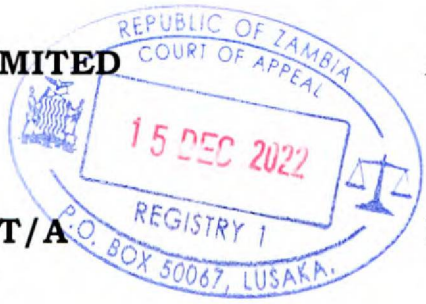
IN THE COURT OF APPEAL OF ZAMBIA Appeal No.23 of 2021
HOLDEN AT LUSAKA
(Civil Jurisdiction)

BETWEEN:

METALCO INDUSTRIES LIMITED Appellant



AND

HAMILTON DOVOROGWA T/A DOVO RISK CONSULTING Respondent

CORAM: Kondolo, Sichinga and Sharpe-Phiri, JJA
on 16th November 2022 and 15th December 2022

For the Appellant: Mr. J. N. Hara of Messrs Muya & Company, standing in for Mr. Osborne Ngoma of Messrs Lungu Simwanza & Company
For the Respondent: No appearance

J U D G M E N T

SHARPE-PHIRI, JA, delivered the Judgment of the Court

Legislation referred to:

1. *The High Court Rules, Chapter 27 of the Laws of Zambia*
2. *The Court of Appeal Act, No. 7 of 2016 of the Laws of Zambia*

Cases referred to:

1. *Minister of Home Affairs, the Attorney General vs Lee Habasonda (2007) Z.R. 207*
2. *Wilson Masauso Zulu v Avondale Housing Project Limited (1982) Z.R. 172*

Other works

1. *Treitel on the Law of Contract, Edwin Reel 13th Edition, 2011, page 828 paragraph 17-49*

2. *Halsbury's Laws of England, 5th Edition at paragraph 203 page 118*

1.0 INTRODUCTION

1.1 This is an appeal against the judgment of Lombe-Phiri J of the High Court delivered at Lusaka on 22nd July 2020.

1.2 By that judgment, the learned trial Judge found that the respondent had proved its claim that it had provided consultancy services to the appellant and that its invoices totaling the sum of US $18,000 and ZMK8,758.20 remain unpaid by the appellant. The Judge also awarded interest and costs on these amounts found to be due.

1.3 In relation to the appellant's counterclaim against the respondent, the Judge found that the appellant had not proved its assertion that the refusal by the International Financial Corporation to provide funds to the appellant was as a result of the respondent's failure to perform his part of the contract. The Judge further held that the appellant had failed to prove that the respondent underperformed in his provision of consultancy services.

2.0 BACKGROUND

2.1 The background of the matter is that the appellant and the respondent entered a contract on 29th June 2016 in which the respondent was to provide consultancy services to the

appellant at the consideration of US$1,500 per month, excluding Value Added Tax. Pursuant to this agreement, the consultancy services were to commence on 1st July 2016.

2.2 The respondent's contention in the Court below was that services were provided to the appellant as contracted and various invoices issued were to the appellant in respect thereof. However, the sum of US$18,000 and ZMW8,758.20 remained due and owing to the respondent from the appellant which prompted the action for the unpaid consultancy fees.

2.3 The appellant denied the respondent's claim, contending that the respondent had breached the consultancy contract by failing to provide quality and skilled services and by underperforming, thus disregarding the terms of the contract. The appellant further alleged that the respondent's actions resulted in losses occasioned to them.

2.4 The appellant contended that it had failed to meet the required condition for a loan due to the poor professional work of the respondent contrary to the provisions of the contract. The appellant had counterclaimed for a refund of the sum of US$100,000 as interest payment that was made on its liability owing to the poor performance of the respondent. The appellant also claimed a refund of US$1,500 that was paid to the respondent for unsatisfactory consultancy services.

2.5 The respondent denied the appellant's counter claim, insisting that the appellant owed him the amounts claimed. He added that he had on at least three occasions, traveled to Lusaka from Johannesburg using his own resources to provide consultancy services to the appellant.

