

IN THE HIGH COURT FOR ZAMBIA

2018/HKC/064

AT THE COMMERCIAL REGISTRY

HOLDEN AT KITWE

(CIVIL JURISDICTION)



BETWEEN:

KATIMA INVESTMENTS LIMITED

PLAINTIFF

AND

JUDITH MULENGA CHILESHE

1st DEFENDANT

INVESTRUST BANK ZAMBIA PLC

2nd DEFENDANT

KAFUBU WATER & SEWERAGE COMPANY LIMITED

3rd DEFENDANT

Before Hon. Lady Justice Abha Patel, S.C.

For the Plaintiff: Mr. J. N. Mukaya

Messrs. J. N. Mukaya Legal Practitioners

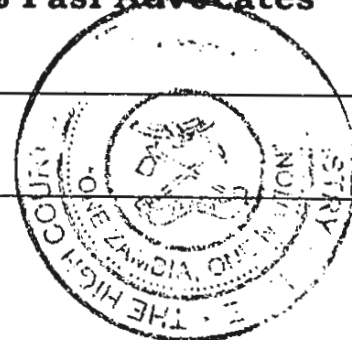
For the 1st Defendant: Mr. E. Sichone

Messrs National Legal Aid Clinic For Women

For the 2nd Defendant: Mr. H. Pasi

Messrs Mando & Pasi Advocates

JUDGMENT



List of Authorities

1. **The Partnership Act 1890.**
2. **The Companies Act No. 10 of 2017.**
3. **Halsbury's Laws of England 4th Edition.**
4. **Cheshire, Fifoot and Furmston's Law of Contract 11th edition.**

Cases Referred to:

1. **Salomon v Salomon and Company (1895-1899) ALLER 33.**
2. **Datong Constructions vs Fraser Associates (As A Firm) Appeal No. 163 of 2019.**
3. **Royal British Bank vs Turquand (1856) E & B 32.**
4. **Madison Investment, Property and Advisory Company Limited and Peter Kanyinji Selected Judgment No. 48 of 2018.**
5. **Mazoka and Others vs Mwanawasa & Others (2005) ZR 138.**
6. **Freeman and Lockyer vs Buckhurst Park Properties (Magnal) Limited.**

1. Introduction

1. The Plaintiff commenced this action on 18th November 2018 by Writ of Summons and Statement of Claim seeking the following reliefs:
 - 1.1 An order for the payment of ZMK 120,000 being money accruing to the Plaintiff and received by the 1st Defendant through the negligence of the 2nd defendant;
 - 1.2 Damages for loss of use of the said amount;
 - 1.3 Damages for pain and mental anguish;

- 1.4 An order for interest on all sums found due to be paid;
 - 1.5 Any other relief the Court may deem just and equitable;
 - 1.6 Costs.
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2. The 1st defendant entered appearance and filed her defence denying the Plaintiffs claims and raised a counterclaim as follows:
 - 2.1 A declaration that the Plaintiff is not entitled to the claim of ZMK 110,000;
 - 2.2 Damages for loss of business as a result of suspended bank accounts;
 - 2.3 ZMK 6,183.67 being refund of customs duty and transportation charges;
 - 2.4 Damages for inconvenience;
 - 2.5 Further or other relief as the Court may deem fit;
 - 2.6 Interest and costs
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3. The 2nd Defendant entered appearance and filed its defence denying any negligence on its part and stating that it followed the standard procedure in opening the account at its Bank and denied in totality any allegations of negligence as pleaded in paragraph 25 of the Plaintiffs statement of claim.
 - 3.1 The 2nd Defendant denies that any loss suffered by the Plaintiff was caused by the 2nd defendant.

3.2 The Plaintiff subsequently filed its Notice of Discontinuance against the 3rd Defendant on 6th March 2020 and the matter proceeded thereafter between the Plaintiff and the 1st and 2nd defendants.

4. **Facts and Background:**

The Plaintiff's case

4.1 The Plaintiff led evidence through one **Lazarus Muntete** in his capacity as managing Director of Katima Investments Limited. His evidence in chief as per his Witness Statement filed in Court on 5th March 2020 was that he was approached by **Judith Chileshe**, the 1st defendant sometime in early in the year 2017, to finance certain business ventures that she was conducting. It was further his evidence that they subsequently agreed that she would arrange for business on behalf of the Plaintiff company and that she would earn a commission of 50% of the profits from such undertakings. The Court has noted the evidence of the Plaintiff.

