

IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT NDOLA
(Criminal Jurisdiction)

Appeal No. 197/2021

BETWEEN:

LIVINGSTONE CITY COUNCIL

APPELLANT

AND

TAONGA SAFARIS LIMITED

RESPONDENT



Coram: Makungu, Sichinga and Ngulube J.J.A
On the 16th day of June and 26th day of October, 2022

For the Appellants: No appearance

*For the Respondent: Mr. A. Chileshe with Miss F. Jere of Messrs Kasama
Chambers*

JUDGMENT

MAKUNGU, JA delivered the Judgment of the Court.

Cases referred to:

1. *Chishimba Kambwili v. Attorney General* 2019/CCZ/009
2. *Barclays Bank v. ERZ Holdings Limited & Others* – SCZ Appeal No.71/2007
3. *Zulu v. Avondale Housing Project Limited* (1982) Z.R 172
4. *Compensation Fund Control Board v. Kangombe & Company* – SCZ Appeal No.113 of 2001
5. *Frank Malichupa & Others v. Tanzania-Zambia Railways Authority* (2008) Z.R 112
6. *Communications Authority v. Vodacom Zambia Limited* – SCZ Judgment (2009) Z.R 196
7. *Nkongolo Farms Limited v. Zambia National Commercial Bank Limited* (2007) Z.R 149
8. *Kajimanga v. Chilemya* – SCZ Appeal No. 50 of 2014
9. *Zambia Bata Shoe Company Limited v. Vin-Mas Limited* (1994) Z.R 136
10. *National Airports Corporation Limited v. Reggie Ephraim Zimba and Another* – SCJ No.34 of 2000

11. *Rating Valuation Consortium D.W. Zyambo & Associates (suing as a Firm) v. Lusaka City Council Zambia, Zambia National Tender Board (2004) Z.R 109*

Legislation referred to:

1. The Local Government Act, Chapter 281 of the Laws of Zambia
2. The Local Government Act, No. 2 of 2019 of the Laws of Zambia
3. Rules of the Supreme Court of 1965 (White Book) 1999 Edition
4. Court of Appeal Rules, Statutory Instrument No. 65 of 2016
5. The High Court Act, Chapter 27 of the Laws of Zambia

Other works referred to:

1. *Zambia Civil Procedure, Commentary and Cases Vol. 1, Patrick Matibini, 2017 Lexisnexis*

1.0 INTRODUCTION

- 1.1 This is an appeal against the judgment of Judge C. Zulu, of the High Court dated 26th March, 2021 in which it was held that the respondent as a sitting tenant of a portion of plot No.316 (s) Sichango Road, Livingstone 0.3045 hectares in extent, is entitled to purchase the same based on the market price obtaining at the time the valuation report was done.

2.0 BACKGROUND

- 2.1 The respondent who was the plaintiff in the court below commenced an action by way of writ of summons and statement of claim claiming the following reliefs:

- i. A declaration that the refusal by the defendant council to sell plot No. 316 (s); in extent 0.3045 Hectares, Sichango Road, Livingstone was unfair, injudicious, unreasonable or irrational.*
- ii. A declaration that the plaintiff as sitting tenant of plot No.316(s) Sichango Road, Livingstone is entitled to purchase the said plot from the defendant.*
- iii. Damages for inconvenience suffered.*
- iv. Costs.*

2.2 The defendant denied all the said claims as it claimed mainly that the respondent was not offered the plot to purchase.

3.0 EVIDENCE ON RECORD

3.1 In brief, the facts of the matter are as follows:

Between 1993 and 1995, the respondent a local tourist operator in Livingstone, through its Managing Director and proprietor Andrew Simpson (PW1) applied to the appellant council for a lease of a piece of land at the Zambezi River water frontage for the purpose of undertaking its tourism business. Sometime in 1995 the appellant was allocated plot 316(s) Sichango Road,

Livingstone, situated along the Zambezi River which used to be a dumping site; it was surveyed. Although there was no formal lease agreement, the respondent developed the area and started paying ground rent to the appellant.

3.2 By letter dated 19th June, 1998 the respondent applied to the appellant to purchase the plot. The Town Clerk replied stating that the application was receiving the necessary attention. After a number of follow-ups, the application was forwarded to the appellant's Finance and Staff Establishment Committee.

3.3 The Finance and Staff Establishment Committee enjoyed delegated authority and as such its resolutions were deemed to be passed by the council. According to PW3, the committee's mandate was to look into matters involving the council with a view to settle the same outside court as it had been observed that the council was flooded with legal matters and it was costly to litigate.

3.4 On 23rd November, 2000 the appellant's Finance and Staff Establishment Committee held a meeting where it resolved under resolution LCC/101/2000 to recommend for approval the respondent's purchase of Plot No. 88(s) Sichango Road,

Livingstone and that the Director of Finance and City Planning proceeds to obtain a valuation of the property for that purpose.

3.5 PW1 explained that, although the exhibited documents show that he applied to purchase part of plot No. 88(s) from the council, for all intents and purposes, his application was for plot 316(s) where the business of the respondent company is conducted. That the appellant had erroneously referred to plot 316(s) as 88(s). That Plot 88(s) in terms of numbering was part of a different plot belonging to the boating club.