3.0 **DECISION OF THE COURT BELOW**

3.1 As stated in paragraph 1.2 above, the trial Judge considered the matter and found in favour of the respondent on his claim for payments of amounts due from the appellant in respect of the consultancy services rendered to the appellant The court also awarded the refund of US$1,500 incurred in relation to an air ticket plus interest and costs.

3.2 The trial court also held that the appellant had failed to establish that the refusal by the International Finance Corporation (IFC) to fund it was because of the respondent's failure to perform his part of the contract. The Judge found that the evidence before it showed that the respondent was engaged by the appellant as a consultant and not a full-time employee and that the contract did not indicate the number of hours the respondent was required to work, nor did it require him spending all his time on the appellant's project site. The Judge therefore held, as stated in paragraph 1.3 above, that the appellant had not proved its claim against the respondent and dismissed the counterclaim.

4.0 **THE APPEAL**

4.1 Being dissatisfied with the judgment of the lower Court, the appellant filed a Notice of Appeal and Memorandum of Appeal on 9th September 2020 advancing three grounds of appeal.

4.2 The grounds of appeal were as follows:

i. **That the trial Court erred in law and in fact to hold that the Respondent performed his duties under the contract in light of the evidence on record by DW1 (Harrison Phiri).**

ii. **That the trial Court erred in law by delivering a judgment which lacked legal analysis of facts and the law of all the evidence on record before drawing a conclusion in form of a verdict.**

iii. **That the trial Court erred at both law and fact by not taking into account the evidence of DW1 (Harrison Phiri) as well as the basis of engagement of the Respondent.**

5.0 **APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL**

5.1 Due to the similarity of Grounds 1 and 3, the two grounds were argued together. The appellant contended that the trial Court erred in holding that the respondent had performed his duties under the contract and was therefore entitled to the sums claimed contrary to the evidence of DW1. It was submitted that the evidence of DW2 as contained at page 91 of the Record of Appeal clearly demonstrated the fact that the appellant was

not happy with the way the respondent had handled his duties under the consultancy contract.

5.2 The appellant referred to the learned authors of **Treitel on the Law of Contract, Edwin Reel 13th Edition, 2011-page 828 paragraph 17-49**[1] where they state as follows:

> ***'A breach of contract is committed when a party without lawful excuse fails or refuses to explain what is due from him under the contract or performs defectively or incapacitates himself from performing. A breach of contract may entitle the injured party to a claim of damages.'***

5.3 Based on the foregoing, the appellant argued that the trial Judge failed to consider the basis of engagement of the respondent which was revealed at page 48 of the Record of Appeal as follows:

> ***'Metalco Industries is seeking lender funding for further growth of its operations and to qualify for such funding, it is required to develop and implement its environmental and social management systems (ESMS) to IFC performance standard requirements... Metalco Industries took a decision to employ an EHS Manager on full time basis to run the project and supported by Hamilton Dovorogwa of Dovo Consulting who will be playing a role of project Consultant.'***

5.4 The appellant argued that its failure to meet the IFC requirement and secure funding was clear evidence of the fact that the respondent's performance was below par or defective.

5.5 In arguing ground 2, the appellant contended that the judgment of the lower Court lacked legal analysis of the law and facts of all the evidence on record before drawing a conclusion in form of a verdict.

5.6 It was submitted that the said judgment fell short of the standard format of a judgment as laid down in the celebrated case of **Minister of Home Affairs, the Attorney General vs Lee Habasonda.**[1]

5.7 In the Habasonda case, the Supreme Court held as follows:

> ***'We must, however stress for the benefit of the trial Courts that every judgment must reveal a review of evidence, where applicable a summary of the arguments and submissions, if made finding of fact, the reasoning of the Court on the facts and application of the law and authorities if any to the facts. Finally, a judgment must show a conclusion.'***

5.8 The appellant contended that contrary to the position of the law as established in the foregoing case, the judgment of the lower Court in this case only contains recital of the evidence but falls short of the holding in Habasonda in the following ways:

i. A review of the evidence on record.
ii. Does not give a summary of arguments and submissions on Record.
iii. There are no findings of facts.

iv. There is no reasoning or rationale of the decision based on the facts.

v. There is no application of law and authorities on the facts of the case on Record; and

vi. Finally, there is no conclusion of findings based on the entire evidence or record.

