writ to recover his claim on 25th October, 2005.

In December 2005, the respondent entered judgment in default of defence against the appellant. This was subsequently set aside in March 2006. The appellant settled his defence wherein he denied entering into any written agreement with the respondent for the sum claimed. The trial court then granted orders for directions, which in our estimation, ought to have been complied with, at least, by June 2006. It is not apparent from the record why the matter then stalled for about nine years. However, on 24th January 2015, when the matter was scheduled for trial, the respondent's counsel was in attendance while the appellant's counsel was not. On 25th August 2015, the trial court referred the matter to mediation. Again the respondent's counsel was in attendance whilst the

appellant and his counsel were absent. After the failure of mediation, the matter was scheduled for hearing on 18th July, 2016. The trial court satisfied itself that an affidavit of service with acknowledgment of service was filed, and ordered the matter to proceed to trial.

Having noted the sequence of events in the court below, we have no difficulty in accepting the respondent's submissions that the trial court was justified to proceed to trial and acted within the provisions of Order 35 rule 3 of the High Court Rules, which provides as follows:

> ***"3. If the plaintiff appears, and the defendant does not appear or sufficiently excuse his absence, or neglects to answer when duly called, the court may, upon proof of service of notice of trial, proceed to hear the cause and give judgment on the evidence adduced by the plaintiff, or may postpone the hearing of the cause and direct notice of such postponement to be given to the defendant."***

In the case of ***Simeza and Others v. Mzyeche***[7] the Supreme Court said ***"that no procedural injustice is occasioned when a***

having failed to appear and to give a good reason for not attending trial, the court below was not precluded from hearing the respondent's evidence and from considering whether he had proved his case on a balance of probabilities. We wish to restate what the Supreme Court said in the cases of ***Khalid Mohamed v. Attorney General,***[9] and ***Zulu v. Avondale Housing Project Limited (supra)*** that the mere failure of a defendant's case does not automatically entitle the plaintiff to judgment if the plaintiff fails to prove his case against a defendant.

So far as the substantial merits of the respondent's case are concerned, the court below considered the evidence of an agreement of repayment executed between the parties and the evidence that the appellant and the respondent had undertaken a business trip together. The court also considered the appellant's defence and his allegations of fraud averred therein. The court below then concluded that the defence lacked merit as the particulars of fraud were not pleaded with sufficient particularity as required by the law.

A perusal of the record shows that the appellant denied the authenticity of the agreement he is alleged to have entered into with the respondent. His defence was that the written document was not signed by him. The respondent did not adduce any evidence to support his assertion that the appellant signed the document. He merely pointed to the document which was signed. At page J3 the trial court had this to say:

> ***"The fact that the defendant admits going on a business trip with Mr. Roy Kirchner in 2005, gives credence to the alleged borrowing of the money by the defendant."***

In the case of ***Sablehand Zambia Limited vs. Zambia Revenue Authority*** supra, the Supreme Court held that, a defendant wishing to rely on the defence of fraud or forgery must ensure that it is clearly and distinctly alleged. Further, at trial, the defendant must lead evidence so that the allegation is clearly and distinctly proved. It was observed in that case that no handwriting expert was called to prove the signature was forged.

In casu, PW1, the witness who sought to assert that the signature on the document was that of the appellant did not witness the execution of the document. The document was witnessed by a third party not called at trial.

Going by these facts that the respondent, as an agent for Roy Kirchner, testified on his principal's behalf, we must resolve the issue whether or not his evidence that the signature on the document was that of the appellant, was sufficient to merit the finding of the court below.

The legal maxim *'Qui facit per alium, facit per se'* is the substance of the law relating to the power of attorney. It literally translates to *"He who acts through another does the act himself"*. In Blacks Law Dictionary, 'power of attorney' is described as the *'instrument by which a person is authorized to act as an agent of the person granting it'*. The donee of a power of attorney may appear or act in a court. The High Court Rules of procedure appear to endorse this position. Order XXIV rule 1 of the High Court Rules Cap 27 of the Laws of Zambia provides that "*...the Court or a Judge may, in its or*

his discretion, permit any other person who shall satisfy the Court or a Judge that he has authority in that behalf to appear for such plaintiff or defendant."

Section 3(3)(a) of the Legal Practitioner's Act Chapter 30 of the Laws of Zambia is of similar import as Order XXIV Rule 1 of the High Court Rule. It provides as follows:

> ***"Nothing in this Act shall be construed or deemed to prevent –***
>
> ***(a) An unqualified person from appearing for and representing in a court any party to any civil cause or matter, if duly authorized thereto by any rule of the court or of subordinate courts."***

The extent of the authority that may be conferred on another by power of attorney is stated by the learned authors of Halsbury's Laws of England, Fourth Edition, Volume 1 (2) at paragraph 43:

> ***"Where an instrument is expressed to confer general authority on the attorney, it confers authority to do on the donor's behalf anything which the donor can lawfully do by any attorney, subject to certain statutory***

restrictions and to any restrictions contained in the instrument." (Emphasis ours)

Although there are no statutory provisions in the Zambian legislation that restrict the extent of authority under a power of attorney, it is settled that an unqualified person is competent to represent a party to an action if such person is acting pursuant to a power of attorney. The question that remains to be determined is whether it is lawful for a person acting on behalf of a litigant by virtue of a power of attorney to depose as a witness on behalf of his principal regarding a transaction to which he was not privy or of which he has no knowledge.

