

IN THE SUPREME COURT OF ZAMBIA
HOLDEN AT LUSAKA
(Civil Jurisdiction)

Appeal No. 43A/2011

BETWEEN :

AMCHILE IMPORT & EXPORT LIMITED

1ST APPELLANT

EMMANUEL KASINSA

2ND APPELLANT

CHILESHE KASINSA (T/A Amchile Delights)

3RD APPELLANT

AND

IAN CHIMANGA (T/A Tawana Business Ventures)

1ST RESPONDENT

MARKS MOTORWAYS LIMITED

2ND RESPONDENT

Coram: Musonda, DCJ, Malila and Kajimanga, JJS
on 1st October, 2019 and 9th December, 2019

For the Appellants: Mr. Bwalya Luo of Messrs Palan & George Advocates
standing in for Messrs Nyirongo & Company

For the Respondents: Mr. Bwalya Luo of Messrs Palan & George Advocates
standing in for Messrs Katongo & Company

J U D G M E N T

Malila, JS delivered the judgment of the court.

Case referred to:

1. *Marcus Kapumpa Achiume v. The Attorney General* (1983) ZR1
2. *BP Zambia Plc v. Interland Motors Ltd* (SCZ Judgment No. 5 of 2001)
3. *Zulu v. Avondale Housing Project* (1982) ZR 175

4. *Rosemary Chibwe v. Austin Chibwe* (SCZ Judgment No. 38 of 2000)
5. *Nkhata & 4 Others v. Attorney General* (1966) ZR 124
6. *Communications Authority v. Vodacom Zambia Limited* (SCZ Judgment No. 21 of 2009)
7. *Wilson Masauso Zulu v. Avondale Housing Project Limited* (1982) ZR 172
8. *Zambia Revenue Authority v. Dorothy Mwanza & Others* (2010)(2) ZR 181
9. *Simwanza Namposya v. Zambia State Insurance Corporation Limited* (2010)(2) ZR 339
10. *Examination Council of Zambia v. Reliance Technology* (2014)(3) ZR 171

Legislation referred to:

1. *High Court Act, Chapter 27 of the Laws of Zambia*

This matter has had to be reheard before a reconstituted panel. This follows the departure from the court of some members of the original panel that heard the appeal. The resultant administrative delay, which has, no doubt, occasioned gross inconvenience to the parties, is sincerely regretted.

The appeal concerns a sale of goods that went wrong. The respondents had, in the lower court, claimed payment of certain moneys from the appellants in respect of the sale to the latter of diesel oil supplied on diverse dates between the 9th and the 18th May, 2007 at the appellants' instance and request. The respondents had also claimed payment for some musical equipment supplied to the second appellant.

The respondents alleged that neither of these things were paid for in full. From their perspective, the net position as at the time of commencement of proceedings in the High Court was that they were owed K261,210,000.00 for diesel supplied; K29,466,703.34 for gas oil short and K29,800,000.00 for the musical equipment; bringing the total claim to K320,477,000.00. All these amounts are in the unrebased Zambian Kwacha.

The appellants resisted the claim, stating that the first respondent was not licensed to trade in fuels; that they did not owe the money allegedly owing for musical instruments as the first respondent was paid K20,000,000.00 while the balance of K9,800,000.00 was netted off against the respondent's indebtedness to the appellants.

Not only did the appellants deny the claim, they also put up a counterclaim in the sum of K140,846,000.00 in taxes after reconciliation of the appellants' and the respondents' accounts; that the first respondent owed the appellants their share of the profits arising from a partnership between the first respondent and the respondents in the business of purchasing and sale of the fuel.

The matter was heard by Kaoma J, as she then was. After appraising the oral and documentary evidence deployed before her, the learned judge allowed some claims and disallowed others. She also disallowed the whole counter claim. In specific terms on the claim for K29,800,000.00 for the value of musical equipment she held that the sum of K20,000,000.00 had been paid towards the purchase price with only K9,8000,000.00 then remaining unpaid. She thus entered judgment in favour of the first respondent for that sum with interest at 10% per annum from 20th January 2008 to-date of full payment.

As regards the claim by the second respondent for the sum of K29,400,703.24 in respect of the cost of gas oil short supplied by the first and second appellants to the second respondent, she disallowed the claim on the basis that there was no evidence adduced to substantiate the second appellant's claim.

Turning to the claim for K261,210,000.00 allegedly paid to the first and third appellants for the purchase of fuel, the learned judge found that all the K261,210,000.00 claimed by the first respondent was paid to the first and third appellants for the purchase of diesel.

