

IN THE HIGH COURT FOR ZAMBIA
AT THE PRINCIPAL REGISTRY
HOLDEN AT LUSAKA
(Civil Jurisdiction)

2013/HP/1551



BETWEEN:

AHESAN MOHAMMED GHADIYALI PLAINTIFF

AND

GRACE FURNITURE COMPANY LIMITED DEFENDANT

BEFORE THE HONOURABLE JUSTICE MRS. M. C. KOMBE

For the Plaintiff:

Mr. M. Mukupa - Messrs Isaac and Partners

For the Defendant:

Mr. M. Katolo - Messrs Milner and Paul Legal Practitioners

J U D G M E N T

Cases referred to:

- 1. Rudnap (Zambia) Limited v. Spyron Enterprises Limited (1976) Z.R. 326.**
- 2. Royal British Bank v. Turquand (1856) 6 E & B 327.**
- 3. National Airports Corporation v. Reggie Ephraim Zimba and another (2000) Z.R. 154.**
- 4. Freeman & Lockyer v. Buckhurst Park Properties (1967) 2 QB 480.**
- 5. Grindlays Bank International Zambia Limited v. Nahar Investments Limited (SCZ Judgment No. 11 of 1991).**

Legislation and other work referred to:

- 1. William Bowstead, Francis Martin Baillie Reynolds, Peter George Watts, Bowstead and Reynolds on Agency, 19th Edition (2010) London, Sweet & Maxwell.**
- 2. Halsbury's Laws of England 4th Edition (re-issue) volume 1 (1)**

By a writ of summons and statement of claim dated 17th October, 2013, the Plaintiff claims the following reliefs:

- (i) The sum of K 50,328.00 being refund of the money due to him for works not executed by the Defendant;*
- (ii) Interest on the sum in (i) above;*
- (iii) Costs of this action; and*
- (iv) Any other relief the Court may deem just and suitable to grant.*

In the statement of claim, the Plaintiff averred that in or about July, 2013, he entered into a contract with the Defendant for the fitting of three (3) kitchen units and three (3) wardrobes relating to his three (3) flats situated in Mass Media area at a sum of K93, 100.00.

He averred that it was a term of the contract that the Defendant would deliver and fit the items contracted for within 3-4 weeks

him to enter into any agreement with anybody including the Plaintiff. Further, that he was not authorised to agree any amount due from anybody including the Plaintiff.

The Defendant further averred that Edwin stole an official company receipt book from which he purported to issue receipts on behalf of the Defendant and the matter had since been reported to the Zambia Police Service; that the said Edwin was currently on the run and was a deserter.

It was thus averred that there was a Standard Form Agreement that all customers that entered into a contract with the Defendant always executed and the Plaintiff would be put to strict proof to produce such contract.

At the hearing of the matter **AHESAN MOHAMED GHADIYAH**, the Plaintiff herein aged thirty eight (38) years old a Businessman of Plot No. 105, Kalanga road in Emmasdale testified as **PW1**.

He testified that he built three (3) flats in Mass Media and when he completed the works, he went to a few companies but discovered that Grace Furniture Limited, the Defendant Company was fair. So he decided to give them one (1) flat to make a kitchen unit for trial.

Within a short period of time, the first kitchen unit was completed. Since he was impressed with the work done, he gave them two (2) flats to install the kitchen units.

The witness identified to the Court the agreement he signed with the Defendant which was at pages 1-5 of the Plaintiff's bundle of documents; that the price per unit was K25, 000.00 and the works were to be completed within a period of 3-4 weeks. He paid the full amount for the two (2) units which was K48, 000.00 and K3, 000.00 for a spoon rack. The total paid was therefore K50, 000.00 and he was issued with receipts. He identified the receipts which were at pages 6-14 of the Plaintiff's bundle of documents. The total amount for all the receipts was approximately K73, 000.00; that he was making a claim of K51, 000.00 because one unit was completed.

The Plaintiff testified that since there was a delay in completing the other units, he went to the Defendant Company where he was told that he should give them some more time to install the kitchen units. However, they never went to do the works. As he couldn't wait, he went to another company called Wire force so that they could complete the works. This company managed to complete the

works and so he decided to take the matter to court in order to get a refund from the Defendant Company as the money was not paid and there was no response from them.

He told the Court that he wanted a refund of the money he paid with interest and legal costs.

In cross examination, he told the Court that the first time he went to the Defendant Company, he dealt with the salesman but he couldn't remember his name. That he was the person he was paying the money to and he didn't deal with any other person; that he signed the contract after the sales man from the Defendant Company took the contract to his office for signing; that he had met the sales man on three or four occasions.