3.6 The appellant at its 23rd Ordinary Council Meeting (full council meeting) held on 30th November, 2000, discovered that the committee had erroneously approved the purchase of plot No. 88(s) Sichango Road, instead of plot No. 316(s) Sichango Road, Livingstone where the respondent was located. Due to the said error in plot numbering, the matter was "withdrawn." According to PW2 and PW4 the withdrawal did not mean that the application was rejected. The Town Clerk, Mr. Chibonta was instructed to correct the error, which he did via a letter dated 10th April, 2001.

3.7 By letter dated 3rd July, 2003, the Town Clerk requested the Regional Valuation Officer to do a valuation of plot No.316(s) Sichango Road. The plaintiff paid K1,200,000.00 (unrebased) for the valuation as the appellant lacked funds to immediately spend on the valuation. A valuation report was rendered.

3.8 On 1st November, 2003, the respondent wrote to the Town Clerk requesting for a formal letter of offer to purchase the plot. In its reply dated 11th December, 2003, the appellant stated that the plot was not available for sale. This shocked the respondent because the parties had exchanged several correspondences regarding the sale.

3.9 According to the respondent, the action by the council was unfair and not done in good faith because the appellant was entertaining other applications for the same plot.

3.10 Through its Consultant LMA Business Solutions, the respondent appealed to the Minister of Lands, Hon. Judith M Kapijimpanga who forwarded the appeal to her counterpart at the Ministry of Local Government and Housing.

3.11 The response from the Ministry of Local Government and Housing to the Town Clerk for the appellant came through a

letter dated 8 July, 2004 authored by the Principal Housing Development Officer, Mr. M. Wina, on behalf of the Minister, advising the appellant to restore plot 316(s) Sichango Raod, Livingstone to the respondent without fail in line with council resolution No. LCC/101/2000. It was the failure by the appellant to yield to the above instructions that led to these proceedings.

4.0 DEFENCE

4.1 The appellant denied ever offering the respondent the subject property to purchase. The appellant's evidence was that it operated through various committees that made resolutions in form of "recommendations" subject to approval by the full council. One such committee was the Finance and Staff Establishment Committee which was not the final body for approval of sale of the appellant's land as it only made recommendations to the full council meeting or ordinary council meeting.

4.2 It averred that plot 316(s) Sichango Road, Livingstone which was occupied by the respondent belonged to the appellant and it was on title. According to DW3 there was neither a resolution

of the council to sell the property to the respondent nor an agreement between the parties for the sale of the property.

4.3 Hence, the Town Clerk DW1 wrote the letter dated 11th November, 2003 advising the respondent that the council had no intention of selling the subject property even though the said letter was not backed by the full council resolution.

4.4 In reference to a letter dated 8th July, 2004 authored by Mr. Wina with regard to restoration of the offer of the piece of land in question to the respondent, DW1 denied ever receiving such a letter from the Minister, Hon. Masebo and stated that the Minister informed him that she was not aware of any letter that had been issued from her office in that regard and that she was going to take action against the officer who wrote the letter. However, he averred that no action was taken against the officer, Mr. Wina, because the Minister was transferred to the Ministry of Health.

4.5 In reference to the letter dated 3rd July, 2003, written by the Town Clerk to the Regional Valuation Officer, requesting for valuation of the subject plot, DW1 stated that the latter was not signed by him and it was not brought to his attention at that

time. That the final authority for sale of council property was the Minister of Local Government and Housing. DW1 admitted that the valuation was done for the council at the expense of the respondent.

4.6 As regards the withdrawal of the matter at the full council meeting held on 30th November, 2000, DW1 explained that the matter was withdrawn from the full council meeting which connotes that it was not debated on. According to DW3 the respondent never applied to purchase plot No. 316(s).

5.0 DECISION OF THE LOWER COURT

5.1 After considering the evidence before him, the learned trial judge found as follows:

That between 1993 and 1995 the plaintiff through its Managing Director, Mr. Simpson, applied to the council for a lease of a piece of land along the Zambezi River for the purpose of undertaking tourism business. The application was accepted by the council and the plaintiff occupied plot No. 316(s) Sichango Road Livingstone and started paying ground rent.

5.2 The trial judge further found that the plaintiff made developments to the said piece of land which was previously used as a dumping site. That the council in its capacity as landlord was expected to draw up the lease agreement but did not. Nevertheless, there was a valid and enforceable verbal agreement and by conduct of the parties the lease of the land was still subsisting.

5.3 The trial Judge noted that the valuation report compiled by the Government Valuation Department dated 21st July, 2003 shows that stand No. 316(s) Sichango Road is in extent 0.3045 hectares. He also took note that Plot No. 316(s) Sichango Road was mistakenly referred to as plot No. 88(s) in some of the documents. He held that the reference to plot No.88(s) was for all intents and purposes a reference to Plot No. 316(s) Sichango Road, Livingstone as that is the piece of land occupied by the plaintiff.

