

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA**

CA 213/0006/2019
APPEAL No. 45/2019

(Civil Jurisdiction)

B E T W E E N:

ZALAWI HAULAGE LIMITED

AND

GOLDMAN INSURANCE LIMITED



APPELLANT

RESPONDENT

CORAM: Chisanga, JP, Majula and Ngulube, JJA
On 21st August, 2019 and 16th December, 2019

For the Appellant: Mr. C. Salati of Mulenga Mundashi Advocates.

For the Respondent: Mr. A. Mbambara of Messrs A. Mbambara Legal Practitioners.

JUDGMENT

MAJULA JA, delivered the Judgment of the Court.

Cases referred to:

1. *Lumus Agricultural Services Company Limited and Others vs Gwembe Valley Development Company Limited (In receivership) (SCZ No. 1 of 1999)*
2. *Anuj Kumar Rathi Krishnan vs The People HPA/11/2010.*
3. *African Alliance Pioneer Master Fund vs Vehicle Finance Appeal No. 21 of 2011.*
4. *Steak Ranches vs Steak Ranches Appeal No. 219/2012.*
5. *National and Grindlays Bank Limited vs Vallabhji and Others (1966) 2 ALL ER 626.*

6. *Arthur Nelson Ndhlovu and Another vs Alshms Building Materials Company Limited (SCZ Judgment No. 12 of 2002)*

Legislation referred to:

1. *Authentication of Documents Act, Chapter 75 of the Laws of Zambia.*

Other works referred to:

Bryan A. Garner, Black's Law Dictionary, 8th Edition

1.0 Introduction

- 1.1 The appellant is appealing against an interlocutory Ruling of the High Court by which the Court dismissed a preliminary issue raised by the appellant challenging certain documents that were in the respondent's bundle of documents.

2.0 Background

- 2.1 The brief facts to this appeal are that Saro Agro Industrial Limited entered into an insurance contract with Goldman Insurance (*the respondent herein*) for the purpose of providing insurance cover for generators purchased by Saro, in transit to Zambia. The generators were to be transported from South Africa to Zambia by Cargo Management and Logistics who in turn engaged Zalawi Haulage Limited (*the appellant herein*) to transport the cargo.
- 2.3 While in transit, a truck belonging to the appellant was involved in a road accident, allegedly occasioned by the negligence of Mr.

Brian Katebe, an employee of the appellant; who was driving the truck at the time of the accident. Mr. Katebe was arrested and charged with the offence of negligent driving. He admitted the offence and duly signed an admission of guilt form which appears at page 46 of the record of appeal.

2.4 The generators that were being transported by the appellant were damaged in the road traffic accident and as insurer to Saro; the respondent paid Saro the sum of K949,918.00 being the sum insured for the damaged generators. As a consequence, the respondent commenced an action in the court below against the appellant by way of writ of summons which was accompanied by the requisite statement of claim. The main relief claimed was for payment of K 949,918.00 as well as interest and costs.

2.5 When the matter came up for trial, Counsel for the appellant raised a preliminary issue with respect to the authentication of certain documents that were in the respondent's bundle of documents. On 22nd November 2018, the learned High Court Judge dismissed the appellant's preliminary issue.

3.0 Ground of Appeal

3.1 Disconsolate with the decision of the learned trial Judge, the appellant has launched this appeal mounting one ground of appeal as follows:

“The learned puisne Judge erred in law and in fact when he held at pages R10 and R11 of the Ruling that the documents appearing at pages 3,7 and 18 of the respondent’s bundle of document did not require authentication as prescribed under the Authentication of Documents Act, because the appellant’s driver was a party to the said documents.”

