SCZ JUDGMENT NO. 11 OF 2013
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IN THE SUPREME COURT FOR ZAMBIA
SCZ/8/69/2010
HOLDEN AT LUSAKA **Appeal No 120/2010**
(Civil Jurisdiction)

BETWEEN:

YORK FARMS LIMITED **APPELLANT**

AND

CEE CEE FREIGHT AND SUPPLIERS LIMITED **1ST RESPONDENT**

QUEST CARGO MANAGEMENT LIMITED **2ND RESPONDENT**

CORAM: Chibesakunda, Ag CJ, Mwanamwambwa and Chibomba, JJS
On 14th August, 2012, and 27th September, 2013

FOR THE APPELLANT **:** Mr. S Chisenga of Messrs Corpus Legal Practitioners

FOR THE 1ST RESPONDENTS **:** Mr. V. W Mutofwe and Mr. F Besa of Messrs Douglas and Partners

FOR THE 2ND RESPONDENTS **:** Not in attendance

JUDGMENT

Chibesakunda, Ag. C.J, delivered the Judgment of the Court.

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Cases referred to:

1. ***Lee Cooper Limited v C.H. Jeakins and Sons Limited [1965] 1 ALL ER 284***
2. ***Nkhata and others v The Attorney General (1966) ZR 124***
3. ***Khalid Mohammed v The Attorney General (1982) ZR 49***
4. ***Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited (2001) ZR 73***
5. ***Air France v Mwase Import & Export Company Limited (2000) ZR 66***
6. ***Aqualon (UK) Limited and Another v Vallana Shipping Corporation and others [1994]1 Lloyds Law Reports 669***
7. ***Zambia Electricity Supply Corporation v Redlines Haulage Limited (1992) ZR***

Works referred to:

1. ***Friedman on Commercial Law***
2. ***Chitty on Contract Volume 1 and 2***
3. ***Halsbury's Laws of England 4th Edition Reissue Volume 1(2)***
4. ***Cheshire and Fifoot's Law of Contract 10th Edition***
5. ***White Book 1999 Edition Order 18/15/4***

This is an appeal against the Judgment of the High Court dated 26th February, 2010 dismissing the Appellant's claim for refund and damages for breach of contract. The Appellant (Plaintiff in the

court below) was claiming against the 1st Respondent (Defendant in the court below) the following:

i. ***Refund of $60,464.67 paid to the Defendant between October and November 2008 for clearing and transportation of seven containers of coco peat from***

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Durban in South Africa to Lusaka whose consideration had wholly failed.

ii. ***Reimbursement of $50,445.40 being costs incurred to transport and clear the containers aforesaid as a result of the Defendant's default.***

iii. ***Reimbursement of $1,000.00 being transport costs incurred in following up on the containers to and from Durban.***

iv. ***Exemplary and punitive damages for breach of contract***

v. ***Further or other relief***

vi. ***Costs***

The undisputed facts were that the Appellant entered into a contract with the 1st Respondent in October 2008 for the clearing and transportation of eight containers of coco peats from Durban in South Africa to Lusaka. Since the containers were arriving in batches and on different dates the 1st Respondent quoted and was paid the following sums:

(i) US$25,792 on 22nd October, 2008 for three (3) containers

(ii) US$25,792 on 6th November, 2008 for a further three (3) containers

(iii) US$17,478 on 20th November, 2008 for the last two (2) containers

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But by 29th December, 2008 only one container had arrived at the Appellant's premises.

The Appellant's only witness PW1 Godfrey Munalula attested that the whole time the 1st Respondent had been lying that the containers were on their way. Upon noticing that the remaining containers were delaying, PW1 set out to Durban where he found that the containers had been marooned and had been accruing charges for non-collection. Two containers had been opened thus exposing the coco peats to elements that had rendered them unusable. This forced the Appellant incur more costs to engage another transporter to ferry the containers to Lusaka and settle demurrage charges.

In its testimony, the 1st Respondent admitted that it had been contracted by the Appellant to find a transporter to ferry its containers. Accordingly the 1st Respondent hired the 2nd Respondent (the Third Party in the court below). The 1st

Respondent averred that it was the 2nd Respondent who had failed to perform the contract forcing the Appellant to incur additional costs. The 1st Respondent argued that the 2nd Respondent, and not the 1st Respondent, should be made to meet the Appellant's costs. That the 1st Respondent as an agent had performed all its functions owed to the Appellant. The 1st Respondent submitted that all the periodical updates it gave to the Appellant on the status of the containers

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were merely relayed as they were received from the 2nd Respondent. It was the evidence of DW1 Chrispin Chiinda at page 83 of the Record of Appeal that when he realized that the 2nd Respondent had not honoured the agreement, he commenced separate proceedings under cause number 2009/HPC/0003. That consequently, the 1st Respondent made a separate application during trial for third party proceedings against the 2nd Respondent. That Judgment for Third Party proceedings was passed in default of appearance against the 2nd Respondent on 9th December, 2009. DW 1 testified at page 160 of the Record that the 1st Respondent also applied to attach the 2nd Respondent's property but that application was dismissed.