After taking into account the amounts credited and debited to the parties' respective accounts, the learned judge dismissed the respondent's claim for the sum of K261,210,000.00 but entered judgment in favour of the first respondent for K95,934,563.00 against the first and third appellants while dismissing the claim against the second appellant entirely. She also awarded interest on the judgment sum at 10% per annum from the date of the transaction to-date of full payment.

Concerning the question of outstanding taxes and the appellant's counter-claim for payment of all balances on taxes and customs and excise and VAT, as well as the payment of the respondent's share of profits the lower court judge held that the claim premised on the share of profits was without merit and thus dismissed it. She further held that the claim for taxes could not be proved on the documentary evidence on record. The judge reasoned further that if any taxes remained unpaid then the appellant had themselves to blame and had to bear their loss. She accordingly dismissed the counter-claim entirely. She awarded costs to the first respondent.

Unhappy with that judgment the appellant has now appealed on two grounds structured as follows:

GROUND ONE

That the trial court erred at law and in fact when it invoked section 13 of the High Court Act, Cap 27 of the Laws of Zambia and found that the sum of K95,934,563.00 was due to the Respondents when pages 61 and 63 of the Respondents' bundle of documents were tax receipts on which the above sum was expended.

GROUND TWO

That the trial court erred at law and in fact in invoking section 13 of the High Court Act, Cap 27 of the Laws of Zambia when the Respondents' substantive claim of K26,210,000.00 for diesel allegedly supplied had totally failed.

For his part, the first respondent, equally unhappy with the judgment, has cross-appealed on one ground structured as follows:

The learned trial judge erred in law and in fact when she decided to award the 1st respondent K95,934,563.00 after having found that money had and received by the appellants on behalf of the 1st respondent was K223,000,000.00 considering the fact that the learned trial judge dismissed the appellants' counterclaim. Therefore, the judgment should be varied to the extent that judgment in favour of the 1st respondent be in the sum of K223,000,000.00.

Both parties filed their heads of argument in support of the positions they took. Counsel for both parties were not present at the hearing. Mr. Luo, who stood in for counsel both parties, informed us that he

had instructions to indicate that both parties were solely relying on the heads of argument as filed.

The appellants argued both grounds together. The substance of the appeal on both grounds is that the court was wrong to have held that notwithstanding the collapse of the respondent's claim for K261,210,000.00 in respect of diesel oil supplied by the respondents to the appellant, the sum of K95,000,000.00 was still due to be paid to the respondent as refund for unpaid taxes. We were referred to a statement by the lower court judge in her judgment which read as follows:

I think that in the absence of clear proof that the K65,934,563.00 and the balance of K30,000,000.00 were used to settle the 1st plaintiff's outstanding taxes as appears on the receipts at pages 61 to 63 and having accepted that the taxes were payable upfront, the 1st plaintiff must recover the money amounting to K95,934,563.00 purportedly paid by the Defendant towards taxes.

The learned counsel for the appellant submitted that the evidence on record did not anywhere show that taxes were payable upfront. To the contrary, the evidence on record, according to counsel, showed that Indeni Petroleum Refinery Company Limited "carried no responsibility for the collection or payment of taxes."

Counsel pointed to a tax invoice in the record of appeal showing that the appellants only paid K73,839,668.00 to Indeni as shown by receipt No. 10941 leaving out the road levy at K10,958,545.00, excise duty at K10,954.13 and VAT at K16,620,460.11 to be paid by the appellants themselves at their convenience to the relevant tax authorities. We were also referred to another tax invoice in the record showing that the appellant only paid the product value component in the sum of K40,300,000.00 under receipt No. 11546 issued by Indeni, leaving out road levy, excise duty and the VAT components. These two examples, according to counsel, show that taxes were not paid upfront but afterwards.

Counsel for the appellant also disputed the statement in the lower court judgment that:

The difficulty I seem to have with the receipts at pages 61 to 63 of the Defendant's Bundles is that there is nothing on these receipts to show that the payments were in respect of unpaid taxes by the 1st plaintiff....it is not clear to me to which tax invoices these payments related as the Defendants were dealing with other customers.

It was the learned advocate's submission that there was nothing from the respondent's evidence which supported the view that the tax invoices referred to by the appellants to which the learned judge had

alluded to in the statement quoted, were not authentic tax payments by the appellants.

It was contended that section 13 of the High Court Act, Chapter 27 of the laws of Zambia, was thus not properly invoked by the lower court since the tax receipts referred to in the record of appeal were not a matter of controversy between the parties. According to the appellant's learned counsel, the respondent neither led nor tendered evidence to refute and or discredit the tax receipt on which the lower court anchored its finding that the sum of K95,000,000.00 was due and payable to the respondent.