4.0 Appellants Arguments

4.1 The appellant’s grievance emanates from the decision of Judge M. D. Bowa that the documents in contention (hereinafter referred to as “the challenged documents”) did not require authentication. Our attention was drawn to the provisions of Section 3 of the Authentication of Documents Act¹. We were also referred to the cases of ***Lumus Agricultural Services Company Limited and Another vs Gwembe Valley Development Company Limited (In receivership)***¹ and ***Anuj Kumar Rathi Krishnan vs The People***² which cases clearly explain the effect of Section 3 of the aforesaid Act. In a nutshell, the Supreme Court has guided that any documents executed outside Zambia are required to be authenticated in line with Section 3 of the Authentication of Documents Act for purposes of validating them for use in Zambia.

4.2 The appellants have argued that the requirement under the Authentication Act is couched in mandatory terms and does not give discretion with respect to the authentication of foreign

documents before being valid for use in Zambia. That being the case, it has been contended that the Court below erred by dismissing the appellant's preliminary issue and the defendant neither prepared nor participated in the preparation of the challenged documents. Neither did the Appellant execute the said documents.

4.3 Counsel conceded that the appellant's driver was mentioned in the documents but, according to him, that does not mean at law that the appellant is a party to the documents by virtue of the appellant's driver executing the documents. It has been strongly contended that the appellant is not a party to the challenged documents and the driver of the appellant who executed the documents in issue is not party to the action and therefore the exception to the authentication rule cannot be applied. On the basis of the foregoing arguments we have been beseeched to overturn the decision of the lower Court with costs.

4.4. Counsel has submitted that the Court below appeared to extend the authentication rule espoused in ***African Alliance Pioneer Master Fund vs Vehicle Finance***³ and ***Steak Ranches v Steak Ranches***.⁴ Counsel has argued that the documentation dealt with in the ***Steak Ranches***⁴ case and ***Lumus***¹ case are distinguishable from the documentation dealt with in the case at hand. That in the aforecited cases, the Supreme Court dealt with documents which were agreements between the parties

whereas the challenged documents in the case in *casu* were not agreements in the strict sense.

5.0. Respondent's Arguments

5.1. In opposing the appeal, the respondents begun their submissions with the definition of authentication of documents as provided for in Section 2 of the 'Authentication of Documents Act' as well as the definition from **Black's Law Dictionary eighth edition** by Bryan A. Garner. According to Bryan Garner, authentication is defined as:

"Broadly, the act of proving that something (as a document) is true or genuine, esp. so that it may be admitted as evidence."

5.2. Counsel also adverted to the provisions of the Authentication Act in particular Section 3 which stipulates the manner of authenticating documents executed outside Zambia. Regarding the interpretation of the above provision, we were referred to the case of **Lumus Agriculture Service Limited vs Gwembe Valley Development Ltd.**¹

5.3. Counsel asserted that the general rule is that a document executed outside Zambia has to be authenticated before it can be used in Zambia. Regarding the status of document executed outside Zambia which has not been authenticated, it was argued that parties to such a document can rely on it however such a document cannot be used against third parties. The

case of ***National and Grindlays Bank Limited vs Vallabhji and Others***⁵ was cited as authority for this proposition.

- 5.4. Counsel vehemently argued that the party trying to distance itself from the document is in fact a party to the said documents.
- 5.5. Pertaining to the argument by the appellant that the exception to the Authentication Act in the ***Lumus*** case was erroneously extended in this case, the respondent submitted that it is not a requirement that a party against whom a document is adduced must actively prepare or participate in the preparation of the document. That the only requirement according to the ***Lumus*** case appears to be that such a person must be a party to the document with full knowledge and acknowledgement of the existence of the said document and the extent to which it attaches to him.
- 5.6. The Respondent further argued that the appellant's driver, one Brian Katebe did sign an admission of guilt form appearing on page 46 of the record. According to the respondent, this means that the appellant, through its driver, was part of the admission of guilt form when he admitted to having committed the traffic offence. To compound this state of affairs, Brian Katebe paid a deposit penalty fine for driving without due care and attention. The respondent's prayer was that the appeal be dismissed with costs.