4.2 The Witness statement narrates the evidence and claim of the Plaintiff and is on record, suffice it to state at this juncture that the Plaintiff claims that the 1st defendant was given copies of company documentation for the Plaintiff namely, the certificate of incorporation, company profile, quotation and

Invoice book and Tax clearance certificate for the purpose of registering the Plaintiff as a supplier to several institutions and Kafubu Water and Sewerage Company limited being one.

4.3 It is further the Plaintiff's evidence that the 1st defendant was not authorised to open any bank accounts in the name of the Plaintiff, and that the account she (1st Defendant) opened at the 2nd Defendant Bank, Investrust Bank Zambia Plc was by fraud there being non-compliance with the norms of banking practice and procedure.

4.4 This dispute revolves around an order received by the Plaintiff from Kafubu Water and Sewerage Company and how the proceeds from that order were processed, banked and handled by the 1st defendant in an account held at Investrust Bank Zambia Plc, that gives rise to the claims of the Plaintiff against the 1st and 2nd defendant respectively

4.5 The Plaintiff's Witness Statement and the Plaintiffs Bundle of Documents and the 1st Defendants Witness Statement and 1st Defendants Bundle of Documents are on record. The 2nd Defendant did not call and witnesses and opted to file its Skeleton Arguments. All the pleadings have graced the record of the Court, and in the interest of brevity, the Court will make specific reference to them in the course of the Judgment and as appropriate.

4.6 From the evidence on record and indeed from the testimony of the parties, it is not in dispute that the Plaintiff and the 1st defendant did enter into some business relations with the intent of making profit. This is also supported by their respective pleadings and the Plaintiffs response as per its defence to counterclaim specifically admits the relationship between its Managing Director and the 1st defendant and the mode of sharing profit between the two. It is further not in dispute that the said Lazarus Muntete and Judith Chileshe did supply filter nozzles to the 3rd Defendant Kafubu Water and Sewerage Company Limited using the Plaintiff as a conduit for their business arrangement.

4.7 Under cross examination, Lazarus Muntete maintained that he had not authorised Judith Chileshe to open an account with the 2nd Defendant bank and that any documents he had sent her were for the purpose of securing the order from the 3rd defendant. He maintained that he had sent her monies from the Plaintiffs Account held at Atlas Mara for the initial expenses to procure the nozzles, the subject of the delivery to the 3rd Defendant. However, and under cross examination he could not point to any documents in his bundle of documents to support his evidence that monies had been sent to Judith Chileshe from the Plaintiffs Account as stated. He confirmed under cross examination by Counsel for the 1st defendant that there was no evidence before Court to show that the Plaintiff had transferred any monies to the 1st defendant. He was

referred to *pages 1 and 2* of the 1st defendant's bundle of Documents to prove that the Plaintiff had presented its quotation to the 3rd Defendant on 1st January 2017 whereas in his Witness Statement, he has told the Court that he only engaged with the 1st defendant sometime between February and March 2017.

4.8 He was referred to the documents on *pages 2, 3, 4 and 5* of the 1st defendant's bundle of documents and agreed that these related to the Plaintiff and that he had sent them by e-mail to Judith Chileshe on dates that he could not recall but denied that these were sent to her for the purpose of opening a bank account with the 2nd defendant. He further narrated that he and Judith Chileshe had travelled to Dubai in June 2017 and that the Plaintiff had paid for the trip and that the 1st defendant had also received an allowance to facilitate that trip. He also maintained that the Plaintiff had transferred the money for the nozzles to a company in Dubai called Gulf Star. He conceded however that none of those documents were before the Court.