5.9 The appellant urged this Court to uphold the appeal and set aside the judgment of the lower Court with costs.

6. HEARING OF APPEAL

6.1 The appeal was heard on the 16th November 2022. The appellant was represented by Mr J. N. Hara of Messrs Muya & Company while there was no appearance from the respondent. The appellant relied on the Heads of Arguments filed before Court on 5th February 2021. The Court did not have sight of any arguments filed on behalf of the respondent.

7.0 DECISION OF THIS COURT

7.1 We have carefully considered the evidence on record; the judgment being impugned and the arguments on record.

7.2 We will address grounds one and three together as they are interrelated. The contention in the said grounds is that the trial Judge failed to consider the evidence of DW1, Harrison Phiri on record and therefore erroneously arrived at a wrong

conclusion that the respondent performed his duties under the contract. The further contention is that the Judge failed to take into consideration the basis upon which the respondent was engaged by the appellant.

7.3 The evidence of DW1 on record in relation to the contract between the parties was to the effect that the respondent was engaged to provide consultancy services to the appellant and to render advice on environmental social management systems, which was a requirement to obtain a loan from the International Financial Corporation.

7.4 That the respondent operated remotely from South Africa and only travelled to Zambia when the IFC were visiting the site. According to DW1, there was no progress on the project because of the poor performance of the respondent and the EMS requirement was not met. DW2 also indicated that the respondent had not performed. However, he conceded that there was nothing on record to show that they were dissatisfied with the respondent's work.

7.5 The respondent on the other hand testified that he had signed a contract with the appellant to provide consultancy services on 29th June 2016. The scope of the works was to provide technical advice on the project in the form of building interface between the appellant and IFC. That he had worked well and rendered invoices to the appellant, which were unsettled. That the appellant had never complained about his works but on

the contrary, as seen in the email correspondence, the appellant's project manager had commended the respondent for the progress he had made.

7.6 After hearing the evidence in the matter, the Judge found that the contract terms were clear that the respondent was to provide services via remote tele-conference meetings with the lenders and the appellant's management teams and that the onsite visits would only take place on critical lender's visits. The Judge further found that the evidence before her indicated that the appellant had at no time communicated to the respondent that he had underperformed.

7.7 In relation to the respondent's claim, the learned Judge in the lower Court considered the following questions for determination:

> ***'(1) Whether the Plaintiff is entitled to the payment of the sum of US$18,000 and ZMW8,758.20 from the Defendant; and***
>
> ***(2) Whether the Plaintiff rendered work and services under a contract dated 29th June 2016.'***

7.8 In addressing the said issues, the trial Judge referred to the learned authors of **Halsbury's Laws of England, 5th Edition at paragraph 203-page 118**[2] which states that:

> ***'To constitute a valid contract there must be an agreement between separate and existing parties. The parties must***

intend to create legal relations as a consequence of their agreement and the promise made by each party must be supported by consideration or by some other factor which the law considers sufficient.'

7.9 Bearing in mind the foregoing provisions, the trial Court determined, at page J9 of the judgment, that the parties intended to create legal relations by the said agreement which the trial Court further determined as an agreement that met the requirements of a valid contract.

7.10 The trial Court went further to make a finding of fact as it held at page J10 of its judgment as follows:

'The evidence of the email correspondence at page 15 and 27 of the Plaintiff's bundle of documents will show that the Plaintiff was providing the services as agreed. It is also clear from the contract terms that the Plaintiff was to provide his services via remote tele-conferences meetings with lenders and Metalco management teams. The onsite visits would only take place on critical Lender's visits.'