He further stated that he first met the salesman at the Defendant Company in the show room; that he was never given any contract forms at this first meeting.

When asked how the idea of the forms being taken to his office came about, he stated that he went with the salesman to the site to show him what to do after selecting the design. On the way to the Defendant Company, they stopped at his office which was

along Cha Cha Cha road. That's how the salesman knew where his office was. That he didn't know how to read English properly so he asked the salesman to drop the contract forms at his shop and he asked his Accountant to read through the contract. After he was told that the contract was okay, he dropped it at the Defendant Company.

In terms of making payments, the Plaintiff told the Court that he used to drop off the money at the Defendant Company; that there used to be a guard at the gate who would record in the book the name and number plate of the vehicle. The Plaintiff admitted that there were a lot of workers at the company and that three were working in the showroom; he also admitted that the salesman he dealt with was Edwin Masalakufa; that all the documents, from pages 1 to 14 in the bundle of documents were handled by Edwin. That according to the document at page 1, the job title for Edwin was Marketing Manager; that at page 6, the title showed cashier. He denied that the only reason he signed the documents was because it was a private arrangement; he also denied that he had a private arrangement with Edwin to refund the money.

When asked to show the Court that the work to be done was for three flats, the Plaintiff stated that the contract in the bundle of documents was for the first flat; that there was no contract for the other two (2) flats because they were following the same contract since it was the same design. However, he stated that the contract did not indicate that it would apply to the other flats although the reason they signed the contract for the first flat was to show that he had entered into a contract with the Defendant Company.

When it was put to him that it was important that he signed a contract for the other two flats, the Plaintiff told the Court that he was following the same contract he had initially signed for the first flat; that there was no written communication from the Defendant Company that the same contract would apply to the other two flats. The Plaintiff denied that the Defendant Company didn't know about the other two flats because he used to pay for the two flats and they used to issue him with receipts for the payments he used to make. That if they never received the money or issued the receipts, it was their internal problem.

He further told the Court that the transaction with the Defendant Company was official and he denied that he used a nick name in

an official transaction. He explained that his real name was Ahesan but because Zambians had difficulties in pronouncing his name, they called him Hassan; that very few people knew him by the name of Ahesan.

In re-examination, he stated that there were three signatures on the document at page 1: one was for the Marketing Manager Edwin, and the second one was for the Operations Manager and the third one was his; that the name that appeared on the document was Hassan.

When asked by his lawyer to elaborate on how they came to agree on the other two flats, he told the Court that the three flats had the same design so he just followed the first contract for the other two; that there were no contracts for the two flats. He denied that he had any private arrangements with Edwin and that he didn't sign any contract with him; that he dealt only with Edwin but he met three other workers who did the installation and there was also a driver.

That marked the close of the Plaintiff's case.

The Defendant did not call any witnesses in its Defence although the Court adjourned the matter on three (3) occasions to enable the witnesses attend Court. At the last sitting, the advocate on record informed the Court that they had failed to secure the attendance of the two witnesses whom they had intended to call. The Defence therefore closed its case and informed the Court that they would rely on the documents produced before Court.

The Court invited the parties to file written submissions. The Plaintiff filed his submissions but the Defendant did not. I will not at this stage replicate what is in the submissions. Suffice it to mention that I will be referring to the submissions as when it is necessary when arriving at my decision.

The issue for determination in this case is whether the Plaintiff is entitled to the sum of K50, 328.00 being refund of the money due to him for works not executed by the Defendant Company.

From the evidence on record, the following facts are not in dispute:

- (i) That Edwin Masalakufa was an employee of the Defendant Company.

- (ii) That the said Edwin signed the Standard Form Contract bearing the name of Defendant Company for the installation of a kitchen unit in one of the Plaintiff's flat at a contract price of K25, 000.00.
- (iii) One kitchen unit was installed in one of the flats.
- (iv) That no written contract was signed to install kitchen units in the other two flats.

What is in dispute is:

- (i) Whether Edwin was acting as an agent of the Defendant Company when he signed the contract for installation of the first kitchen unit.
- (ii) Whether Plaintiff further engaged the Defendant Company through Edwin to install kitchen units in the two remaining flats.

The Defendant Company in its Defence contends that at the time of execution of the agreement, Edwin Masalakufa was not acting as an agent for the Defendant Company but in his individual capacity. That he was not authorized to agree on any amount due from anybody for any works and that he stole the official company

receipt from which he purported to issue receipts on behalf of the company.