5.4 The trial judge further found that the plaintiff's application to purchase the said piece of land was forwarded to the Finance and Staff Establishment Committee for consideration. That the said committee had delegated authority by virtue of **section**

35(1) and (4) of the Local Government Act.¹ The Committee at its meeting held on 23rd November, 2000 resolved under resolution LCC/101/2000 that the application by the plaintiff to purchase the portion of land leased to it be approved. The Director of Finance and Director of City Planning were later instructed to proceed to obtain the value of the said portion of land. The Judge determined that the approval by the committee of the sale of that land was tantamount to acceptance of the offer to purchase the property. That the resolution to allow the plaintiff to purchase the property was never revoked and it was acted upon by both parties.

5.5 The lower court further found that when the matter was taken to the full council meeting held on 30th November, 2000 the plaintiff's application was withdrawn and not rejected. That the council called for a valuation report and allowed the plaintiff to bear the costs. That the Minister of Local Government and Housing equally acted on the same resolution LCC/101/2000. Therefore, the plaintiff had a legitimate expectation to be the purchaser of the said land.

- 5.6 The trial judge regarded the letter by the Town Clerk purporting to cancel the sale as of no legal effect because there was no resolution by the council to revoke the intention to sell the property to the plaintiff.
- 5.7 The lower court went on to dismiss the argument by the council that there was no authority to sell from the Minister of Local Government and Housing due to the letter authored by Mr. Wina on behalf of the Minister. The trial Judge took the view that if Mr. Wina had no authority to write the letter on behalf of the Minister, then the letter would have been disowned by the Minister but the same was never revoked and no disciplinary action was taken against Mr. Wina.
- 5.8 The trial court further found that the plaintiff's reliance on the defence filed by the council in cause number 2017/HL/55 between the same parties and relating to the same property to prove that the defendant had admitted to having offered the property to the plaintiff was proper.
- 5.9 The lower court accordingly held that the council should be estopped from denying the formation of an agreement to sell a portion of plot No.316(s) Sichango Road to the plaintiff by taking

advantage of its own lethargy and elusiveness in the manner it dealt with the plaintiff.

5.10 That it was against good conscience for the council to reap from the plaintiff's investment and development of the property amassed over half a jubilee after approval of its application to purchase the property.

5.11 The lower court further found that the principle that, there is no law which forces an unwilling person to sell his property did not apply to this case, as the council was a willing vendor who had approved the sale under resolution LCC/101/2000 which is valid to date.

5.12 The lower court accordingly made a declaration that, the plaintiff as sitting tenant of a portion of plot No.316(s) Sichango Road, Livingstone is entitled to purchase a subdivision of the said plot in extent 0.3045 hectares based on the market price obtaining at the time the valuation report was done. Costs were awarded to the plaintiff.

6.0 GROUNDS OF APPEAL

6.1 The appellant has advanced seven grounds of appeal as follows:

1. *That the court below erred in law when it referred to and relied on evidence under cause No. 2017/HL/55 an active case between the respondent and appellant, which is sub judice to negate the appellant's claims.*
2. *The court below erred in law and fact when it held that the resolution by the appellant held on the 23rd November, 2000 under resolution LCC/101/2000 by its Finance and Staff Establishment Committee was deemed to have been its approval to sale plot 316s Sichango Road, Livingstone to the respondent contrary to evidence on record indicating that it was only a recommendation to be approved by the appellant's full council meeting.*
3. *The court below erred in law and fact when it held that the appellant's Financial and Staff Establishment Committee resolution to allow the respondent to purchase plot No. 316(s) Sichango Road, Livingstone remained valid and unaltered contrary to evidence on record indicating that the resolution was rescinded by the appellant during its subsequent ordinary full council meeting held on the 30th November, 2000.*

4. *The court below erred in law and fact when it held that the appellant sanctioned the valuation of plot No. 316s Sichango Road by the respondent contrary to the appellant's evidence on record indicating that the appellant had not authorized the valuation.*
5. *That the court below erred in law and fact when it held that the appellant's Minister of Local Government and Housing approved the sale of plot No. 316s Sichango Road Livingstone through a letter to the respondent contrary to the provisions of the local Government Act, Chapter 281 of the Laws of Zambia.*
6. *That the court below erred in law and fact when it held that the principle of unwilling vendor was not applicable contrary to the appellant's evidence on record indicating that the application to purchase plot No. 316(s) Sichango Road Livingstone by the respondent was rescinded.*
7. *The court below erred in law and fact when it held that the respondent as a sitting tenant of a portion of plot No. 316(s) Sichango Road, Livingstone was entitled to purchase it based on the market value undertaken*

eighteen (18) years ago contrary to Circular No. 2 of 1996, The Revised Procedure for sale of Council Houses which was not applicable to the respondent and the principle of selling property at current market value respectively.

7.0 APPELLANT'S HEADS OF ARGUMENT

7.1 At the hearing of the appeal, counsel for the appellant relied on the Heads of Argument filed on 27th August, 2021. In support of ground one, it was submitted that the court below delved into the issues and evidence in cause No. 2017/HL/55 which is an active case between the parties on whether or not the appellant accepted the counter offer in the purported agreement to sell plot 316(s) Sichango Road, Livingstone, the subject of this appeal. Counsel contended that the lower court went on to decide on evidence that was before another High Court Judge and therefore sub judice. We were referred to the case of **Chishimba Kambwili v. Attorney General**¹ where the term sub judice was defined as:

“A rule limiting comment and disclosure relating to judicial proceedings in order not to prejudice the issue or influence the jury.”