Though Counsel for the Appellant and 1st Respondent undertook to file written submissions, the court only received submissions from the 1st Respondent which were to the effect that the 1st Respondent company was a customs and clearing agent,

and not a transporter. That it was appointed to find a cheaper transporter. That although the appointment was not reduced in writing it was evidenced by a number of emails. It was the 1st Respondent's submission that once the contractual relationship between Principal and the Third party had been established, the agent generally dropped out of the picture.

In his Judgment, the learned Trial Judge found as a fact that there was an implied agency arising from the conduct or situation

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of the parties. The learned Trial Judge also found that from the evidence and the e-mails exchanged between the two parties, the Appellant was aware that the 1st Respondent was a clearing and forwarding agent and not a transporter. The learned Trial Judge was of the view that if the Appellant was not aware (that the 1st Respondent was a clearing and forwarding agent and not a transporter) or was not satisfied with the choice of transporter, the Appellant would have immediately made its objection known to the 1st Respondent. The learned Trial Judge further found that although the tax invoices issued by the 1st Respondent gave an impression that the company was a transporter, the said invoices ought to have been understood in the context of the whole transaction. In his view, the invoices could not be relied upon to support the contention that the 1st Respondent was a transporter.

Before concluding his Judgment, the learned trial Judge said that although the 1st Respondent had argued that he was only an agent and therefore was not liable to the full extent of the Appellant's claim, agency came with duties and liabilities. An agent had a duty generally to exercise reasonable care. The learned Trial Judge criticized the 1st Respondent for the unusual manner he released the Appellant's money to the third party in that he only obtained acknowledgement of receipt after the event. He also noted that the 1st Respondent included some additional charges for each

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container in the tax invoice which the Appellant may not have been aware of or may not even have approved of it. The learned Trial Judge also recited the duties of an agent from the learned authors of Halsbury's Laws. Namely the duty to avoid conflict of interest, duty to make full disclosure, duty not to make secret profit from the agency without the principal's knowledge and duty not to take a bribe or secret commission from the third party. The learned Trial Judge then said he would have awarded the Appellant US$2,214.00 paid over and above the US$6,000.00 for each container but the pleadings precluded him from doing so and from making a decision on whether or not there was a breach of duty. The learned Trial Judge dismissed the Appellant's claim for a refund of US$60,464.67 and awarded costs to the 1st Respondent to be taxed in default of agreement.

Being dissatisfied with the Judgment the Appellant appealed to this Court and raised the following four grounds of appeal:

(i) The court below erred both in law and fact when it held that the 1st Respondent who was engaged by the Appellant as its clearing and forwarding agent was not engaged to transport the goods subject of this appeal;

(ii) The court below erred both in law and fact when it held that the Appellant had instructed the 1st Respondent to appoint the 2nd Respondent as the

transporter of the goods subject of this appeal when in fact the indisputable evidence was that the Appellant had instructed the 1st Respondent as its clearing and forwarding agent, an assignment which involved clearing the goods with the customs authorities and forwarding them to the Appellant's premises;

(iii) The court below erred both in law and fact when it failed to take into consideration the 1st Respondent's claim against the 2nd Respondent under cause number 2009/HPC/0003 and the third party proceedings in which the 1st Respondent was claiming against the 2nd

Respondent as a Principal and not on behalf of the Appellant; and

(iv) The court below erred both in law and fact when it failed to award damages for breach of fiduciary duty and account for secret profits by the 1st Respondent on account of the fact that the Appellant had not pleaded for such relief when in fact the Appellant had pleaded for further and other relief.