For their part, the learned advocates for the respondent also responded to the appellants' arguments compositely. It was submitted that the lower court judge was correct in invoking section 13 of the High Court Act in determining the dispute. The learned counsel discounted the submission by counsel for the appellant that there was no evidence given in the lower court that taxes were paid to the appellants by the respondents upon. The truth, according to the learned counsel for the respondent, that there was testimony given by the first respondent which was cited by the court below

to the appellant's witness, to the effect that taxes were actually paid upfront. The first respondent maintained in cross-examination and re-examination that taxes were paid upfront and therefore that it just is not true that there was no evidence to show that the tax payments made by the appellant to Zambia Revenue Authority as receipts evidencing such payments were on record. Counsel submitted that it is clear from the first respondent's reply and defence to counterclaim that the first respondent disputed the appellant's averment on the issue of taxes.

It was further submitted that the findings of the court below were supported by the evidence available to it; that the appellant cannot attack findings of fact of a lower court except in exceptional circumstances as was explained by this court in *Marcus Kapumpa Achiume v. The Attorney General*⁽¹⁾. The learned counsel also cited the case of *BP Zambia Plc v. Interland Motors Ltd*⁽²⁾ where section 13 of the High Court Act was invoked on the basis that courts must resolve all issues in controversy between the parties so that litigants avoid prosecuting their matters piece meal over the same subject and

between the same parties. The case of *Zulu v. Avondale Housing Project*⁽³⁾ was also cited to buttress the same argument.

Counsel for the respondent submitted on a different point. He posited that the writ of summons shows that the respondent had, in the lower court, sought 'any other relief the court may deem just.' The court was thus on firm ground to award the respondent the sum of K95,934,563.00 notwithstanding that it was not specifically asked for. Counsel also submitted that as was held in the case of *Rosemary Chibwe v. Austin Chibwe*⁽⁴⁾, Zambian courts must invoke both principles of equity and law concurrently.

Counsel further contended that the appellant's counter-claim for unpaid taxes in the sum of K140,846,572.62 was dismissed by the court below. That amount was inclusive of the K95,934,563.00 awarded to the respondent. The appellant did not appeal against the dismissal of the counter-claim for taxes aforesaid. This, according to counsel, means that the appellants are in agreement with the lower court regarding the finding of the court on the issue of taxes and therefore, cannot at the same time contend that the respondent is

not entitled to be refunded the sum of K95,934,563.00 withheld in respect of taxes.

As regards the sum of K9,800,000 awarded by the court below to the respondent, counsel for the respondent contended that the notice of appeal related only to the part of the judgment as decides that the respondents were entitled to the total sum of K105,734,563.00 which is made up of K9,800,000.00 in respect of musical instruments and K95,934,563.00 for taxes. The grounds of appeal, however, only relates to the award for K95,934,563.00. There is, according to counsel, no ground of appeal regarding the award of K9,800,000.00. We were thus urged not to interfere with that award on that basis.

In the ultimate, it was counsel's submission that the whole appeal should be dismissed.

We are grateful to counsel for both parties for their efforts. The real question is whether we should disturb the lower court's judgment.

Under ground one of the appeal the issue that the appellants raise is that the lower court judge found that the sum of K95,934,563.00 was due to the respondents when in fact there were tax receipts explaining how the money was expended. In other words, the question, strictly speaking, was whether or not the respondents owed the K95,934,563.00 which the appellants claim the former owed. The respondents, for their part, claimed they did not owe it.

To us, this was purely a factual issue that was amenable to resolution based on the facts available to the court. The point is undeniable that facts are indeed the fountain head or cradle of the law and that it is often not easy to separate the law from its factual environment. However, the dichotomy between law and fact in a ground of appeal is a significant one for while there can be an appeal against one, there will ordinarily be no appeal against the other.

We have time and again explained the position that an appeal to this court will only be entertained when it raises a point of law or if the disputed question is one of mixed law and fact. In *Nkhata & 4 Others v. Attorney General*⁽⁵⁾, the Court of Appeal, predecessor to this

court, took time to explain that findings of fact by a trial court will only be reversed in four circumstances, namely (i) where the trial court erred in accepting evidence; (ii) where the judge erred in assessing and evaluating the evidence, taking into account some matter which it should have ignored or failing to take into account something which it should have considered, or (iii) the judge did not take proper advantage of having seen and heard the witnesses and (vi) external evidence demonstrated that the judge erred in assessing the manner and demeanor of the witnesses.