- 7.2 Counsel contended that the court below strayed and encroached into the adjudicative duty of another court of equal jurisdiction.
- 7.3 On ground 2, it was submitted that the trial judge disregarded the cogent evidence adduced by DW3 the serving Town Clerk at the time that the council operated through various committees via resolutions in form of recommendations subject to final approval by the full council.
- 7.4 That in the absence of a resolution by the full council, the council had no intention of selling the property. Counsel explained that an approval by council means full council or a resolution of all the councilors at a meeting of the council. That the council being a body corporate operates through resolutions of meetings of the decision making body being the full council and not mere committees such as the Finance and Staff Establishment Committee which exclusively deals with finance and staff welfare.

7.5 Grounds 3 and 4 were argued together thus: the court below disregarded the cogent evidence adduced by both DW1 and DW2 that the resolutions of the Finance and Staff Establishment are not final as they are forwarded to the full council meeting for approval. That as shown by the testimonies of DW1 and DW2, the court below breached the fundamental principle of pleadings which states that a court should confine its decision to the evidence raised in the pleadings. Reference was made to the case of **Barclays Bank v. ERZ Holdings Ltd and Others**² where it was stated that:

“No relief can be granted by any court if such relief has not been pleaded.”

7.7 In the light of the foregoing, it was submitted that the trial judge misdirected himself by adjudicating upon matters which were not pleaded at J31 that:

“The resolution to allow the plaintiff to purchase the property remained valid and unaltered and the reality is that the resolution was acted upon by both parties.”

7.8 We were urged to reverse this finding in line with the authority of **Zulu v. Avondale Housing Project Limited**³ as it was not even supported by evidence.

7.9 On the fifth ground; we were urged to quash the holding of the court below at J34 to the effect that “....*the approval from the minister would have been sought first before approving the plaintiffs application.*” It was argued that the letter authored by Mr. Wina does not in any way signify approval of the sale of plot no.316(s) Sichango Road.

7.10 Counsel submitted that the trial judge disregarded the cogent evidence of DW1 and DW3 that the final approval for sale of all the appellant’s properties lay with the Minister of Local Government and Housing. **Section 67 (1)** of the former **Local Government Act No. 2 of 2019**² provided as follows:

“Subject to the provisions of this section, a council may sell, let or otherwise dispose of any property of the council.”

7.11 Counsel submitted that this entails that the appellant has the discretion whether or not to sell its property and in this case,

there was evidence from the appellant to the effect that it did not intend to dispose of the property in issue.

7.12 Counsel further submitted that section 67 (2) of the Local Government Act made it mandatory for any disposal of the appellant's property to be finally approved by the Minister of Local Government and Housing. That the above mentioned provisions have been retained under section 23 (1) and (3) of the current Local Government Act No. 2 of 2019.

7.13 It was submitted that the appellant's evidence on the procedure of selling its properties was consistent and that the final authority to approve the sells is the Minister of Local Government and Housing and this evidence was neither disputed by the respondent nor did the respondent produce evidence to show that it had the final approval from the minister to purchase plot no. 316(s) Sichango Road from the appellant.

7.14 Counsel contended that any purported sale without the approval by the Minister responsible for local government is a nullity.

7.15 On ground 6 counsel referred to the case of **Compensation Fund Contraol Board v. Kangombe and Company**⁴ that there is no law which forces an unwilling person to sell his property.

7.16 Counsel submitted that evidence on record shows that although the Finance and Establishment Committee approved the purchase of plot No. 316(s) Sichango Road, Livingstone to the respondent, the approval amounted to a recommendation as the matter was referred to the full council for final approval. It is clear that at the full council meeting the matter of the sale of the said property was withdrawn which meant that it was not for sale.

7.17 In support of ground 7, it was submitted that the respondent was not a sitting tenant of plot No. 316(s) Sichango Road in terms of Circular No. 2 of 1996, The Revised Procedure for sale of council houses which it relied on in the court below, but a tenant conducting business from the appellant's premises. Therefore, Circular No. 2 of 1996 was not applicable to it. Even assuming that the respondent was a sitting tenant in terms of the foregoing circular, it could not be entitled to purchase the property as it did not meet the principles laid down by the Supreme Court in the case of **Frank Malichupa & Others v. Tanzania- Zambia Railways Authority**.⁵

7.18 Counsel contended that the trial judge erred in law and fact to grant a declaratory order. In support of this submission he cited the case of **Communications Authority v. Vodacom Zambia Limited**⁶ where the Supreme Court stated *inter-alia* that:

“A declaration is a discretionary remedy. A party is not entitled to it as of right. Of course the discretion must be judiciously exercised. The Court:-

(a) Will not pass a declaration judgment casually, lightly or easily. The remedy should be granted for good cause, on proper principles and considerations. It must be made sparingly; with care and utmost caution. It is a remedy which courts discourage, except in very clear cases.

(b) Will not grant a declaration when no useful purpose can be served or when an obvious alternative and adequate remedy, such as damages is available.

(c) Will not grant a declaration unless all the parties affected by and interested in it are before the court.”

