IN THE SUPREME COURT OF ZAMBIA **Appeal No. 165/2016**
HOLDEN AT LUSAKA **SCZ/8/138/201**

(Civil Jurisdiction)

BETWEEN:

OSSIE MANGANI ZULU **APPELLANT**

AND

ROBBIE PHIRI **1ST RESPONDENT**

HELLEN M. PHIRI **2ND RESPONDENT**

Coram: **Hamaundu, Malila and Kaoma JJS**
On 9th July, 2019 and 19th September, 2019

For the Appellants: Dr. O. M. M. Banda of Messrs OMM Banda & Company

For the Respondent: Mr. J. Chibalabala of Messrs John Chibalabala Legal Practitioners

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JUDGMENT

Malila, JS, delivered the Judgment of the Court.

Cases referred to:

1. *Industrial Gases Ltd. v. Waraf Transport Ltd and Mussah Mogeehaid (1995-1997) ZR 183.*
2. *Cavmont Bank Ltd. v. Amaka Agricultural Development Ltd. (SCZ Judgment No. 12 of 2001)*
3. *D. Landless (M/W) v. Attorney-General (1970) ZR 56.*
4. *Alfred Siakasipa v. Attorney-General and 2 Others (1995/HP/2313).*
5. *Mushota Associates v. Chasika Enterprises Ltd. And 2 Others (2005/HPV/0099).*
6. *Williams and Another v. Natural Life Health Foods and Another (1998) ALL ER 577.*
7. *Ethiopian Airlines Ltd. v. Sunbird Safaris and Others (2007) ZR 235.*

8. *Sara Sinjani and Edina Mvunga v. Chilenga Musonda, Appeal No. 212 of 2013.*
9. *Standard Chartered Bank Ltd. v. Attorney-General and Siafumba (1973) ZR 140*
10. *Attorney-General v. EB Jones Machinist Ltd (2000) ZR 114.*
11. *Secretary General of the United Independence Party v. Elias Mark Chisha Chipimo (1983) ZR 125.*
12. *Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v. United National Independence Party (1978) ZR 388.*
13. *National Milling Co. Ltd v. A Vashee (suing as Chairman of Zambia National Farmers Union) (SCZ Judgment No. 23 of 2000).*
14. *Beaumont v. Meredith A 3 V a B. 18.*
15. *Grossman v. The Glanville 28 Sol. J 513.*
16. *Davies v. Barnes Webster & Sons Ltd. EWHC (Chancery Division) unreported. 29 June, 2011.*
17. *Kelner v. Baxter (1866) LR 2CP 174.*
18. *Chishimba Chipasha Mambwe v. Millington Collins Mambwe (Appeal No. 222/2015).*

Legislation referred to:

1. *Halsbury's Laws of England, 4th Edition, vol. 6 para. 275*

The action that has culminated in the present appeal was commenced by writ of summons as way back as October 2009 – nearly ten years ago. It originally had four plaintiffs and two defendants to it. The claims, as endorsed on the writ, were a classic repudiation of all the tenets of lucid, good claim structuring for endorsement on originating process or pleadings. They were quite unconventionally structured as follows:

(a) An order that the defendants' intention was to defraud the University of Zambia and the club of the sum of US$2,696.00.

(b) Recommendation to the Director of Public Prosecutions for possible criminal prosecution of the defendants for intending to defraud the University of Zambia and the club out of the sum of US$2,696.00.

(c) Damages for being misjoined to Cause No. 2006/SSP/0350 in the Subordinate Court.

(d) Damages for defamation of character.

(e) Damages for trauma.

The 4th plaintiff claims:-

(f) Damages for embarrassment and inconvenience caused by the execution of the writ of fifa against him by the Sheriff of Zambia.

(h) Payment of the repair costs he incurred on preparing of his damaged properties.

(i) Costs.

(j) Interest and any other relief the court may deem fit.