7.11 In arriving at the said conclusion, the trial Court, stated as a matter of principle of law, at the same page that:

'It is a settled legal principle that the general requirement to be met before there can be the right to terminate a contract for defective performance is that the breach in question amounts to a substantial failure to perform. This was the

decision in the case of Poussard v Spiers and Pond (1876) 1QBD 410.'

7.12 While addressing her mind to the appellant's counterclaim, the trial Court at page J11 further found as follows:

> ***'The Defendant has not established before this Court that the refusal by the IFC to fund it was as a result of the Plaintiff's failure to perform his part of the contract. A further perusal of the contract and evidence on the record shows the Plaintiff was employed as a Consultant by the Defendant not as a full-time employee. The Plaintiff has shown that he carried out the particular services. The Defendant has actually conceded.'***

7.13 In view of the aforesaid determinations and findings of fact, it is our considered view that the trial Judge placed reliance on the terms of the contract entered by the parties and the manner the respondent was to perform his part of the obligations.

7.14 It is evident that the trial Judge did consider all the evidence placed before her in drawing the conclusion that the respondent did perform his obligations as contained in the contract, a fact which the trial Court found that even the appellant had conceded. By the grounds of appeal, the appellant is requesting this Court to reverse findings of fact in relation to the respondent's performance of the contract. In the

case of **Wilson Masauso Zulu v Avondale Housing Project Limited**[2] the Supreme Court held that:

> ***'Before this court can reverse findings of fact made by a trial judge, we would have to be satisfied that the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which, on a proper review of the evidence, no trial court acting correctly could reasonably make.'***

7.15 The authority above illustrates that for an Appellate Court to reverse findings of fact, it would have to be satisfied that the said findings were perverse or made in the absence of relevant evidence or upon a misapprehension of the facts or that they were findings which no trial Court acting correctly ought to have reasonably made.

7.16 Having carefully reviewed the record, we are of the view that the trial Judge correctly interpreted the evidence and applicable law on the case before her in arriving at the conclusions she made. The said findings of the lower Court were neither perverse, nor made in the absence of any relevant evidence or upon a misapprehension of facts before the court. Given this, it would be improper for this Court to interfere with the findings of fact by the lower Court. Grounds 1 and 3 of appeal therefore fail accordingly.

7.17 The appellant contends in ground 2 of the appeal that the trial Court erred by delivering a judgment which lacked legal

analysis of the facts and the law on all the evidence on record before drawing a conclusion in form of a verdict. In augmenting this argument, the appellant relied on the Supreme Court case of **Minister of Home Affairs, the Attorney General vs Lee Habasonda**[1] in which that Court laid down some key parameters of a standard judgment.

7.18 As stated in part when addressing grounds 1 and 3 earlier, we note that the trial Court had objectively addressed her mind to the pleadings, the evidence of the parties and the law governing contracts. On consideration of the evidence, the trial Court found that the respondent had performed his part of the obligations as enshrined in the contract. This fact was also conceded in the appellant's evidence. The Judge also found that the appellant had not demonstrated that the respondent was responsible for its failure to get funding from the IFC.

7.19 The Judge therefore concluded that the respondent was entitled to the sums claimed with interest while the appellant's counterclaim had not been proved on a balance of probabilities. For the foregoing reasons, we find no merit in the appellant's argument in ground 2. The said ground also fails accordingly.

8.0 **CONCLUSION**

8.1 The grounds of appeal having been wholly unsuccessful; this appeal is dismissed with costs to the respondent.

The costs are to be taxed in default of agreement.

M.M. Kondolo, SC
COURT OF APPEAL JUDGE

D.L.Y. Sichinga, SC
COURT OF APPEAL JUDGE

N.A. Sharpe-Phiri
COURT OF APPEAL JUDGE