7.19 In light of the above authority, it was submitted that the trial judge erred when he declared that the respondent is entitled to purchase plot No. 316(s) Sichango Road, Livingstone based on the market price obtained at the time the valuation was done eighteen years ago.

7.20 Finally, counsel urged us to uphold the appeal and quash the decision of the lower court, with costs to the appellant.

8.0 RESPONDENT'S HEADS OF ARGUMENT

8.1 The respondent relied on the Heads of Argument dated 19th October, 2021. To counter ground one, counsel submitted that the evidence alluded to under cause No. 2017/HL/55 is contained in paragraph 7 of the respondent's defence appearing at pages 370 to 372 of the record of appeal. The evidence is an admission by the appellant that there was an offer to the respondent to purchase the property in question.

8.2 In any case, the appellant did not dispute that pleading or object to the respondent's use of this particular evidence. Counsel contended that the trial court was therefore on firm ground when it relied on the aforesaid evidence.

8.3 Counsel relied on **order 38 rule 10 (1) of the White Book**³ in support of the submission that courts are not precluded from admitting in evidence any document including a pleading, which is from another court. Counsel also made reference to a passage from **Zambia Civil Procedure: Commentary and cases**¹ at page 606 that:

“The court has power to receive any document at a later stage if the genuineness of a document is beyond doubt and it is relevant to decide the real issue in controversy. Thus, no documents (whether public or private) should be excluded if they are necessary for the just decision of a case.”

8.4 Counsel for the respondent further cited the case of **Nkongolo Farms Limited v. Zambia National Commercial Bank Limited**⁷ and submitted that when evidence is adduced before a trial court, which evidence was not objected to, the trial court has an obligation to consider and weigh that evidence so far as it is relevant in determining the issues raised.

8.5 He went on to submit that, since the appellant did not object to the evidence at discovery or at trial, it cannot object to it at this

stage of the proceedings. To support this position, reliance was placed on the case of **Kajimanga v. Chilema**⁸ where the Supreme Court guided as follows:

“An objection to a document must be made timely to allow the opposing party to respond and if possible, to make any relevant application. The objection cannot be validly made after the trial of the matter has closed. In the absence of an objection the court is not precluded from taking into account documents contained in a bundle.”

- 8.6 Counsel submitted that the trial court’s reliance on the evidence under cause No. 2017/HL/55 was correct at law.
- 8.7 In arguing ground 2, counsel submitted that the appellant seemed to disregard section 35 (1) of the Local Government Act which was applicable at that material time, which provided that a committee with delegated functions can discharge the functions of the council on behalf of the council. The appellant has instead opted to rely on a wrong practice that has been perpetrated over the years that, a committee with delegated

functions cannot discharge a function on behalf of the council unless the latter approves such a decision.

8.8 Counsel contended that after the committee approved the purchase of property, there was no need for another approval by the full council. That the appellant failed to address itself to the provisions of the law on functions and powers of a standing committee. That section 35 (4) of the Local Government Act stipulates that when a committee with delegated functions discharges a function, that function is deemed to have been discharged by the council and the matter is submitted to the full council for information only pursuant to section 36 of the Act.

8.9 Counsel went on to state that the appellant did not dispute the fact that approval of the sale of the appellant's property was one of the delegated functions of the said committee. He submitted that all the appellants' witnesses confirmed that the Finance and Staff Establishment Committee was a standing committee with delegated functions of the council. Thus, the evidence by the appellant's witnesses to the effect that the Finance and Staff Establishment Committee had no final authority to decide on

the sale of the property without approval of the council is at variance with the law. That DW1 and DW3 admitted in their evidence that there was no council resolution to the effect that the appellant had rejected the respondent's application to purchase the property in issue neither was there a resolution to the effect that the appellant was not selling.

8.10 To counter ground 3, it was submitted that in the absence of a resolution by the appellant nullifying the approval given by the Finance and Staff Establishment Committee and in the absence of a resolution not to sell the property in issue, the court below cannot be faulted for concluding that the approval to sell the property to the respondent is still valid. DW1 conceded that even though he wrote a letter indicating that the appellant had no intention to sell the property, there was no such resolution by the council and it was his own decision.

8.11 Counsel further submitted that although the minutes of the council meeting dated 30th November, 2000 show that the matter was withdrawn, the court was on firm ground when it held that at the meeting held on 30th November, 2000, the council did not reject the approval made by the Finance and

Staff Establishment Committee. This is in tandem with the testimony of PW3 that the matter was withdrawn because there was an error in numbering of the property and that there was litigation concerning the subject property cited as stand No.88 Sichango Road, Livingstone.

8.12 In opposing ground 4, it was submitted that the court below cannot be faulted for allowing itself not to be misled by the appellant's witnesses concerning the valuation of the property. In the eyes of the public, any communication from an officer of the appellant is deemed to be with the blessing of the appellant. That there is no evidence on record to show that the authors of the letters in question such as Mr. Wina were disciplined for writing such letters. Neither is there proof that the appellant wrote to the respondent withdrawing the letters or cancelling the valuation of the property.