At the hearing of this appeal, Counsel for the Appellant made an application, which was granted, to file into court Heads of Argument on which he relied entirely. The gist of the arguments put

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forward for ground one was that the court below grossly misdirected itself when it came to the conclusion that the 1st Respondent was not engaged to help the Appellant to transport the goods despite having been engaged as a forwarding and clearing agent. That the findings of the trial court were not sound because they failed to take into account evidence of payments made to the 1st Respondent for freight from Durban to Lusaka and clearing fees. That there was no doubt that the 1st Respondent was paid for transportation in its capacity as a clearing and forwarding agent. The Appellant further submitted that there was no contractual relationship between the Appellant and the 2nd

Respondent who the 1st Respondent engaged to transport the Appellant's goods from Durban to Lusaka. Similarly, the trial Court ought to have found the 1st Respondent liable in respect of the Appellant's claim because the Appellant did not have a contractual relationship with the 2nd Respondent who in the circumstances qualified as a contractor of the 1st Respondent. Therefore, it was submitted that there was no privity of contract between the Appellant and the 2nd Respondent who was solely contracted by the 1st Respondent. This court was invited to read the case of ***Lee Cooper Limited v C.H. Jeakins and Sons Limited***[1] to support the above prepositions. Counsel for the Appellant said although the Appellate Court did not easily reverse findings of fact of a lower court, this court could and should in the present case disturb the findings in accordance with our decisions in ***Nkhata***

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and others v The Attorney General[2] and ***Khalid Mohammed v The Attorney General***[3]***.***

Counsel for the 1st Respondent equally made an application to file into court Heads of Argument which he relied on completely. He submitted on ground one that the learned Trial Judge was on firm ground when he held that the 1st Respondent was engaged as an agent to help the Appellant find a transporter for its coco peat shipment. He submitted that it was not in dispute

that the appointment of the 1st Respondent as agent was not reduced in writing but the correspondence between the two parties was well documented leaving no doubt as to the nature of relationship between them. Counsel argued that there was undisputed evidence from the emails, some of which the Appellant had chosen to ignore, that 1st Respondent was a customs clearing agent. That the 1st Respondent was not a transporter and had never held itself out to be as such. Counsel argued that there were no findings of fact warranting a reversal by the Appellate court. Consequently the cases cited by the Appellant, urging this court to reverse the findings, were not applicable.

Counsel argued that evidence before the court pointed to the existence of the relationship of Principal and Agent between the Appellant and the 1st Respondent. He submitted that the Appellant's argument that there was no contractual relationship

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with the 2nd Respondent was wrong. That the case of ***Lee Cooper Limited v C.H. Jeakins and Sons Limited***[1] was distinguishable as the case referred to a subcontract and not an agency and the laws governing subcontracts were different. In subcontracts the party subcontracted owed a contractual duty to the party who had engaged them, while in an agency the middle person acquired no rights or obligations of his own from the contract and

fell off from the scenario. The 1st Respondent argued that since an agency had been established, the question to be answered was whether a Principal could claim compensation from his agent for a loss arising from the default of a third party. It was the 1st Respondent's submission that this was wrong at law. Counsel referred us the learned author ***Friedman on Commercial Law***[1] who stated:

"Once the contractual relationship between the principal and the third party has been established by the agent A, A generally drops out of the picture-his task, that of bringing P (his Principal) and T (the third party) together has been fulfilled- and the rights and obligations contained in the contract created between P and T belong solely to P and T. A generally has no rights or liabilities under that contract."

Counsel submitted that the Appellant was not entitled to recover from the 1st Respondent as the law governing agency precludes the principal from claiming refunds and or compensation from his own

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agent on account of default of the third party. That there was privity of contract between the Appellant and 2nd Respondent and that there was none between the 1st Respondent and the 2nd Respondent since the 1st Respondent being an agent was not party to the contract.

Having examined the evidence in the record and submissions in the Heads of Arguments the main issue is whether there existed an agency relationship between the Appellant and the 1st Respondent and the extent of their contractual relationship as between each other and with the Third party. To determine how an agency comes into existence, we have looked at some authorities and we are indebted to both Counsel for the authorities they provided. We looked at the learned authors of ***Chitty on Contract[2] Volume 2 at pp 1-2 para 31-001*** where they stated that:

> ***"At common law the word agency can be said to represent a body of general rules under which one person, the agent has power to change the legal relations of another, the principal. The full paradigm relationship of principal and agent arises where one party, the principal consents that another, the agent, shall act on his behalf and the agent consents so to act. The consent is said to confer authority on the agent and from this authority stems his power…"***
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The learned author, ***Friedman on Commercial Law[1]*** stated:

> ***"The Agent may be called anyone of a number of terms-a representative, a broker, a factor- but whatever name he is in practice, he is in law an agent***

> ***if he is employed to affect the legal relations of his principal, usually by bringing a contract between his principal and a third party… in all these examples, the function of an Agent is to act on behalf of his principal in bringing about a contract between his principal and a third party."***

Further, ***Chitty on Contract[2] Volume 2 at p5 para 31-006*** states:

> ***"The consent of the principal, which is regarded as the basic justification for the agent's power to affect his principal's legal relations, may of course be implied from his conduct or from his position with regard to the agent or vice versa."***

From the authorities cited above, we agree with the learned Trial Judge that there was in existence an agency relationship between the Appellant and the 1st Respondent. The Appellant in this case was the Principal who contracted the 1st Respondent as Agent to handle his shipment of coco peat containers. The fact that the appointment was not reduced in writing or that the terms principal and agent were not used expressly does not negate the agency.