4.9 He was referred to the document on *page 10* being an acknowledgment of a cash payment in the sum of USD 4,000 to Gulf Star Building Materials LLC of Dubai. He maintained that there was still a balance outstanding to the supplier and that he received constant reminders from them though there was nothing placed before the Court as proof of that

statement. He further stated that he had sent the sum of K4,000 to Judith Chileshe to clear the nozzles when the consignment had arrived at the Lusaka International Airport although again, he could not show how that payment was made. He was also referred to the documents on *page 12* and confirmed that one Brenda Mulenga Kaluba received the consignment and paid to clear it. In conclusion of the cross examination by the 1st defendant, Lazarus Muntete confirmed that there was no evidence before the Court to prove that he had invested a sum of K79,000 into the project for the supply of nozzles to the 3rd Defendant company.

4.10 During cross examination by the 2nd Defendant, the witness confirmed that he was to split the profit with the 1st defendant on an equal basis. He was not aware how much money was still in the account held at the 2nd Defendants bank nor did he know how much money the 1st defendant had apparently withdrawn to give to him.

4.11 He was also referred to documents in the Plaintiffs bundle of documents which though not numbered, he was referred to a letter from Bank of Zambia of 11 June 2019. When asked about the allegation of fraud, he was asked if the matter had ever been prosecuted and whether the 1st defendant had been charged by the Police. When questioned repeatedly to point to the proof of fraud before the Court, the witness chose to remain silent.

4.12 He confirmed that he gave the 1st defendant the certificate of incorporation, the TPIN certificate and the certificate of share capital for the purpose of registering the Plaintiff as a supplier to the 3rd defendant. He named other shareholders and directors of the Plaintiff Company and stated that they were aware of and approved the transaction between the Plaintiff, 1st defendant and the 3rd defendant. He however could not point to a board resolution of the Plaintiff confirming this arrangement nor could he point to a board resolution authorising the 1st defendant to open an account with the 2nd defendant. He could not also refer to any document in which the 3rd defendant had been informed of the Plaintiff's bank held at Atlas Mara bank nor could he confirm that they had been advised to transact with the Plaintiff through that account. It was his understanding that although the 1st defendant operated as an agent, the extent of her authority was limited.

The Plaintiff closed its case at this stage.

5. **The 1st Defendant's case**

5.1 The 1st defendant **Judith Mulenga Chileshe** filed her witness statement on 17th August 2020 and her bundles of documents of the same date. Both were marked and admitted into evidence. It was the gist of her evidence that she had been in business for several years and was a registered

supplier to several institutions, *inter alia*, the third defendant, Kafubu Water and Sewerage Company Limited. She further gave evidence that **Lazarus Muntete** was her cousin and a Bank Manager at Bank ABC in Chingola and was the owner of the Plaintiff Company. It was her evidence that they agreed to go into some joint business dealings and he allowed her to use his company as a vehicle to source orders and that he specifically authorised her to open a bank account with the 2nd defendant and sent her the relevant account opening documents.

5.2 It was her evidence under cross examination that she and Lazarus Muntete had met to discuss their business venture and the documents that were sent to her by him under cover of his e-mail on *page 2* of her Bundle of documents were meant to facilitate the opening of a bank account in the name of the Plaintiff for her to use for their business venture.

5.3 She remained consistent under cross examination that she and Lazarus Muntete were business partners and that she withdrew the sum of K50,000 to give to him being his share from the venture, but that he insisted that he should get K100,000 and she should remain with K20,000 which is what led to their falling out.

5.4 She further confirmed that the matter had been reported to the Drug Enforcement Commission but that she had not been

charged for any offence either by the Drug Enforcement Commission or by any other law enforcement agency. She narrated that he (Lazarus Muntete) knew of the bank account held with the 2nd defendant even before payment was made by the 3rd Defendant and that she only ever dealt with Lazarus Muntete and nobody else from the Plaintiff company.

5.5 It was further her evidence that Kafubu Water and Sewerage Company limited subsequently paid the sum of ZMK 120,000 for the supply of nozzles which had been procured by Judith Chileshe, through the Plaintiff Company and that the money had been deposited in the account at the 2nd defendant bank. She withdrew K50,000 to give Lazarus Muntete his share, which he refused to accept, and demanded for ZMK100,000 and that she should take K20,000. That was the start of the dispute in that he did not want to share the proceeds with her and he further alleged that the Bank (the 2nd Defendant) had erred in its banking procedure and that he would take them to task for the account that had been opened.

