

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

APPEAL NO.58/2018

BETWEEN:

S. P. MULENGA INVESTMENT LIMITED

APPELLANT

AND

WELUZANI ZULU

RESPONDENT

Coram: Mchenga DJP, Chashi and Mulongoti, JJA

On 25th November 2018 and 21st March 2019

For the Appellant: P. Kalonde, KCM Associates

For the Respondent: C. Siatwinda, Legal Aid Counsel,
Legal Aid Board

J U D G M E N T

Mchenga, DJP delivered the judgment of the Court.

Cases referred to:

1. Associated Chemicals Limited v Hill and Delamain
Zambia Limited and Ellis and Company (As A Law Firm)
(1998) S.J. 7
2. Shamwana and 7 Others v The People [1985] Z.R. 41
3. Wilson Masauso Zulu v Avondale Housing Project
Limited [1982] Z.R. 172

Works referred to:

1. **Halsbury's Laws of England, Third Edition, Volume 15, London, Butterworth & Co, 1956.**

The background to this appeal is that in 1996, the respondent approached S.P. Mulenga Associates International, an estates agency, intending to purchase a house. At their premises, he met a Mr. Kwenje who told him that he had a house for sale and that S.P. Mulenga Associates International, where acting on his behalf.

As it turned out, the house actually belonged to Zambia Airways but they had offered it to Mr. Kwenje for sale as a former employee. He had paid part of the purchase price and there was a balance outstanding. The respondent agreed to buy the house from Mr. Kwenje at K20,000,000.00. He paid the money to S.P. Mulenga Associates International, who were supposed to pay off the balance that Mr. Kwenje had not paid.

It later transpired that S.P. Mulenga Associates International, did not pay the balance and as a result,

the offer to Mr. Kwenje was withdrawn. The vendors then took possession of the house and the respondent lost his money.

The respondent then took out an action in the High Court seeking the reversal of the decision to cancel the offer to sale the house to Mr. Kwenje. In the alternative, he sought damages against the appellant for negligence. Their failure to pay the balance of the purchase price led to him losing the opportunity to buy the house from Mr. Kwenje.

The appellant's position at the trial was that they could not be held responsible for the actions of S.P. Mulenga Associates International, because they were a separate legal entity.

The trial judge found that there was negligence when S. P. Mulenga Associates International, failed to remit the balance to the sellers of the house. She considered the relationship between the appellant and S.P. Mulenga

Associates International and observed that there was a close relationship between them. The directors behind the two companies were the same.

She also recalled that the two organisations had previously been sued together and she concluded that S.P. Mulenga Associates International was the forerunner of the appellant. She then took judicial notice of the fact that the appellant S.P. Mulenga Investment Limited and S.P. Mulenga Associates International, were the same organisation.

Though four grounds of appeal have been advanced in support of this appeal, they all deal with one issue and we will deal with them together. It is contended that the trial judge erred when she held that the appellant and S. P. Mulenga Associates International, were the same organisation. That, that finding disregards the status and independence of a company, as a separate legal person.

Mr. Kalonde referred to **section 16 and 2 (b) of the Companies Act** and the case of **Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (As A Law Firm)**¹ and submitted that the trial judge erred when she held that the appellant could be held responsible for the actions of S. P. Mulenga Associates International. The decision was erroneous because following its incorporation, the appellant became a separate legal entity.

In response, Mr. Siatwinda indicated that he would rely on the evidence on record.

The finding that the appellant and S. P. Mulenga Associates International were the same organization were premised on two issues. The trial judge took judicial notice of that fact and also took into account the fact that the directors of the two companies were the same.

The editors of **Halsbury's Laws of England, Third Edition, Volume 15**, at paragraph 615, have said the following on

the circumstances when a court can take judicial notice of a fact:

"Judicial notice is taken of various facts which are familiar to any judicial tribunal by their universal notoriety or regular recurrence in the ordinary course of nature or business."

Further, in the case of **Shamwana and 7 Others v The People²**, at page 41, the Supreme Court had the following to say on when a court can take judicial notice of a fact that is in issue:

"In an appropriate case, therefore, particularly where, as in this case, facts may be judicially noticed after an enquiry has been made, a judge has power, not only to look at his own records, but also at those of another judge, and to take judicial notice of their contents. This applies to all courts in the Republic. Whether a court is at liberty to take judicial notice of another court's records will depend upon the circumstances of the particular case before it.

In this particular case, the acquittal of PW5 was public knowledge but to put the matter beyond any shadow of doubt, the trial judge was entitled to make an inquiry by reference to the appropriate source of information, which was the case record on appeal, in order to equip himself before he could take judicial notice of PW5's acquittal. For the reasons given, judicial notice of

PW5's acquittal was properly taken and the fact of acquittal was properly used."

In this case, it is our view that it is not a notorious fact that S. P. Mulenga Associates International and the appellant are one and the same company. In addition, even if the trial judge found that the two had been previously sued together, she did not call for or examine any court record before coming to that conclusion. Consequently, there was no basis on which she could take judicial notice of the fact that S. P. Mulenga Associates International and the appellant, were one and the same company.

As regards the two companies sharing the same directors, as was correctly submitted by Mr. Kalonde, in the case of **Associated Chemicals Limited v Hill and Delamain Zambia Limited and Ellis and Company (As A Law Firm)**¹, it was held that a company is a distinct legal person different from its members or shareholders. The fact that S. P. Mulenga Associates International and the appellant share the same directors, cannot, on its own, lead to a conclusion that they were one and the same company.

We are satisfied that this is an appropriate case to invoke the holding in the case of **Wilson Masauso Zulu v Avondale Housing Project Limited³**, that an appellate court can reverse a finding of fact made by a trial court, if it is satisfied that the finding is either perverse or made in the absence of any relevant evidence. Consequently, we set aside the finding that S. P. Mulenga Associates International and the appellant were one and the same company as it was not supported by any evidence.

The net effect is that the appeal succeeds. The orders that the appellant pays damages and costs, are set aside. We award the appellant costs here and in the court below, to be agreed and in default to be taxed.



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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT



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J. Chashi
COURT OF APPEAL JUDGE



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J.Z. Mulongoti
COURT OF APPEAL JUDGE