8.13 Section 6 of the Local Government Act, bestowed the council with a status of a body corporate and thus the respondent cannot be faulted for any lapses in the council's administration of its affairs. Reliance was placed on the case of **Zambia Bata Shoe Company Limited v. Vin-Mas Limited**⁹ where it was held

that a company's authorized agents can bind a company with the contract and such liability cannot be avoided.

8.14 Counsel contended that the appellant had the property valued for purposes of selling it to the respondent. This was done pursuant to **section 67(1) of the Act**, which stated *inter-alia* that:

“Provided that were the council intends to sell a council asset, the council shall before conducting the sale, cause a valuation of the asset to be carried out by the department of the Government responsible for property valuations or by a valuer approved by the Minister.”

8.15 Counsel contended that it is clear from the appellant's conduct that the intention to sell the property was there and section 67 (1) was complied with even though it was the respondent who paid for the valuation procedure. Counsel cited the case of **National Airports Corporation Limited v. Reggie Ephraimimba and Another**¹⁰ that:

“An outsider dealing with a company cannot be concerned with any alleged want of authority

when dealing with a representative of appropriate authority or standing for the class or type of transaction.”

8.16 Counsel for the respondent further submitted that section 63 (3) of the Local Government, Act also bound the council in matters of contract whether or not standing orders were complied with. That the appellant cannot run away from liability for acts done by its employees.

8.17 In arguing ground 5, counsel submitted that section 119 (1) of the Local Government Act, the law applicable at that time gave guidance on how the approval should be done that; the approval could be done generally. It was submitted that ‘generally’ meant that even a directive by the Minister through a ministry official would suffice, as was in this case. Section 119 (2) (b) provided guidelines on how the Minister’s approval should be signified.

“(2) Any approval, confirmation or determination of the minister for the purposes of this Act shall be signified.

(b) By notice in writing addressed to the principal officer of the council concerned.”

8.18 It was submitted that in compliance with section 119(2) (b) of the Act, the Minister's approval was contained in the letter authored by an official from the Ministry of Local Government and Housing to the principal officer of the appellant council. That there is no cogent evidence on record that this letter was queried by the Minister of Local Government and Housing or the appellant. DW1 who was the Town Clerk then admitted that he never brought the said letter to the attention of the council. He went on to submit that section 119 (2) (b) provided guidelines on how an approval from the Minister should be withdrawn and it was not complied with, therefore ground 5 has no merit. .

8.19 In arguing ground 6, counsel submitted that the court below was on firm ground when it held that the principle of willing seller was not applicable. This is supported by the evidence on record that the appellant through the Finance and Staff Establishment Committee approved the sale of stand No.316s Sichango Road, Livingstone to the respondent.

8.20 Counsel argued that it was not correct to assert that the approval was withdrawn. What was withdrawn at the meeting of 30th November, 2000 was the discussion of the matter

relating to stand No. 88 Sichango Road because there was litigation involving that property.

8.21 Counsel contended that by giving the approval and proceeding to have the property in issue valued, the appellant showed its intention to sell the property and should not have purported to change its position suddenly as equity considers that which ought to be done as done.

8.22 The thrust of the argument on ground 7 was that circular No.2 of 1996 was issued after the respondent was offered the property. That the circular could not operate retrospectively and it could not supplant the provisions of the Act which mandated the appellant to sell any of its property.

8.23 Counsel submitted that the evidence on record shows that the respondent was a tenant of the appellant and that is why the appellant accepted its application to purchase the property. The purchase price was determined in the valuation report by the Government Valuation Department.

8.24 Counsel further submitted that where there is a breach of contract, as a way of relief, the law will put the injured party in the position he would have been in had the contract been performed.

breached. The lower court was on firm ground when it ordered that the property in issue be purchased at the price indicated in the valuation report.

8.25 It was submitted further that the arguments by the appellant relating to declaratory orders in ground 7 are misconceived as there is nothing in ground 7 which suggests that the court below made a declaratory order. That submissions should be relevant to the grounds of appeal and counsel should not sneak in issues which are outside the grounds of appeal contrary to **Order X rule (3) and (4) of the Court of Appeal Rules, 2016.**⁴

8.26 Counsel argued that even assuming that the court below made a such declaratory order, the same was judiciously made as the judge had the requisite jurisdiction to so. We were urged to dismiss the appeal with costs.

9.0 OUR DECISION

9.1 We have carefully considered the record of appeal and the arguments by both counsel.

9.2 The issue raised in the first ground of appeal is whether the lower court breached the 'sub judice' rule when it made

reference to the pleadings in cause No. 2017/HL/55 an active case before another High Court Judge.

9.3 Counsel for the respondent has argued that, the reference to the “appellant’s defence under cause 2017/HL/55” was merely to show that there was an admission by the appellant to offer to the respondent the property in issue to purchase. He contended that since the appellant did not object to the production and use of the evidence when it was adduced before the trial court, it cannot raise the issue now.

9.4 To ably determine the question raised, it is imperative to have a clear understanding of the term ‘sub judice.’ The constitutional court in the case of **Chisimba Kambwili v. Attorney General**¹ defined the ‘sub judice’ rule as follows:

“A rule limiting comment and disclosure relating to judicial proceedings, in order not to prejudge the issue or influence the jury.”