The factual background was that the appellant, who was the fourth plaintiff in the lower court, was an employee of the University of Zambia and a member of the Executive Committee of the University of Zambia Staff Sports Club (the Club), an unincorporated entity operating under the auspices of the University of Zambia. The first and second respondents were

husband and wife respectively and also employees of the University of Zambia.

The first respondent was the Chairman of the Club in 2001, when *Transport Aid, Wheels for Africa,* donated to the Club, a motor vehicle, namely, Toyota Townace. Associated costs such as freight and insurance were to the donee's account. In this case, the donee was reflected as the University of Zambia.

The first respondent represented to the membership of the Club that he had sourced, on behalf of the Club by way of loan from a third party, the sum of US$2,696 to settle the freight, clearing, insurance and other incidental charges in respect of the donated motor vehicle. The membership of the Club subsequently ratified the borrowing of US $2,695 and entered into a formal agreement with the lender, a third party who happens to be the second respondent. The loan was to be repaid in twelve months.

What the appellants and his colleagues in the Club later came to discover, beggar belief. All the charges and bills associated with the clearance of the donated motor vehicle were in fact, to the account of the University of Zambia and had been

settled through an arrangement between the University of Zambia management and the Ministry of Finance.

Upon discovering these facts, the Club declined to honour the loan agreement, which its Executive Committee henceforth treated as having been procured through misrepresentation and deceit on the part of the first respondent. The second respondent, thereupon, commenced legal action in the Subordinate Court against the appellant and three of his colleagues in their capacity as office bearers of the Club. The action was for the recovery of the money lent to the Club which, at that time, translated to the equivalent sum of K12, 447,432.

The second respondent subsequently obtained a default judgment in the sum of K16,508,432. The appellant and other defendants believed they had been wrongfully sued for an obligation that truly belonged to the Club. This prompted the appellant and his colleagues to apply for a stay of execution pending an application for misjoinder. The application for a stay of execution was granted and the date for hearing the application for misjoinder set for the 20th March 2006. On that day, however, there was no appearance for the applicants. The application was

thus struck off with liberty to restore. The stay of execution was thereupon discharged.

Five days later, execution of the default judgment was levied against the appellant in the process of which an assortment of the appellant's household goods were seized. Those goods were only released upon the appellant obtaining another stay of execution, and against payment of K1,330,000 being Sheriff's seizure fees.

The prayer of the appellant and other defendants to the Subordinate Court action was finally answered when, in February 2009, that court struck off the appellant and his colleagues from the second respondent's action for misjoinder.

The sequence of events up until his misjoinder had so severely aggrieved the appellant that he commenced legal proceeding in the High Court, claiming the medley of relief that we earlier alluded to, which were set out in his statement of claim.

The respondents denied the appellant's claims, with the second respondent counter claiming the US$2,696. This counter claim was, on application by the appellant, dismissed for being

statute barred. As we observed at the opening paragraph of this judgment, some of the appellant's claims were unconventionally crafted and were thus also struck out as they did not disclose a cause of action. At the time of trying the action, the following claims, from the original ones as framed, had remained subsisting:

(a) **Damages for embarrassment and inconvenience caused by the execution of the writ of fifa against him by the Sheriff of Zambia.**

(b) **Damages for loss of use of his household properties seized by the Sheriff of Zambia.**

(c) **Payment of the repair costs he incurred of his household properties seized by the Sheriff of Zambia.**

(d) **Costs.**

(e) **Interest and any other relief the court may deem fit.**

After hearing the parties' evidence and listening to the submissions made on their behalf, the learned High Court judge held that the respondents were liable in their individual capacities for the Club's loan contracted under the loan agreement with the second respondent. According to the learned judge, there was a common interest between the appellant and his colleagues and the members of the Club who sanctioned the

agreement to borrow the money. The judge thus held that it followed that the execution against the appellant's goods was legitimately done. He thus dismissed the whole action.