The instrument by which the plaintiff appeared on behalf of Roy Kirchner is not in dispute. What appears to be of relevance to the issue under consideration is whether the plaintiff as a power of attorney holder can depose as witness on behalf of his principal. We have considered the Indian case of ***Janki Vashdeo Bhojwani vs. Industrial Bank Ltd***[10] which is of persuasive value. In that case the Supreme Court of India held that a power of attorney holder cannot depose for a principal in respect of matters of which

only the principal could have personal knowledge and in respect of which the principal is entitled to be cross-examined. The Supreme Court of India in the case of ***Man Kaur vs. Kartar Singh Sangha***[11] summarized the position as to who should give evidence in regard to matters involving personal knowledge. It held inter alia as follows:

> ***"(a) An attorney holder, who has signed the plaint (charge/writ) and instituted the suit, but has no knowledge of the transaction can only give evidence about the validity of the power of attorney and the filing of the suit.***
>
> ***(b) If the attorney holder has done any act or handled any transactions, in pursuance of the power of attorney granted by the principal, he may be examined as a witness to prove those acts or transactions. If the attorney holder alone has personal knowledge of such acts and transactions and not the principal, the attorney holder shall be examined, if those acts and transactions have to be proved.***
>
> ***(c) The attorney holder cannot depose or give evidence in place of his principal for the acts done by the principal or transactions or dealings of the principal, of which principal alone has personal knowledge."***

The positon in India as deciphered from the Supreme Court decision is that the donee of a power of attorney practically steps

into the shoes of the principal to perform all the acts on his behalf except the right to depose to facts which are in the exclusive knowledge of the principal.

The position of the law is that the extent of the agent's authority is governed by the rules which define its scope in accordance with the nature of the agent's employment and duties. Halsbury's Laws of England, 3rd Edition, Volume 1 at paragraph 378 states:

> ***"As between the agent and his principal, the authority may be limited by agreement or special instructions, but as regards third persons the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances, and which is reasonably to be gathered from the nature of his employment and duties."***

The long and short of these authorities is that the authority conferred by power of attorney must be adhered to strictly.

Having discussed the extent of a power of attorney, we now turn to admission of evidence as practiced in our jurisdiction. The rule relating to the admission and production of documents specified in

a list of documents is provided under Order 27 rule 4 of the Rules of the Supreme Court, 1999 edition. This provides as follows:

> ***"4.-(1) Subject to paragraph (2) and without prejudice to the right of a party to object to the admission in evidence of any document, a party on whom a list of documents is served in pursuance of any provision of Order 24 shall, unless the court otherwise orders, be deemed to admit –***
>
> ***(a) that any document described in the list as original document is such a document and was printed, written, signed or executed as it purports respectively to have been, and***
>
> ***(b) that any document described therein as a copy is a true copy."***

The rule specifically states that it does not apply to a document whose authenticity has been denied in the pleading. Further, the Evidence Act, Section 3 provides the conditions under which a document may be received as evidence of a fact. That evidence may be received if the maker of a statement has personal knowledge of the matters dealt with by the statement and the maker is called as a witness in the proceedings.

The proviso to this provision is that a court may dispense with the maker of the statement as a witness if he is dead, or physically or

mentally unfit to attend trial. Further, if the maker is outside Zambia and it would not be reasonably practicable to secure his attendance, or all reasonable efforts to locate the maker have failed. In applying the provision of the Evidence Act, the Supreme Court held in the case of ***Lufeyo Matatiyo Kalala v. The Attorney-General***[12] that the only way a document may be received in evidence other than by production by its maker is under the Evidence Act, Cap 170. It further held that before the court can exercise its discretion to admit a statement without the maker being called as a witness, it must be satisfied that undue delay or expense would otherwise be caused. The wording of the current Evidence Act Cap 43 of the Laws of Zambia is identical to the provisions of the Evidence Act, Cap 170 considered in the ***Kalala case.***

Applying the forestated principles to the current case, we have first considered the instrument granted to the respondent by Roy Kirchner. The power of attorney shows the respondent was to deal with the case between the appellant and his principal, and more specifically to retrieve $27,000 owed to his principal. This is confirmed by his oral evidence where he testified that he was

appointed as an attorney in November, 2015 and was availed a document executed by the said Kirchner, of one part, and the appellant, of the other. The said document was executed in 2005. From these facts, it is clear that the respondent neither had personal knowledge of the transaction between the appellant and Kirchner, nor could he attest to the authenticity of the document he had produced. His role as attorney was limited to commencing the action and presenting the agreement in his possession. We note that the agreement in dispute was infact witnessed by a third party. In furtherance of his authority under the power of attorney, the respondent could have called the witness to the disputed agreement to attest to its authenticity. He did not do so.

In our considered view, the trial court erred when it held that the fact that the defendant admits going on a business trip with Mr. Roy Kirchner in 2005, gives credence to the alleged borrowing of the money by the defendant in light of the fact that the respondent's attorney could not testify to the contents of the document allegedly proving debt, going by the persuasive authorities cited herein. The appellant here contends that the finding was not supported by the

evidence. We agree with this assertion. It was incumbent upon the respondent to prove his case on a balance of probabilities, which he did not. We therefore allow ground two of the appeal. The result is that this appeal succeeds, with costs awarded to the appellant to be agreed and in default to be taxed.

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F.M. CHISANGA
JUDGE PRESIDENT

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J.Z. MULONGOTI
COURT OF APPEAL JUDGE

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D.Y. SICHINGA
COURT OF APPEAL JUDGE