9.5 In order to determine whether the trial judge’s comments were caught up in the sub judice rule, we need to consider the statement made at page J30:

"I see nothing irregular for the plaintiff to rely on the same to prove or disapprove a set of facts herein". And as rightly noted by Mr. Chileshe, the council in its defence in paragraph 7, to some degree acknowledged the formation of an agreement by stating that: **"the plaintiff disputed the purported price of the Finance and General purpose committee of the council which resulted in a counter offer nullifying the original offer."** However, the council through its witnesses, DW1 and DW3 stated otherwise, and completely denied any form of intention to sell the land to the plaintiff. Notably, no evidence was adduced that the council made a counter-offer, which was rejected by the plaintiff. **The statement in that defence materially negates the defendant's claims in this regard."**

9.6 It is trite that trial courts should desist from commenting on any active matter before other courts in a manner that is prejudicial to any of the parties thereto. We agree with counsel for the appellant that the lower court strayed when it commented on the said pleadings in the manner that it did as that case was on - going and its comments are likely to influence

the outcome of that case. We therefore set aside the findings relating to cause number 2017/HL/55 stated above.

9.7 We shall deal with grounds 2 to 6 together as they are connected. The main issue under these grounds of appeal is whether the Finance and Staff Establishment Committee's resolution LCC/101/2000 to recommend the respondent to purchase the property could be deemed to be the full council's approval of the sale and whether it remains valid and unaltered.

9.8 It has been argued by the appellant's counsel that the final authority to authorize a sale of the property was vested in the full council and not the Finance and Staff Establishment Committee. On the contrary, counsel for the respondent contends that, the assertion by the appellant that a committee with delegated functions cannot discharge a function on behalf of the council unless the latter approves such decision is not supported by law.

9.9 The application by the respondent was considered by the Finance and Staff Establishment Committee which had delegated authority to consider the sale of the appellant's property. The committee derived its authority from section

35(1) of the Local Government Act (the law applicable at that time, herein after referred to as the Act).

9.10 Section 35(4) of the Local Government Act provided that when a committee with delegated functions discharges a function, that function is deemed to have been discharged by the council and the matter is submitted to the full council for information only, pursuant to **section 36 of the Act**.

9.11 On 23rd November, 2000 the Finance and Staff Establishment Committee held a meeting and resolved under resolution LCC/101/2000, that the application by the respondent to purchase plot No.88 be approved. There is no appeal against the lower court's finding that reference to plot 88(s) Sichango Road instead of plot No. 136(s) was erroneous because the respondent occupies plot 316(s) which has even developed and not plot 88(s). The committee further directed that both the Director of Finance and Director of City Planning proceed to have the land valued. The property was then evaluated by a government valuer and the respondent had to pay for the valuation to speed up the process.

9.12 Under the circumstances, we cannot fault the lower court for its holding that the approval by the Finance and Staff Establishment Committee should be deemed to be an acceptance by the appellant, of the respondent's application to buy the said property as the committee delegated function was discharged. Section 36 of the Act clearly provides that submission of the matter to the full council thereafter, was just for its information.

9.13 As regards whether the committee's resolution LCC/101/2000 remained valid and unaltered, we take note that there is no evidence on record to show that the resolution was rescinded by the full council at its meeting held on 30th November, 2000. The record shows that when the matter was taken before the full council it was simply withdrawn. The Town Clerk Mr. Chibbonta was instructed to correct the mistake, which he did via letter dated 10th April, 2001. The other reason it was withdrawn was because of the litigation pertaining to the same property plot 88s. There was no express rejection of the committee's resolution by the full council. Consequently, we cannot fault the trial judge for finding that the resolution remained valid and unaltered.

9.14 On the issue of the valuation of the property, the record shows that following resolution LCC/101/2000 by the Finance and Staff Establishment Committee, the council requested the Regional valuation Officer to conduct a valuation of the land. By letter dated 11th July, 2003 from the Government valuation Department to the respondent, the Regional Valuation Officer acknowledged receipt of the sum of K1,200,000.00 being valuation fee for stand No. 316(s) Sichango Road, Livingstone.

9.15 We uphold the trial court's finding that the respondent was not bound to enquire as to whether or not the officer requesting the valuation report on behalf of the council was clothed with authority to do so. There is a plethora of cases in this jurisdiction to the effect that an outsider dealing with a company cannot be concerned with any alleged want of authority when dealing with a representative of appropriate authority or standing for the class or type of transaction. See the case of **National Airports Corporation Limited v. Reggie Ephraim Zimba and Another**.¹⁰ Further the council being a body corporate acts through its authorized agents whose acts can bind the council. We are fortified by the case of **Zambia Bata Shoe Company Limited v. Vin-Mas Limited**⁹ where the

Supreme Court held that a company's authorized agents can bind a company with the contract and such liability cannot be avoided.

9.16 Further as argued by counsel for the respondent, under section 67 (1) the council was required to cause a valuation of the asset to be carried out by the department of the government responsible for the property before conducting a sale.

9.17 The appellant's intention to sell the property to the respondent can be deduced from the conduct of the parties. Our view is that if there was no such intention, the appellant would not have directed that the property be valued. Payment of the valuation fee by the respondent was not at all detrimental to the appellant under the circumstances.