The position articulated in the *Nkhata*⁽⁵⁾ case has been repeated by this court in numerous case authorities including *Communications Authority v. Vodacom Zambia Limited*⁽⁶⁾, *Wilson Masauso Zulu v. Avondale Housing Project Limited*⁽⁷⁾, *Zambia Revenue Authority v. Dorothy Mwanza & Others*⁽⁸⁾, *Simwanza Namposya v. Zambia State Insurance Corporation Limited*⁽⁹⁾ and *Examination Council of Zambia v. Reliance Technology*⁽¹⁰⁾.

To succeed, a party urging an appellate court to reverse findings of fact by a trial court, must demonstrate that the trial court made findings which were perverse or in the absence of relevant evidence,

or upon a misapprehension of facts, or that on a proper view of the evidence before the court, no trial court properly directing its mind to it could make those findings. The appellant has not demonstrated that in making the findings of fact, the lower court judge could fairly be said to have brought those findings within the exceptions to the rule against interference by an appellate court with a trial court's findings of fact.

As the learned counsel for the respondent demonstrated in his submissions, the findings of the court below were amply supported by the evidence deployed before it. We accept counsel's arguments on this score and have no reason to hold that there was perversity in the finding of the court to warrant us to interfere with the lower court's findings.

Under ground two, the lower court judge is faulted for invoking section 13 of the High Court Act, after the respondents' substantive claim for K26,210,000.00 for diesel had allegedly failed. That section enjoins the High Court to administer law and equity concurrently. It provides as follows:

In every civil cause or matter which shall come in dependence in the court, law and equity shall be administered concurrently, and the

court, in the exercise of the jurisdiction vested in it shall have the power to grant, and shall grant, either absolutely or on reasonable terms and conditions as shall seem just, all such remedies or reliefs whatsoever interlocutory or final, to which an of the parties thereto may appear to be entitled in respect of any and every legal or equitable claim or defence properly brought forward by them respectively or which shall appear in such cause or matter so that, as far as possible, all matter in controversy between the said parties may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided; and in all matters in which there is any conflict or variance between the rules of equity and the rules of the common law with reference to the same matter, the rules of equity shall prevail.

Equitable jurisdiction is part of our system of justice which is designed to supplement the common law by taking action in a reasonable and fair manner which results in just outcomes. Equitable jurisdiction averts and mitigates the rigidities of the common law and gives the judge exercising it enormous discretion.

The circumstances that motivated the trial judge to invoke the provisions of section 13 of the High Court Act, cannot be understood independently of the factual milieu of this case and her findings of fact. In resorting to section 13 of the High Court Act, the court was in the midst of deciphering a rather complex maze of facts as will be clear from the following passage from the judgment (J19):

However, I am convinced that the 1st plaintiff is not entitled to recover the amount claimed of K261,210,000.00 as the money used to purchase fuel which was delivered to the 1st plaintiff's customer except that the defendants did not release to the 1st plaintiff the monies paid by the group of companies to whom the fuel was supplied. The dollar cheques amounted to US\$56,752.00 and following the defendants' figures this translated into K223,000,000.00. It is out of this amount of money that the 1st plaintiff should be refunded the sum of K95,934,563.00.

Accordingly, I dismiss the plaintiffs' claim for the sum of K261,210,000.00 being the value of the diesel supplied by the 1st plaintiff at the request of the defendants. However, as this court must under section 13 of the High Court Act, Cap 27 of the Laws of Zambia, administer law and equity concurrently and must completely and finally determine all matters in controversy between the parties, I enter judgement in favour of the 1st plaintiff for the sum of K95,934,503.00 as against the 1st and 3rd defendants while I dismiss the claim completely against the 2nd defendant as he did not deal with the 1st plaintiff in his individual capacity.

I also award interest at the same rate as the judgment for the musical instruments.

We think that in expressly stating that she was exercising equitable jurisdiction, the learned judge's approach could not have been more intuitive. She sent a clear signal to the parties that she was exercising equity to resolve the issues between the parties, untrammelled by any rigidities that the pleadings entailed.

We are of the settled view that the criticism directed at the trial court under ground two of the appeal is without any legitimate basis and is liable to be discountenanced. We dismiss ground two accordingly.

In the result, ground one is dismissed.

We had stated earlier in this judgment that the respondent had raised a cross-appeal premised on one ground. No heads of argument were filed in support of that cross-appeal nor were any arguments in opposition filed. The absence of both parties at the hearing effectively meant that the cross-appeal was not prosecuted. We treat the cross-appeal as having been abandoned. We thus dismiss it also.

The respondents shall have their costs to be taxed if not agreed.

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M. C. Musonda
DEPUTY CHIEF JUSTICE

.....
M. Malila
SUPREME COURT JUDGE

.....
C. Kajimanga
SUPREME COURT JUDGE