5.7. At the hearing of this matter of 21st August 2019, Mr. Salati counsel for the appellant sought to rely on the heads of argument filed on 15th March 2019. He, however, went on to argue that the appellant could not be considered to be party to the documents on account of the fact that the documents at pages 42 and 46 were prepared by the Zimbabwean police and signed by Katebe. He drew a distinction with the document at page 46 which shows an admission of guilt prepared by Zimbabwe National traffic police, but his contention was that the same was not signed by Brain Katebe. He went on further to assert that he could raise this issue on a point of law notwithstanding the fact that they had an opportunity to conduct discovery and had admitted them before. In this regard, he placed reliance on the case of **Arthur Nelson Ndhlovu and Another vs Alshms Building Materials Company Limited**⁶ for the principle that there is no estoppel against a statute.

5.8. Mr. Mbambara counsel for the respondent equally sought to rely on the heads of argument filed on 2nd April 2019 together with the authorities therein. He drew our attention to page 42 of the record which indicates where the first party Katebe was coming from Zalawi and further that at page 46 which is the admission of guilt form the same driver admitted liability and paid a fine. It was on account of the foregoing that Mr. Mbambara was of

the view that the appellant was clearly a party to the documents.

5.9. Turning to the issue of the signatures on the challenged documents not being that of the driver, learned counsel argued that this issue was only being raised now. He went on to conclude that the fact of signing by the appellant's driver bound him and his employer and that he had admitted.

5.10. In reply, Mr. Salati strongly argued that the issue of signatures and who signed the documents was not new and had been addressed in the heads of arguments. He went on to argue that you cannot ascribe responsibility on the basis of someone signing. He explained the ***Lumus*** case by stating that document in the said case was a franchise agreement between two parties and the parties did not dispute the genuineness of the documents and signatures.

6. 0. Decision of the Court

6.1. The law regarding Authentication of documents is set out in the Authentication of Documents Act, Chapter 75 of the Laws of Zambia.

Section 3 of the Act provides as follows:

Any document executed outside Zambia shall be deemed to be sufficiently authenticated for the purpose of use in Zambia if:-

- (a) *in the case of a document executed in Great Britain or Ireland it be duly authenticated by a notary public under his signature and seal of office;*
- (b) *in the case of a document executed in any part of Her Britannic Majesty's dominions outside the United Kingdom it be duly authenticated by the signature and seal of office of the mayor of any town or of a notary public or of the permanent head of any Government Department in any such part of Her Britannic Majesty's dominions;*
- (c) *in the case of document executed in any of Her Britannic Majesty's territories or protectorates in Africa it be duly authenticated by the signature and seal of office of any notary, magistrate, permanent head of a Government Department, Resident Commissioner or Assistant Commissioner in or of any such territory or protectorate;*
- (d) *in the case of a document executed in any place outside Her Britannic Majesty's dominions (hereinafter referred to as a "foreign place") it be duly authenticated by the signature and seal of office:-*
- (i) *of a British Consul-General, Consul or Vice-Consul in such foreign place; or*
 - (ii) *of any Secretary of State, Under-Secretary of State, Governor, Colonial Secretary, or of any other person in such foreign place who shall be shown by the certificate of a Consul or Vice-Consul of such foreign place in Zambia to be*

duly authorized under the law of such foreign place to authenticate such document.”

6.2. The law simply put is that any document executed outside Zambia must be authenticated for it to be valid for use in this country.

6.3. There are a number of authorities which have clearly expressed the intendment of this provision. In ***Lumus Agriculture Services Ltd vs Gwembe Valley Development Ltd***,¹ the Supreme Court made a general observation as follows:

“if a document executed outside Zambia is authenticated as provided by the Authentication of Documents Act, then it shall be deemed or presumed to be valid for use in this country and if it is not authenticated the converse is true that it is deemed not valid and cannot be used in this country.”

6.4. Another insightful case is that of ***Anuj Kumar***² which held as follows:

“This section demonstrates the need for the document executed outside Zambia to be notarized for it to be valid for use in Zambia... since the said documents were deposited to outside Zambia, they should have been authenticated in accordance with section 3 of the Authentication of Documents Act for purposes of validating them for use in Zambia. In view that the documents

were not authenticated, the trial Court erred at law in admitting the evidence.”