5.6 She explained under cross examination that of the K120,000 paid by the 3rd defendant, the Plaintiff and the 1st defendant were meant to share the sum of K110,000 equally although he owed her K6,183 being the amount she used to clear the consignment. She confirmed that he was only entitled to the sum of K48,817 (being K55,000 less K6,183), which she rounded off to K 50,000, as he was her relative.

Counsel dispensed with his second witness and closed the case for the 1st defendant.

6. The Issues for determination

6.1 The Parties having failed to file a list of agreed issues in dispute for the determination by the Court, the Plaintiff in its submissions filed on 8th December 2020 submitted its list of issues. In the considered opinion of the Court, the critical issues that requires the Courts determination are the following:

- i. What was the nature of the business relationship between the Plaintiff and the 1st Defendant ie. was it an agency relationship or a partnership and subsequently whether the 1st Defendant was fraudulent in her dealings with the Plaintiff? A corollary issue is whether the Plaintiff is entitled to the claim of K120,000.00
- ii. Was the 2nd defendant negligent in the manner in which it opened an account on behalf of the Plaintiff?

7. The Law

7.1 Section 1(1) of the **Partnership Act of 1890** defines partnership as: *“a business relationship which subsists between persons carrying on a business in common with a view*

of profit. It is common ground and the parties admitted that they were business partners. Their evidence confirmed the arrangement that the 1st defendant was to source for business ventures using the Plaintiff as a conduit to register and obtain orders from business houses. The witness statement of the Plaintiff confirms that the 1st defendant was to earn a commission of 50 percent. Further to the provision above, *Section 2(3)* provides that:

“Receipt by a person of a share of the profit of a business is prima facie that he is a partner in the business.”

7.2 The 2nd defendant has submitted that pursuant to *section 5* of the *Partnership Act*, as partners, Lazarus Muntete, and the 1st defendant were agents of each other for the purpose of the business venture with power to bind each other in the course of their actions. It is equally noted that the actions of the 1st defendant had the blessings and consent of the Plaintiff or at the least Lazarus Muntete. The evidence has not been clear what role, *if any*, was played by the Plaintiff in this transaction.

7.3 **Halsbury’s Laws of England**, 4th edition (reissue) provides the definition of agency as follows:

“ 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 circumstances of the relationship, but on the nature of the agreement or the exact circumstances of the relationship between alleged principal and agent...”

7.4 The learned authors **Cheshire, Fifoot and Furmston's Law of Contract 11th edition** at page 480 state that;

“ If an agent enters into a contract with a third party within the scope of his actual authority the result is to create contractual obligations between the principal and the third party. It is irrelevant that the latter was unaware of the existence of the authority, and irrelevant even that the agent acted with improper motives with desire solely to promote his own interests.”

7.5 Further **Cheshire, Fifoot and Furmston's Law of Contract** at page 481 state that;

“ an agent who is employed to conduct a certain business transaction is deemed to possess authority to do everything usually incidental to do business transaction of that type”

7.6 Actual Authority of an agent is defined at page 479 by the said authors of **Cheshire, Fifoot and Furmston's** as

follows;

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

7.7 Halsbury’s (supra) further provides:

“ as a general rule, a principal is responsible for all the acts of his agent within the authority of the agent, whether the responsibility is contractual or tortious....A principal is not exempt, where he would otherwise be liable in respect of an act done or bound by a contract made by his agent, by reason of the fact that the agent in doing it was acting in fraud of the principal or otherwise to his detriment.”

8.Submissions by the Plaintiff

8.1 The Court has noted that submissions were received from the Plaintiff on 8th December 2020 and although the 1st and 2nd defendants undertook to file their respective submissions by 22nd December 2020, none have been received. The Court has proceeded to deliver the Judgment.

8.2 Counsel for the Plaintiff has submitted on issues not in dispute namely that the Plaintiff and the 1st defendant did enter into some form of business arrangement and

that the proceeds from the business arrangement were paid into a bank account held by the 2nd defendant.

He went on to submit that the evidence presented to the Court was clear that the Plaintiff only wished for the 1st defendant to be an agent of the company. According to him, evidence was led to show that the relevant documents given to the 1st defendant were only meant to source for business and not to open a bank account to transact for the Plaintiff.