The appellant is dissatisfied with that judgment and has appealed on five grounds as follows:

1. **The learned trial judge erred and misdirected himself in fact and law by holding that since the appellant was sued in his capacity as a representative of the UNZA Sports Club the execution of the writ of fifa on his personal and private household properties was legal, lawful and regular despite holding that nothing was done outside their authority.**

2. **The learned trial judge erred and misdirected himself in fact and law by holding that the appellant was personally held liable for entering and executing the loan agreement between the 2nd respondent and UNZA Sports Club on behalf of the said sports Club in the presence of the evidence revealing that the said club is under the University of Zambia who was and is capable of being sued or sue on behalf of the said club despite holding that there was nothing done outside their authority.**

3. **The learned trial judge erred and misdirected himself in law and fact by determining the matter as if it was an appeal from the subordinate Court by holding the appellant and others were properly sued.**

4. **The learned trial judge erred and misdirected himself by holding that the respondents were not liable for the execution of the writ of fifa against the appellant on his personal and**

private household goods despite acknowledging the principles set by this honourable court in the cases of *Standard Bank Limited v. Attorney General and Siafumba (1973) ALR 140* and *Attorney General v. E. B. Jones Machinist Limited (2000) ZLR 114.*

5. **The learned trial judge erred and misdirected himself by not entering judgment in favour of the plaintiff against the 1st defendant despite holding that the only recourse available to the plaintiff is against his members including the 2nd defendant with whom he had a common interest.**

The learned counsel for the appellant filed heads of argument upon which he relied at the hearing of the appeal.

In regard to ground one of the appeal, Dr. Banda, for the appellant, submitted that the Club is a University of Zambia internal department running the University's staff sports activities. He referred us in this connection, to clauses 1.1, 2.1, 3.1, 3.3, 6 and 7 of the Club's Constitution. Those provisions, in paraphrase, stated the name and the sponsor of the Club (being the University of Zambia) as well as its situation and official address – all of these being those of the University of Zambia. The objectives of the Club as well as its emblem, are other matters mentioned in the provisions to which the learned

counsel referred us to. They all, without doubt, imply a very close relationship between the Club and the University of Zambia.

The learned counsel quoted a portion of the loan agreement which read as follows:

> **LOAN AGREEMENT**
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> **THIS LOAN AGREMENT MADE THE SIX (6TH) DAY OF FEBRUARY, 2002 BETWEEN Hellen M. Phiri of Flat No. 2 Sep, Simon Mwansa Kapwepwe Road, Avondale, Lusaka, Zambia, herein called "Lender" of the part and the University of Zambia Staff Sports Club (UNZASSC) a body under the University of Zambia (hereinafter called "Beneficiary" of the other part WITNESETH as follows:**

Dr. Banda submitted that the agreement was executed by the appellant and four others on behalf of the Club in their capacities as office bearers of the Club. In so doing, they disclose that they were executing the agreements as agents of the University of Zambia which owned the Club. It was his further submission that, where an agent shows proof that he was acting for a principal and did so within his authority and mandate, and the agent furthermore makes full disclosure, he is not liable. Counsel cited the cases of **Industrial Gases Ltd. v. Waraf Transport**

Ltd and Mussah Mogeehaid[1] and **Cavmont Bank Ltd. v. Amaka Agricultural Development Ltd.**[2].

Not only that, Dr. Banda also cited a multitude of High Court judgments including **D. Landless (M/W) v. Attorney-General**[3], **Alfred Siakasipa v. Attorney-General and 2 Others**[4], **Mushota Associates v. Chasika Enterprises Ltd. and 2 Others**[5], all in the belief that they would support the submission he was making, that an agent is not liable for acts and omissions that can properly be attributed to the principal where the capacity of the agent is made known.

Dr. Banda then referred us to specific aspects of the recorded testimony of the witnesses in the lower court the purpose of which was to show the chronology of events and the capacity in which the appellant and others acted when the loan agreement was contracted. In counsel's view, the appellant was a victim of the respondents and the Club's executive at the time of the loan agreement in 2001.

The learned counsel also referred us to the case of **Williams and Another v. Natural Life Health Foods and Another**[6] and quoted a

passage from that judgment which dealt with the personal liability of a director of a company.