Neither of these is necessary to empower an agent to act. In fact the learned authors of ***Halsbury's Laws of England[3] Volume 1(2) at p4 para 1*** put it this way:

> ***"Whether that relation exists in any situation depends not on the precise terminology employed by the parties to describe their relationship but on the nature of the agreement or the exact circumstances of the relationship between the alleged principal and agent."***

As correctly observed by the learned Trial Judge, from the evidence and the plethora of electronic mail exchanged between the Appellant and the 1st Respondent, an agency could be inferred or implied from the conduct or situation of the parties. However, we hold a firm view that the learned Trial Judge ought to have gone further to determine the relationship between the 1st Respondent and the Third Party. By having not done so, the trial court left the Appellant without remedy. This flew in the teeth of the maxim, ***"Equity will not suffer a wrong to be without a remedy."***

Counsel for the 1st Respondent argued forcefully that the 1st Respondent was an agent whose sole function was to establish legal relations between the Principal and the Agent and that once that relationship was established, he dropped out of the picture and was not a party to the contract. Furthermore, that the Agent

did not have any rights and obligations of his own under that contract

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except as between the agent and the principal. We agree with Counsel. That is the general position of the law. However, it does not apply to the case before us. We are fortified in this position by the learned authors of ***Cheshire and Fifoot's Law of Contract[4] at p431***, who stated:

> ***"The general rule is that the agent drops out, but once more whether he does so or not depends essentially upon the intention of the parties. It is still a question of construction, dependant inter alia upon the form of the contract or the nature of the agent's business, whether they intended that the Agent should possess right and liabilities".***

From the evidence, PW 1 in cross examination at page 138-139 of the record, stated that the Appellant was introduced to the 1st Respondent by the company that supplied the coco peats. The Appellant was advised that the 1st Respondent could help with transportation since they had assisted other Zambian farmers to transport their coco peats from Durban to Lusaka. The Appellant had never been to the 1st Respondent's premises. All the Appellant knew was that the 1st Respondent was in clearing and forwarding and that transportation was an incidence of clearing and forwarding. We think that this was the general public

perception, which we take judicial notice of. That freight forwarders are normally assumed to take control of all or any incidentals in the

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cargo handling chain, including carriage. Furthermore, the tax invoices exhibited at pages 64, 66 and 68 were prepared by the 1st Respondent and not the 2nd Respondent as the alleged Third Party and stated clearly that the quotation was for transportation and clearing from Durban to Lusaka. DW 1 said its agency commission was reflected as handling fees and but during cross examination, could not justify why it was not stated expressly. (See pages 152-154 of the Record). Further, at no time did the Appellant have any direct dealings with the Third Party (2nd Respondent) (See page 148). Neither was there any evidence that the Third Party (2nd Respondent) was aware of the Principal (Appellant). Generally, the law treats each circumstance differently. For instance, where the Principal is known to the Third Party and where he is not known to the Third party or where he is known but not named to the Third Party at the time the contract was being made. The prima facie rule is that if the contract is made for a named Principal, then the Principal alone can sue or be sued. Where, however, the name of the Principal has not been disclosed an intention that the Agent shall be the contracting party will be more readily inferred. ***(See Cheshire and Fifoot's Law of Contract[4] pages 431 and 433).***

Given the circumstances of this contract and the nature of the business, it could be expected that the 1st Respondent would automatically drop out from the picture. However, in this case, although Counsel argued forcefully that the 1st Respondent was not

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a transporter and neither did it hold itself out to be a transporter, as we have stated earlier, evidence on record suggests otherwise. Looking at the evidence, it is clear that the 2nd Respondent was sub-contracted by the 1st Respondent. As such, we find that there was no privity of contract between the Appellant and the 2nd Respondent. To support this proposition we adopt the ratio decidendi in ***Lee Cooper Limited v C.H Jeakins and Sons Limited***[1] that as a contractor, the Third Party (2nd Respondent) owed a contractual duty to the Agent (1st Respondent) and not the Principal, the Appellant. In that case, Marshall J stated, that the Agent was acting as a Principal when they entered into the contract with Plaintiff and the Defendant. In any event, we are bound by our decision in ***Cavmont Merchant Bank Limited v Amaka Agricultural Development Company Limited***[4] where we said,

