IN THE COURT OF APPEAL OF ZAMBIA **Appeal No. 68 of 2023**

HOLDEN AT LUSAKA

(Civil Jurisdiction)

BETWEEN:

SHREE VAGMI COTTON LIMITED **APPELLANT**

AND

JAMES KATENGO **RESPONDENT**

CORAM: SIAVWAPA, CHISHIMBA AND PATEL, JJA

On 22nd January & 12th February 2024

For the Appellant: Mr. W. Simutenda

Mesdames TMB Advocates

For the Respondent: Mr. Chama Mutambalilo

Messrs. Bemvi Associates

JUDGMENT

Patel, JA, delivered the Judgment of the Court

Cases Referred to:

1. Amchile Import & Export Limited and Others v Ian Chimanga (T/A Tawana Business Ventures) and Another -SCZ Appeal No. 43A/2011
2. Nkhata and Others v The Attorney General (1966) ZR 124
3. The Attorney-General v Ndhlovu (1986) ZR 12
4. Ministry of Home Affairs, the Attorney General v Lee Habasonda (on his own behalf and on behalf of SACCORD) (2007) ZR 207.
5. Attorney General and the Movement for Multiparty Democracy v. Akashambatwa Mbikusita Lewanika, Febian Kasonde, John Mubanga Mulwila, Chilufya Chileshe Kapwepwe, Katongo Mulenga Maine- SCZ Judgment No.2 of 1994.
6. R (on the application of Majera (formerly SM (Rwanda) v Secretary of State for the Home Department (2021) UK SC 46
7. Bank of Zambia v Al Shams Building Materials Company Limited, Jayesh Shah and the Attorney General – CAZ/08/430/2023
8. B.P. Zambia Plc vs Zambia Competition Commission & others - SCZ Judgment No. 22 of 2011
9. YB and F Transport Limited vs Supersonic Motors Limited- SCZ Judgment No. 3 of 2000
10. Doyle B Kapambwe v Machona Kapambwe, Henry Machina & Rose M Kamungu - CAZ Appeal No. 143 of 2017
11. Re Elgindata Limited (No.2) 1993 1 AllER 232.

Legislation referred to:

1. The Rules of the Supreme Court 1999 Edition.
2. The High Court Rules, Chapter 27 of the Laws of Zambia.

Other Works referred to:

1. Matibini P, Zambian Civil Procedure: Commentary and Cases.
2. Halsbury Laws of England, 4th Edition, Volume 29.
3. Black's Law Dictionary, 9th Edition (2009).
4. Halsbury's Laws of England 4th Edition Volume 1.

1.0 INTRODUCTION

1.1 This is an appeal against the Ex-tempore Ruling of **Justice E.L Musona** delivered on 28th December 2022 in an action filed on 31st July 2020 in the Commercial Division of the High Court at Lusaka. Final Judgment was entered on 21st October 2022.

2.0 BACKGROUND

2.1 The Plaintiff, (now Respondent) commenced these proceedings against the Defendant (now Appellant), by way of Writ of Summons and Statement of Claim filed on 31st July 2020 claiming the following reliefs:

i. *A declaration that the verbal contracts are legally enforceable;*
ii. *Payment for the sum of K 372,225.00 for works done at the Mwambeshi Plant;*

iii. *Damages for suffering caused to the plaintiff and his employees;*

iv. *Any other reliefs the Court may deem fit;*

v. *Interest on the awarded sum;*

vi. *Costs incidental to these proceedings.*

2.2 The Appellant entered a Memorandum of Appearance accompanied by a Defence and Counterclaim.

2.3 The Respondent filed a Reply to the Defence and Counterclaim on 28th August 2020.

2.4 The Court rendered its judgment on 21st October 2022.

2.5 The Respondent issued a Writ of Fieri Facias on 29th November 2022, prompting the Appellant to make an *ex parte* application to stay execution combined with its Summons to set aside the Writ of Fieri Facias.

2.6 The Ex-parte Application for a Stay was granted in favour of the Appellant by the High Court, which stay of execution was subsequently discharged on 28th December 2022, following the delivery of its Ex-Tempore Ruling of the same date, and now the subject of the appeal before us.

2.7 The Appellant filed its renewed application for a stay before this Court which Stay was granted and subsequently confirmed by a Ruling of this Court dated 10th January 2023.

3. DECISION OF THE COURT BELOW

3.1 The trial Judge, having considered the pleadings and evidence of the witnesses, the arguments and submissions before the court, delivered its final judgment on 21st October 2022.

3.2 In the Court's view, and whilst dismissing the claims of both the Plaintiff, and the counterclaim of the defendant, for insufficient evidence and for not having discharged the requisite burden of proof, the lower Court went ahead and awarded the Plaintiff the claimed sum of K372,225.00.

3.3 In its ex-tempore Ruling, the lower Court declined to set aside the Writ of Fieri Facias, on the ground that the order for payment of the sums under the final judgment of the Court, had neither been appealed against, nor paid to the Plaintiff. The Court also vacated the order of stay that had been granted on 8th December 2022.