Dr. Banda did not leave matters there. He also cited the case of **Ethiopian Airlines Ltd. v. Sunbird Safaris and Others[7].** It will be recalled that, that case dealt with the personal liability of a director who allowed a company to run fraudulently. The learned counsel cited other case authorities which we, with respect, think have no application here.

In ground three, the appellant seeks to fault the trial judge allegedly for determining the matter as if it were an appeal from the Subordinate Court. The reason in support of that submission, according to counsel for the appellant, is that the lower court held that the appellant and others were properly sued in the Subordinate Court. The learned counsel submitted that the court below delved into the merits and demerits of the matter that was before the Subordinate Court when the action before him did not go to the learned lower court judge by way of an appeal. He cited the case of **Sara Sinjani and Edina Mvunga v. Chilenga Musonda[8]** in which we condemned the lower court judge who on appeal, from the Deputy Registrar's refusal to hear the

appellant's application, dealt with a totally different issue of multiplicity of action, which was not the subject of the appeal.

Turning to ground four of the appeal, the appellant sought to challenge the holding by the lower court that the respondents were not liable for the execution of the writ of fifa against the appellant on his personal and private household goods despite acknowledging the authorities available on the point.

Counsel outlined that although the appellant and others were sued in their capacities as office bearers of the Club, that Club was, in truth, part of the University of Zambia. According to counsel, the second respondent, upon obtaining judgment, should have pursued the University of Zambia for the recovery of the judgment sum and not the appellant and other committee members of the Club.

Dr. Banda contended that there was no basis for holding the appellant liable for the debt of the Club, given that the appellant was disjoined from the proceedings in the Subordinate Court. Following the disjoinder, all actions against the appellant in the Subordinate Court became, according to Dr. Banda, illegal, unlawful and null and void.

The learned counsel observed that the second respondent engaged the Sheriff of Zambia to levy execution against the appellant in his official capacity as an executive member of the Club. The Sheriff of Zambia was thus the agent of the second respondent. Counsel quoted the cases of **Standard Chartered Bank Ltd. v. Attorney-General and Siafumba**[9] and **Attorney-General v. EB Jones Machinist Ltd.**[10] to support his submission.

Ground five alleges error on the part of the lower court judge in entering judgment in favour of the appellant despite holding that the only recourse available was against the Club's members, including the second respondent with whom the appellant had a common interest. Counsel contended that the respondent, like the appellant, were members of the Club and should have been party to the judgment in the court below. Counsel prayed that we uphold the appeal.

The respondents filed their heads of argument upon which the learned counsel relied.

In regard to grounds one and two, it was contended on behalf of the respondents, that the lower court was right to hold as it did because members of the managing committee of an

unincorporated entity such as the Club do incur personal liability for acts allegedly performed on behalf of such entity. Furthermore, that there was no evidence to show that the Club was a department of the University of Zambia or an integral part of it. The case of **Secretary General of the United National Independence Party v. Elias Mark Chisha Chipimo**[11] was cited as authority for the proposition that a club is not corporation sole and does not have a distinct legal character.

The learned counsel then quoted a multitude of authorities to support the submission that liability attaches to officers of a club where the club incurs liability. Notably, the learned counsel quoted a passage from **Halsbury's Laws of England, 4th Edition, vol. 6 para. 275** as follows:

> **"Personal Liabilities of Club's Officers and Agents Trustees,**
>
> **Members of the Management Committee or other agents, contracting or purporting to contract on behalf of a club, may incur personal liability, either by reason of the form or terms of the contract, or because in making the contract, they are acting in excess of their authority."**

Counsel also cited the case of **Cavmont Merchant Bank Ltd. V. Amaka Agricultural Development Company Ltd.**[2] where the Supreme

Court stated that where an agent is a contracting party he will be held personally liable even if he names a principal. To the same intent, counsel referred us to the case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v. United National Independence Party**[12].

We were urged to dismiss ground one and two of the appeal.

With respect to ground three, Mr. Chibalabala's response was simply that the lower court judge never determined the matter as if it was an appeal from the Subordinate Court. He took into account all the evidence of the witnesses before him. The learned counsel extracted portion of the evidence of witnesses in the lower court to demonstrate what he meant. He prayed that we dismiss ground three.