> ***"The law of agency is very clear. Where an agent is a contracting party, he will be held personally liable even if he names his Principal."***

Similarly, where there is a sub-agent, as general rule, there is no privity of contract between the Principal and the sub-agent, the sub-agent being liable only to his employer, the Agent. Although this rule would not ordinarily apply where the Principal was a party to the appointment of the sub-agent or the Principal has subsequently adopted his acts, an Agent is, nevertheless liable for the act and defaults of his sub-agent. (See ***Halsbury's Laws of***

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England[3] page 52 para 69 and page 112 para 78). Ground one of the appeal therefore succeeds.

On ground two, Counsel for the Appellant submitted that the scope of the 1st Respondent's instructions was to ensure that the Appellant had received the goods it paid for. That in contracts there was an implied obligation that the agent so contracted ought to transport the goods. We were referred to the case of ***Air France v Mwase Import & Export Company Limited[5]*** and ***Aqualon (UK) Limited and Another v Vallana Shipping Corporation and others[6]***, to support the proposition that the obligations of a clearing and forwarding company did not exclude transportation and that among other roles forwarding agents were contracted for carriage. Counsel also cited from the learned authors of ***Chitty on Contracts Volume 1 and 2[2]***, the definition of a forwarding agent and a contract by implication. Counsel

submitted that given the authorities cited above, the court below ought to have sustained the Appellant's claim.

In response, Counsel for the 1st Respondent argued that the Appellant's assertions were not supported by evidence. Counsel submitted that the aspect of clearing goods and forwarding them to Lusaka never arose at trial. That it was it was a settled principle of law that evidence not adduced at trial could not be considered on appeal. Counsel submitted that the Appellant could not be seen to

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be seeking to imply conditions or terms into the contract to determine the nature of relationship between the Appellant and the 1st Respondent. The question of what the 1st Respondent was assigned to do was settled. He was an agent contracted to find transporter.

We shall not dwell much on ground two as the issues raised have been covered in ground one. Suffice to say, we do not agree with the 1st Respondent that the issue of forwarding the shipment to Lusaka never arose at trial. The issue of transportation, forwarding or whatever name it may be called has been the contention of the Appellant at the trial court and before this court. Ground two therefore succeeds.

As regards ground three, Counsel for the Appellant submitted that the Court below should have taken judicial notice that the 1st Respondent was claiming against the 2nd Respondent as Principal rather than as Agent of the Appellant in a subsequent action under cause number 2009/HPC/0003. Counsel for the 1st Respondent argued that as an Agent, the 1st Respondent was entitled to sue on behalf of the Appellant, the Principal. Further that it was wrong for the Appellant to include proceedings of another action in the Record as that was tantamount to bringing new issues on appeal. Having established that there was privity of contract between the 1st Respondent as Agent and the 2nd Respondent as sub-agent or sub-

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contractor, and none between the Appellant and the 2nd Respondent, the 1st Respondent was perfectly within its right to sue separately on its own behalf. Further, as regards, the contractual relationship between the 1st Respondent and the Appellant, the 1st Respondent was liable to the Appellant for the acts or omissions of the 2nd Respondent, the sub-Agent in this case. Ground three must fail.

The Appellant did not argue ground four. We take it that the Appellant abandoned the ground. In any case, the ground must fail. The learned Trial Judge was right in stating that he could not make a determination on breach of fiduciary duty because it was not specifically pleaded. We thus follow the principle pronounced

in ***Zambia Electricity Supply Corporation v Redlines Haulage Limited***[7] where we stated:

> ***"It is important for litigants to follow the rules of pleadings and in certain cases failure to do so may be fatal to ones case."***

In addition, the Court will always grant a Plaintiff any general or other relief to which he is entitled provided it be not "**inconsistent with that relief that is expressly asked for**." (See ***White Book***[5] ***1999 Edition Order 18/15/4***)

We are satisfied that this is a case where this court can disturb the findings of fact of a lower court as espoused in our previous decisions in **Nkhata and Others vs Attorney General**[2]

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and **Khalid Mohammed vs Attorney General**[3]. Having succeeded in two of the four grounds, we allow the appeal with costs to the Appellant to be taxed in default of agreement.

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L. P. CHIBESAKUNDA
ACTING CHIEF JUSTICE

..... **.....**

H. CHIBOMBA
SUPREME COURT JUDGE

M. S. MWANAMWAMBWA
SUPREME COURT JUDGE