9.18 Following the valuation of the property, the respondent was waiting for the appellant to complete the transaction. The Town Clerk in a letter dated 11th December, 2003 to the respondent stated *inter-alia* that the valuation was not done properly as the officer who wrote the letter to the Valuation Department had no authority to do so and that the council did not wish to sell the property.

9.19 This prompted the respondent to lodge an appeal to the Minister of lands which appeal was directed to the Minister of Local Government and Housing. The reply dated 8th July came, 2004 came through the Principal Housing Development Officer, Mr. Wina, who was authorized by the Minister to reply to the respondent's appeal. In the said letter, Mr. Wina advised the Town Clerk to restore plot No. 316(s) Sichango Road to the respondent without fail as resolved by the council under resolution LCC/101/2000.

9.20 Since the final authority for approval of sale of all the appellants properties lay with the Minister of Local Government and Housing, it was imperative for the Minister to sanction the sale.

9.21 On the form of approval, section 119 (1) of the Act, stipulated that the approval could be done generally. Section 119 (2) of the Act stated inter-alia that the Minister's approval should be signified by notice in writing addressed to the principal officer of the council concerned. We accept, the submission by counsel for the respondent that even a directive by the minister through a ministry official would suffice and in this case, such approval was signified by the letter written by Mr. Wina on behalf of the

minister. According to evidence on record, this letter was not revoked by the minister neither was the said Mr. Wina sanctioned for writing it. Therefore, the letter from the Town Clerk, purporting to cancel the sale was null and void as it had no backing from the full council and was superseded by the letter from Mr. Wina. We thus uphold the trial judge's finding that the minister's approval came through a letter written by Mr. Wina. Since the Minister referred to resolution LCC/101/2000 and talked about restoration, we take it that the import of the letter was final approval that the said portion of land be sold to the respondent.

9.22 We hold that the appellant's resolution LCC/101/200 through the said committee that the sale of the portion of land be sold to the respondent and the fact that property was valued by a government valuer for the purpose of selling it and that the sale was finally approved by the Minister of Local Government and Housing indicates that the appellant was a willing vendor. Therefore, the trial Judge was on *terra firma* when he held that the principle that there is no law which forces an unwilling person to sell his property as espoused in the case of

Company⁴ does not apply to this case. For the foregoing reasons, we find no merit in grounds 2 to 6.

9.23 Turning to ground 7, it is clear from the facts on record that the respondent is a sitting tenant conducting business on the appellant's plot No. 316(s) Sichango Road, Livingstone. Circular no. 2 of 1996, the Revised Procedure for Sale of Council Houses clearly relates to the sale of council houses and not the property occupied by the respondent as it is not a council house. The said Circular is therefore inapplicable to this case. We note that the trial Judge did not even rely on the said Circular.

9.24 The portion of land in question was just a dump site at the time it was allocated to the respondent. By now, the respondent must have built some structures on it to make it suitable for its business operations as can be deduced from the valuation reports dated 7th August, 1996 and 21st July, 2003. The valuation report dated 7th August, 1996 was done by C.M. Mulenga Property Consultants and it shows that the value of the property at that time was K2,200,000.00 unrebased. The valuation report dated 21st July, 2003 was done by the Government Valuation Department and it shows that the value

of the property was K25,000,000.00 at the time. The latter valuation report indicates towards the end that it was the appellant who called for the valuation. The final approval of resolution No. LCC/101/2000 by the Minister came on 8th July, 2004. For the preceding reasons, we find no merit in ground 7.

9.25 At page J35, in order to determine that there was in fact an agreement between the parties to sale the property, the lower court relied on the case of **Rating Valuation Consortium D.W. Zyambo & Associates (suing as a Firm) v. Lusaka City Council Zambia, Zambia National Tender Board** ¹¹ where it was held that:

“There is a growing school of thought supported by a plethora of authorities indicating that the analysis of putting labels to the process of reaching agreement as offer and acceptance is to simplify the issue and thus being unrealistic. The proper approach according to these developments in the law is that the court has to, in a given

case, take an objective approach. In other words, what should guide the court in analyzing business relationship should be whether or not the parties; conduct and communication between them amounted to offer and accept.”

9.26 Apart from applying the law, the lower court also applied equity by invoking **section 13 of the High Court Act** at the same page 35 of the Judgment. We therefore do not fault the trial court for granting judgment in favour of the respondent as it did. Since the portion of land was initially a dumpsite the valuation report of 21st July, 2003 should suffice for purposes of determining the purchase price.

10.0 CONCLUSION

10.1 Overall, it may be said that the appeal fails as the Minister of Local Government and Housing who is the overall authority on the sale of council properties approved or accepted the respondent's application to purchase the property by letter

dated 8th July, 2004 written on her behalf by Mr. Wina, the
Principal Housing Development Officer.

10.2 We uphold the lower court's judgment as it was well reasoned.

The appeal is hereby dismissed for lack of merit with costs
which may be taxed if not agreed upon between the parties.

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C.K. MAKUNGU
COURT OF APPEAL JUDGE

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

.....

P.C.M. NGULUBE
COURT OF APPEAL JUDGE