The learned counsel for the respondent made a joint response to grounds four and five. The point he pressed was that there was no misdirection on the part of the lower court judge when he held that the respondents were not liable for the execution of the writ of fifa against the appellant which saw the seizure of the appellant's personal and private household goods. This, according to Mr. Chibalabala, was in sync with the

principles of agency which the lower court judge correctly explained.

The point counsel made was that the second respondent had rightly sued the appellant and not the University of Zambia, which was not privy to the said agreement. As the appellant was misjoined from the proceedings well after the execution of the writ of fifa, he cannot claim damages for misjoinder and that claim was in fact struck out by the lower court judge.

Counsel referred us to the evidence of the appellant where he stated, in cross-examination, that he was not claiming anything from the second respondent, and elsewhere that the execution on him was legally done by the Sheriff of Zambia.

Counsel distinguished the case of **Attorney-General v. EB Jones Mechinists Ltd**[10], in the present case there was, unlike in that case illegality in the steps taken by the second respondent in the Subordinate Court when the writ was issued and execution conducted.

Mr. Chibalabala urged us to dismiss these two grounds of appeal too.

We are grateful to counsel for their exertions.

This appeal, in our view, brings to the fore the issue of the liability of members of unincorporated associations. It is all about the pitfalls of being on an executive committee of an unincorporated association. It also reminds us that such associations appear simple and hassle-free until they run into problems – usually when it is too late for members to absolve themselves of the responsibility.

In our considered opinion, the overarching question determinative of all the grounds of appeal, is whether it was legally correct for the second respondent to have sued the appellant for the debt of the Club in the subordinate Court. The answer to this question will invariably also answer the question whether execution against the private property of the appellant was legitimate in the circumstances. This will in turn resolve in substance, all the other grounds of appeal.

Under the current law in Zambia, an unincorporated association such as a social club, does not have a separate legal personality. This means that the law does not recognize such an association as a separate legal entity, distinct from its members

or its management committee. One of the consequences of this position is that a club cannot, in its own name enter into contracts; sue or be sued; take on a lease; own property; or employ staff.

Like other unincorporated associations such as political parties and partnerships, clubs generally lack legal capacity. The point was well articulated in the case of **Harry Mwaanga Nkumbula and Simon Mwansa Kapwepwe v. United National Independence Party**[12] cited by counsel for the respondent. The case involved, not a club, but a different form of unincorporated association called a political party, the United National Independence Party (UNIP).

That party was cited as a respondent in court proceedings. The Attorney-General, appearing on behalf of UNIP made a preliminary objection that UNIP, as an unincorporated body, was not a legal entity and could thus not be sued in its name. He equated UNIP to a member's club, and adopting the definition of a 'club', submitted that UNIP is a society of persons associated together for the purpose of the promotion of politics and as such had no legal existence apart from the members it is composed of.

It was held that an unincorporated body is not a legal entity and is, therefore, not capable of suing or being sued in its name. A materially similar conclusion was arrived at by this court in **National Milling Co. Ltd v. A Vashee**[13].

An ordinary club can only operate or undertake activities through its members as individuals. This is the view enforced in all leading cases such as **Beaumont v. Meredith**[14] and **Grossman v. The Glanville**[15]. The effect of the decision in all such cases is that where it is sought to hold a club liable for wrongs done or duties neglected, all the members must be made parties as individuals.

If money is borrowed under the rules of, or a resolution of a club or its executive management, for legitimate club purposes, the club members are liable to their committee for their proportionate share of money borrowed by the committee during their membership.

That the appellant in this case and his colleagues were members of a sports club which was an unincorporated entity, is not in dispute. Their responsibility as members did not just lie in paying club membership fees – assuming some were payable. As the club was not a separate legal entity, its members are

accountable for any claim or debts accumulated. They do not enjoy the protection of limited liability as they would if the club were incorporated (i.e. was a limited liability company).