Regarding the question whether Edwin acted as an agent/employee of the Defendant Company when he executed the contract and received money from the Plaintiff, I find it imperative to define who an agent is.

The learned authors of Halsbury's Laws of England 4th Edition (re-issue) vol 1 (1) at paragraph 1 define the term 'agent' as:

“... in law, the word agency is used to connote the relation which exists where one person has an authority or capacity to create legal relations between a person occupying the position of principal and third parties. The relation of agency arises whenever one person called the ‘agent’ has authority to act on behalf of another called the ‘principal’ and consents so to act. Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the true nature of the agreement or the circumstances of the relationship between the alleged principal and agent.”

It is trite law therefore that agents are recognized as having the power to affect the legal rights, liabilities and relationships of the principal.

The Supreme Court stated in the case of **Rudnap (Zambia) Limited v. Spyron Enterprises Limited** ⁽¹⁾ that:

“When a contract is made with an alleged agent of a company the onus is on the claimant to prove that the agreement was made with an employee or agent of that company who was held out to be authorised to enter into such an agreement.”

It is clear from the above authority that since the Plaintiff alleges that he dealt with Edwin, an agent acting on behalf of the Defendant Company, the onus on proof of agency is on him to prove that he dealt with an agent for the Defendant Company.

The Plaintiff's evidence is that he executed a contract with the Defendant Company for the installation of a kitchen unit for one of the three flats that he had constructed. That he dealt with the salesman at the Company by the name of Edwin Masakalufa. After he was satisfied with the works done, he engaged the Defendant Company to install kitchen units in the remaining two flats; that

he paid for these works and he was issued with receipts bearing the Defendant Company's name which were the same as the receipts he was issued with when he engaged the Defendant Company for the first flat. The Plaintiff also added that he used to deal with Edwin Masakalufa and that the payments were made at the Defendant Company.

I have accepted this evidence because there is documentary proof at page 1 of the Plaintiff's bundle of documents that the Standard Form Contract which Edwin signed was not only signed by Edwin but by the Operations Manager as well. The receipts that were issued to the Plaintiff were in the name of the Defendant Company and that the payments were being made at the offices of the Defendant Company.

Based on this evidence, I find that the said Edwin Masalakufa was an agent of the Defendant Company when he signed the contract for the installation of the first kitchen unit.

So while the Defendant Company contends that Edwin had on several occasions engaged third parties in his own capacity but purporting to be working on behalf of the Defendant Company, I am persuaded by the rule in **Royal British Bank v. Turquand** ⁽²⁾.

This is to the effect that third parties who had dealings with the company need not inquire into the regularity of the indoor management but could assume that its requirements had been complied with.

This principle was adopted by the Supreme Court in the case of **National Airports Corporation v. Reggie Ephraim Zimba and another**⁽³⁾ where it was stated 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.

Therefore, a director, or other officer could bind the company if he had ostensible or apparent authority, even though the board of directors had not endowed him with actual authority.

The distinction between actual and apparent authority was explained by Diplock L.J. in **Freeman & Lockyer v. Buckhurst Park Properties** ⁽⁴⁾ as follows:

“An “actual” authority is a legal relationship between principal and agent created by a consensual agreement to which they alone are parties...

As “apparent” or “ostensible” authority, on the other hand, is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted on by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the “apparent” authority, so as to render the principal liable to perform any obligations imposed on him by such contract. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation. The representation, when acted on by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.”

Therefore, although the Defendant Company contends that Edwin stole the receipts and thus he had no authority to enter into the contract with the Plaintiff, on the authority of the above cases, it can be inferred that there was no need for the Plaintiff to inquire into the regularity of the indoor management of the Defendant Company or inquire into whether or not Edwin he was dealing with had the authority to bind the company.

I say this because the kind of transaction that Edwin, the Marketing Manager was engaged in was of a type that could bind the Company. It would have been different if Edwin was just a driver or an office assistant.

I also find that Edwin as an agent had ostensible authority to execute the contract, receive money paid by the Plaintiff and also issue receipts to the Plaintiff as he was the Marketing Manager of the Company who within the scope of the transaction was permitted by the Defendant to act in some way in the conduct of its business with other persons.

Before I proceed to consider the next issue, I should add that I have examined the agreement that was produced by the Defendant in its bundle of documents. This hand written agreement was entered into between Edwin Masalakufa and Mr. Ahmed for the installation of three (3) kitchen units and six wardrobes at a price of K32,000.00 at a house in Kamwala.