8.3 The Plaintiff has further submitted that the 1st defendant could not point to any evidence to show that she had been specifically authorised to open a new bank account in the name of the Plaintiff with the 2nd defendant.

8.4 It was also his submission that the Court ought to take judicial notice of the fact that the Plaintiff's Managing Director, being a seasoned banker, is correct in there not having been due diligence by the 2nd defendant in the opening of the said account.

8.5 It was his submission in conclusion that the Plaintiff's case had satisfied the standard required in civil matters and relied on the pronouncement by the Supreme Court of Zambia in the case of **Mazoka and Others vs Mwanawasa & others** wherein the Supreme Court stated:

“As regards burden of proof the evidence adduced must establish the issues raised to a fairly high degree of convincing clarity.”

Counsel submitted that the Plaintiff had discharged the burden of proof and further submitted that the 2nd defendant having deliberately not provided witness statements and or documents which may have augmented the Plaintiffs claims.

9. Analysis and application of the facts to the law

9.1 Having heard the evidence of the Parties, in chief and undercross examination, and having considered the submissions of the Plaintiff, the following facts are not in dispute:

- i. The Plaintiff, and the 1st defendant were related to each other and appear to have had a long-standing personal relationship.
- ii. Lazarus Munteteis a shareholder and director of the Plaintiff company although no proof was adduced and no other shareholder or director appeared to be involved in the transaction with the 1st defendant giving rise to the assumption that he was involved in this venture as a side business to profit from it personally and not for the benefit of the Plaintiff company.

- iii. The 1st defendant did attend to certain transactions, which led to the securing of a contract for the supply of nozzles to the 3rd defendant in the name of the Plaintiff.
- iv. The 2nd defendant opened a bank account for the Plaintiff based on the authority and representation of the 1st defendant.
- v. There was no issue raised by the Bank as to the *status* of the 1st defendant or indeed her capacity in the Plaintiff company.

10. Findings of the Court

10.1 From the totality of the evidence in this matter, I find as a

fact that the 1st defendant was the agent of the plaintiff and had the authority to transact and conduct business to the benefit of herself and Lazarus Muntete using the Plaintiff as the corporate vehicle. The evidence of the Plaintiffs witness who at all times confirmed that it was the 1st defendant who sourced and secured the contract for the supply of nozzles for the 3rd defendant confirmed this. She alone knew the logistics and clearing details and appeared to have handled the entire transaction from start to finish, apart from the one trip to Dubai where Lazarus Muntente went with her.

10.2 I also find as a fact that the 1st defendant acted within her authority to do the acts she did and that any purported limitation that the Plaintiff sought to impose on her authority, was after the event and in any case, not known to third parties. On this, I am suitably guided by the principle of apparent or ostensible authority as established by the English case of **Freeman and Lockyer vs Buckhurst Park properties (Magna) Limited**.

10.3 I am also of the considered view that the 1st defendant became an Agent of the Plaintiff in the discharge of her duties and interactions with third parties and in her dealings with the 2nd Defendant. On this I am guided by the decision of the Supreme Court of Zambia in the case of **Datong Constructions vs Fraser Associates (As A Firm)** and on the **Turquand** rule, as the rule that governs the principle of the indoor management rule, which emanated from the celebrated case of **Royal British Bank vs Turquand**. It is the Courts considered view that the 2nd defendant contracting with a party in good faith is entitled to presume that the internal regulations and procedures had been complied with and will not be affected by irregularities (in the appointment of the agent) of which they had no notice.

10.4 The Court does note and it is trite that the burden rests on the person that alleges, and will deal with the issue of whether the plaintiff in *casu*, has discharged that burden.

10.5 Having come to the conclusion that the 1st defendant was an agent for the Plaintiff with the actual authority to bind the Plaintiff, I am also of the considered view that the Plaintiff has not been able to prove or establish fraud against the 1st defendant who testified that although she had been called in by the Drug Enforcement Commission, no charges were preferred against her. On the issue of credibility, I found the evidence of the 1st defendant to be credible. I found her to be steady, trust-worthy and her evidence was backed by her documents and her narration of events were more plausible than the far-fetched evidence of the Plaintiff who has presented virtually no evidence in support of his many claims against both the 1st and 2nd defendant.