What is worse is that the debt of the club, does not need to be split between all members. Members are jointly and severally, liable, which means that a creditor can pursue one or all the members as he sees fit. A creditor has only one right to action so that if he chooses to sue one member alone, he waives his right of action against other members.

In **Davies v. Barnes Webster & Sons Ltd. EWHC (Chancery Division)[16],** Barnes Webster & Sons, a company of builders, had been contracted to carry out works for a club. Mr. Davies was a member of the club's executive committee. A contract signed by the club's treasurer and witnessed by Mr. Davies, provided for payment by the club of an agreed sum plus other sums which might become payable under the contact. The building work was completed and the agreed sum paid by the club. However, an additional £47,000 for agreed variations to the contract, was not paid by the club. This created a claim by the builder.

A statutory notice demand was served on Mr. Davies in respect of the additional sum. Mr. Davies applied to have the statutory demand set aside on the basis that he was not personally liable for the debt. The court held that, on the face of it, a club member of an unincorporated association is not personally liable for the acts of those who entered into contracts on behalf of the association. Instead liability is to be determined on who had authority under the rules of the club. In this particular case it was the management committee who had been entrusted with the affairs of the rugby club and without evidence to the contrary, the court inferred that the club's treasurer was acting on the authority of the committee when entering into the building contract.

As a result, the members of the club's committee were personally liable under the contract and the builder had the right to seek payment from Mr. Davies as a member of the committee. Likewise, in the present case, there is no reason to hold otherwise than that the appellant who was a member of the executive committee and was authorized by the Club to contract the loan, was liable.

Dr. Banda referred us to numerous case authorities in support of the proposition that an agent who enters into a contract on behalf of a principal will not be liable where the fact of his agency is disclosed. We agree that elementary agency principles postulate so. Yet, the important point that the learned senior counsel appears not to have addressed is that the principal must exist. By existence in the present context, we mean physically or legally. While animate beings have a physical existence, metaphysical entities such as partnerships, companies and indeed clubs, lack any physical existence. What they may acquire is legal existence. Such legal existence comes about by incorporation.

In the case before us, the club was never incorporated. It lacked any legal existence. For good measure, we can add also that it had no physical existence either. It could thus not enter into a contract. The case of **Kelner v. Baxter**[17] is instructive.

Dr. Banda argued, with the help of a string of High Court decisions, that a director is an agent of a company and, therefore, that acts done by the director for and on behalf of the company are those of the company. We understand him to use that

analogy to illustrate liability of a club for the actions of its office holders. We do not wish to rehash our view that, provided the principal exists, there is a fair starting point to consider whether the acts of the agent can be properly attributed to the acts of the principal. Here we have stated why the alleged principal did not in law exist.

Perhaps for the benefit of the senior counsel for the appellant we must, in passing, state the attitude of this court towards uncalculated reference to High Court and other inferior court's judgments as authority in support of arguments made before us. In Penelope **Chishimba Chipasha Mambwe v. Millington Collins Mambwe**[18], we stated as follows:

> **We have previously stated that in keeping with the fundamental common law principles of *stare decisis* and judicial precedents, in an environment such as ours which is replete with both binding and persuasive case authorities of superior courts, it may well be a misapplication of intellectual efforts to attempt to persuade us through High Court decisions, unless there is paucity of authorities on a novel point. This is not the case here.**

We can only re-echo those sentiments. The point we make is simply that unless there is no directly applicable Supreme Court judgment or judgment from courts of similar or coordinate

jurisdiction, counsel should not routinely cite High Court judgments even if they are reported. There is much more precedential value in unreported judgments of this court than thee is in reported inferior court judgment.

For the reasons we have given in this judgment, it would follow that all the grounds of appeal raised by the appellant should suffer the same fate. They are without merit and are accordingly dismissed.

The respondents shall have their costs.

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E. M. HAMAUNDU
SUPREME COURT JUDGE

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M. MALILA
SUPREME COURT JUDGE

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R. M. C. KAOMA
SUPREME COURT JUDGE