No evidence was led to substantiate this document as the Defendant did not call any witnesses. Having, considered the contents of this agreement, I have come to the conclusion that it does not show that it relates to the matter before this Court as the

Plaintiff in this case is Ahesan Mohamed Ghadyali and not Mr. Ahmed.

Further, the agreement relates to installation of 3 kitchen units and 6 wardrobes in Kamwala while in the present case, the claim is for the 3 kitchen units in Mass Media.

In view of these glaring disparities, I find that the document is not does not support the Defendant in any way and I therefore attach no weight to it.

Getting back to the next issue in dispute, what I have to determine is whether the Plaintiff further engaged the Defendant Company to install kitchen units in the two remaining flats although no written contract was executed between the Plaintiff and the Defendant Company for the remaining two flats?

It is trite that a contract is a legally binding agreement which gives rise to obligations which are enforced or recognised by law. It may be written or verbal for as long as it has the four parts; that is offer, acceptance, consideration and mutual intention to enter into an agreement.

In the present case, the Plaintiff's evidence is that he first executed a contract with the Defendant Company for the installation of a kitchen unit in one of the three flats. When he was satisfied with the works that had been done, he told the representative of the Company, Edwin to proceed to install kitchen units for the remaining two flats. To this effect, he made several payments to the Defendant through Edwin, the employee which were produced at pages 6 to 14 of the Plaintiff's bundle of documents.

I have carefully examined these receipts. They are all in the name of Grace Furniture, the Defendant Company and the total paid is K73, 180.00. The receipt at page 12 of the Plaintiff's bundle of documents dated 12th August, 2013 shows that the payment of K27, 000.00 was for two kitchens. The receipt at page 14 shows that a further K10, 700.00 was paid for two kitchens and wardrobe on 19th August, 2013.

There is also evidence from the Plaintiff and the letters at pages 15 to 19 that although the Plaintiff paid the Defendant Company, the Kitchen units were not installed in the remaining two flats.

Based on this evidence which I accept, I find the following facts as proved:

- (i) Although no written contract was executed, the only reasonable inference that can be drawn from the above evidence is that there was mutual intention by the parties to enter into a legally binding agreement for the installation of two kitchen units.
- (ii) The Plaintiff therefore engaged the Defendant Company through Edwin Masalakufa to install kitchen units in the remaining two flats.
- (iii) The Defendant Company did not fulfil its part of the agreement as the two kitchen units were not installed although payments were made towards the installation of the kitchen units.
- (iv) Based on the receipts adduced, the Plaintiff paid a total of K73, 180.00 but only one kitchen unit at the price of K25, 000.00 was installed. This means that the Plaintiff is owed K48, 180.00 for the remaining two kitchen units he paid for and not K50, 328.00 endorsed on the writ of summons.

What then is the effect of these findings in the light of the Defendant's Company's defence that Edwin stole the receipt books?

In answering this question, I should pause here and mention that the learned authors of Bowstead and Reynolds on Agency, state at paragraph 8-063 that:

“An act of an agent within the scope of his apparent authority does not cease to bind his principal merely because the agent was acting fraudulently and in furtherance of his own interests.”

Similarly, in Grindlays Bank International Zambia Limited v. Nahar Investments Limited ⁽⁵⁾ which has been cited by counsel for the Plaintiff, the Supreme Court held that where the fraudulent conduct of the servant falls within the scope of the servant's authority, actual or ostensible, the employer will be liable.

In answering the question posed, I find that while the Defendant Company claims Edwin Masalakufa stole the receipt books, the Defendant Company is liable for the actions of its employee Edwin Masalakufa as he was an agent who acted within the scope of his ostensible authority as a Marketing Manager of the Company.

The net result of the above findings is that the Plaintiff has proved his case on a balance of probabilities that he is entitled to the sum

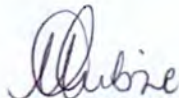
of K48, 180.00 being refund of the money due to him for works not executed by the Defendant Company.

I hereby enter judgment in his favour for the amount of K48, 180.00 which shall attract interest at short term deposit rate from the date of writ of summons up to the date of judgment and thereafter at the current bank lending rate as determined by the Bank of Zambia until final payment.

Costs are awarded to the Plaintiff to be taxed in default of agreement.

Leave to appeal granted.

DELIVERED AT LUSAKA this 30th DAY OF JUNE, 2020



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M.C. KOMBE
JUDGE