6.5. It must be quickly noted that there exist exceptions to the authentication rule. The exception is to the effect that the document which is not attested is valid and binding between the parties but is ineffective against other persons. This has been clearly articulated in the cases adverted to by both parties namely:

- ***African Alliance Pioneer Master Fund vs Vehicle Finance***³
- ***Steak Ranches vs Steak Ranches***⁴; and
- ***National and Grindlays Bank Limited vs Vallabhji and Others***.⁵

6.6. The position of the requirement for authentication thus being settled the question arising for our determination is whether the appellant can successfully argue that they were not a party to the challenged documents in the face of an admission of guilt form having been signed by their driver? Can they contend that they neither prepared nor participated in the preparation of the challenged documents and that neither they nor their driver is party to the documents and therefore the application of the exception to the authentication rule was erroneously extended?

6.7. We take a leaf from the decision of the Supreme Court in the ***Steak Ranches***⁴ case where they explained their earlier

decision in the **Lumus** case. They explained the issue of authentication and validity of the document signed between the parties. They went on to observe as follows:

*“To oust a document only on the ground that it is not authenticated when in actual fact the parties themselves do not dispute attesting to the document would be a miscarriage of justice. In other words, in **Lumus** we were saying the matter should not end at looking at whether the document is authenticated or not but if the parties agree they signed the instrument none of them can hide behind section 3 of the Act.”*

- 6.8. In the matter before us what confronts us is a situation where it is not disputed that it is the appellant's driver who was in the accident. The appellants are contending that he did not sign the challenged documents at page 46 (admission of guilt). They are submitting that they are not party to the said documents. We have pondered over this argument and having looked at the peculiar circumstances of this case, we hold the firm view that the argument does not hold water for the reasons we shall give. It is a fact that the driver of the appellant one Brain Katebe was involved in an accident in Zimbabwe. It is also not in dispute that the said driver was an employee of the appellants.

- 6.9. The appellant in this instance is attempting to hide behind the provisions of section 3 of the Act and dissociate itself from the documents. On the facts of this case this argument is untenable. The liability of the appellant arises from the fact that the action was from an employee of the appellant who was carrying out his duties by virtue of his employment. The employer is liable for the employees acts which are done in the course of his employment. Furthermore, we are fortified in our decision by the fact that the challenged document is as a matter of fact a police document, a police traffic report. The appellant's driver Brian Katabe paid a deposit penalty fee for driving without due care and attention. This was a clear admission of guilt.
- 6.10. We hold the view that whether or not the appellant's driver is the one who signed or not is a red herring. The appellant is attempting to side tract or side step the real issue.
- 6.11. The authentication rule is designed to prevent mischief. It is not there to aid or enable mischief. We refuse to be distracted from the relevant question in this matter. The question of whether the challenged documents fall within the exception to the authentication rule should be approached on the facts of a particular case. The facts revealed in this particular case are that it was the appellant's driver who was involved in the accident and admitted that he drove without due care and attention. Therefore, they cannot now seek to extricate

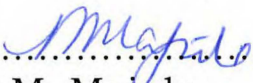
themselves from the actions of the driver. The trial Judge in our view cannot be faulted for holding that the challenged documents fall within the exceptions to the authentication rule.

7.0. Conclusion

7.1 In light of what we have stated in the preceding paragraphs we hold that the appellant is certainly not a stranger to the challenged documents and that these fall within the exceptions to the authentication rule and can be relied upon by the respondent. We find the appeal devoid of merit and dismiss it accordingly. Costs abide the event to be taxed in default of agreement.



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F.M. Chisanga
JUDGE PRESIDENT



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B.M. Majula
COURT OF APPEAL JUDGE



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P.C.M. Ngulube
COURT OF APPEAL JUDGE