10.6 Having analysed the first issue, I must now escalate my enquiry to establish if the evidence supports the second issue, namely whether the 2nd defendant was negligent in the manner in which it opened an account on behalf of the Plaintiff.

Having concluded that the 1st defendant was acting as the agent for and with the authority of the Plaintiff, and having found her evidence to be credible, I can only conclude that the

2nd defendant was not negligent in the manner in which it opened the account in the name of the Plaintiff. The Court has also noted that the Plaintiff failed to point to any proved fraud against the 1st and 2nd defendant.

It was obvious from the record and from the evidence of the 1st defendant that the documentation required for the purpose of opening the account were provided by the Plaintiff to the 1st defendant. The Court also notes that there has been no evidence of loss attributed to the 2nd defendant save for the manner in which the Bank is alleged to have opened the Account.

10.7 The Plaintiff in its submissions has urged the Court to find the 2nd defendant *guilty* of some wrong doing as it chose not to file any witness statements and or documents. To the extent that it is the prerogative of the 2nd defendant and its counsel, as to what line of defence it wished to pursue, and to the extent that there was no proof of any loss occasioned to the Plaintiff at the hands of the 2nd defendant, the Court will not wander down the slippery path of speculation.

The Plaintiff expects this Court to *cherry pick* and choose the evidence in the manner he wishes to present it. According to him, the copies of the company documentation were provided only for the purpose of registering the Plaintiff as a supplier.

However, and to the extent that the Court found the 1st defendant to be a credible witness, the Court has no hesitation in accepting the evidence of the 1st defendant that she had his express authority to open the account with the 2nd defendant. This is despite the fact that the Plaintiffs only witness, Lazarus Muntete testified that he is a banker by profession and did lodge complaints against both the 1st and 2nd defendant to the relevant reporting bodies in the country. However, there was no evidence of loss or fraud suffered at the hands of the 2nd defendant by the Plaintiff, the 1st defendant or at all.

10.8 There is further no proof before the Court to show that the Plaintiff was acting for the Plaintiff company. No PACRA returns, no board resolution confirming that he was the Managing Director or at all or mandated to bring this case to Court. It would seem to suggest that he was on a frolic of his own. The case at hand appears to be a business dealing gone sour after Kafubu Water & Sewerage Company paid the proceeds, and Lazarus Muntete was of the view that he ought to be paid more than the 1st defendant.

10.9 Counsel for the 2nd defendant attempted to lead the 1st defendant through an exercise in account reconciliation, and the Court notes that such evidence was not challenged or tested by way of cross examination and no documents were placed before the Court nor were any bank statements

produced to show the status of the account.

However, in the interest of finality and accepting the evidence of the 1st defendant and in order to fully determine the dispute between the parties, I dismiss the claims by the Plaintiff for not having discharged the burden of proof and make the following orders:

10.10 The 1st defendant to pay out to the Plaintiff his share of the proceeds in the sum of Kwacha Fifty thousand (K50,000) as per her narration of the expenses incurred in accordance with her evidence which the Court has accepted as trustworthy and credible. This is to be paid within 14 days of the date of the Judgment.

The Account opened at the 2nd defendant (Investrust Bank) to be closed after the funds have been paid to the Plaintiff.

I make no award for interest as the Plaintiff wilfully refused to accept the money.

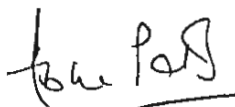
It follows therefore that the claim for damages equally fails.

11. Before I vacate this Judgment, I must state that it is cases such as the one in *casu*, that cry-out for a mediated settlement. The Court did refer the Parties to mediation which however

failed and in accordance with Statutory Instrument No. 72 of 2018, the Court is entitled to use its discretion on the issue of costs where suitably guided by the report of the mediator.

The record not revealing any such reasons, in the interest of justice and in the discretion of the Court, each party will bear its own costs.

Delivered in open Court, the 5th day of March, 2021.

A handwritten signature in black ink, appearing to read 'Abha Patel', written in a cursive style.

Lady Justice Abha Patel, S.C.