3.4 Being dissatisfied with the ex- tempore Ruling, the Defendant, (now Appellant), has brought this appeal.

4 THE APPEAL

4.1 Being dissatisfied with the entire Ex-tempore Ruling of the lower Court, the Appellant filed a Notice of Appeal and Memorandum of Appeal on 29th December 2022, advancing four (4) grounds of appeal as follows:

1. *The Court below gravely erred in both law and fact when on its own motion and despite the Court being functus officio re-opened the matter in which the Court had already delivered a Final Judgment dated the 21st October, 2022 dismissing the Respondent's entire action for insufficient evidence by awarding the Respondent the same dismissed relief(s).*

2. *The Lower Court gravely erred in both law and fact when it dismissed the Appellant's Application for an Order to Set Aside Writ of Fifa for Irregularity without revealing a review of evidence on the Court Record, a summary of the arguments and submissions, findings of fact, the reasoning of the Court on the facts and the application of the law and authorities to the facts as strictly at law.*

3. *That the Honourable Court below erred in law and in fact when he dismissed the Appellant's Application to Set Aside Writ of Fifa for Irregularity without taking into account that the pertinent and cardinal principle of law that an act of the Court shall prejudice no one.*

4. *Such other Grounds of Appeal as may be filed upon further perusal of the Record.*

5 APPELLANT'S ARGUMENTS IN SUPPORT OF THE APPEAL

5.1 We have duly considered and appreciated the Appellant's Heads of Arguments filed on 20th March 2023, which will not be recast, save for emphasis as necessary.

6 RESPONDENT'S HEAD OF ARGUMENTS

6.1 We have equally considered and appreciated the Respondent's Heads of Arguments filed on 27th March 2023 which will equally not be recast, save for emphasis as necessary.

7 THE HEARING

7.1 At the hearing, Counsel for the Appellant placed reliance on the documents filed into Court

7.2 Respondent Counsel argued that it had not been served with any appeal as regards the main matter, either in this Court or through the Supreme Court. It was his argument that the appeal to set aside the Writ of Fieri Facias had, in counsel's words *''no leg to stand on''* and prayed for it to fial and for the Stay to be vacated.

7.3 In response, Counsel Simutenda, referred to their heads of argument in reply, filed on 5th April 2023.

8 DECISION OF THIS COURT

8.1 For reasons that will become apparent in this Judgment, we will not delve into the appeal in accordance with the grounds as advanced by the Appellant. The issue for our consideration raises a fundamental question of how to approach a court order which is irregular, erroneous, illegal or a nullity, or not supported by the evidence placed before the Court.

8.2 We have considered the Judgment of the lower court and note at page **J10** (page 307 of the Record of Appeal Vol 1), where the lower Court made the following findings of fact.

"I have analysed the whole evidence in this case. The Plaintiff stated that he did some work under contracts. He did not adequately itemise which works fell under oral contracts and which ones fell under written contracts. What I have noted is that the claims made by the Plaintiff were not substantiated. One such example is the claim by the plaintiff that he constructed 8 cyclones and referred this court to pages 12 to 14 of the Plaintiff's bundle of documents. What is on these pages are photographs purportedly showing the cyclones. No evidence was led to prove that what is on these photographs are actually cyclones.

I have reminded myself that in cases such as in casu, proof is not beyond all reasonable doubt. Proof is always on a balance of probability.

I have looked at the cases of Wilson Masauso Zulu v Avondale Housing Project Limited, Khalid Mohamed v The Attorney General, and Galaunia Farms Limited v National Milling Corporation. These cases are elaborative on aspects of proof in cases such as in casu. I am well guided".

The net result is that the Plaintiff has not satisfied the benchmark as set in the above cases. Consequently, I dismiss the case by reason of insufficiency evidence.

In the same vein, I have found that the Defendant has not proved their counterclaim. I say so not only that the defendant witness never alluded to it in their witness statement but also because the Defendant never produced to this Court any proof to support their counter claim.

Now, therefore, I equally dismiss the Defendant's counterclaim.

The only relief available to the Plaintiff is the sum of K372,225.00 *this is the amount which the Defendant arrived at after the Defendant did their computation of what was owed by the Plaintiff to the Defendant. I have no reason to reject this computation. It will be pleasing if this amount has already been paid to the Plaintiff, but if it has not yet been paid,* ***I order that it be paid by the Defendant to the Plaintiff forthwith.*** *Seeing that both parties had a claim against each other, and seeing that both claims for the Plaintiff and Defendant have been dismissed, I shall order no costs. Each party shall bear their own costs. Leave to appeal is granted.''* (the emphasis is by this Court).

8.3 It is trite that an appellate court can only reverse findings of fact made by the trial judge where the findings in question were either perverse or made in the absence of any relevant evidence or upon a misapprehension of the facts or that they were findings which on a proper view of the evidence, no trial court acting correctly could reasonably make.

Although the authorities speak to reversing findings of fact made by a trial judge, we are of the considered view that the same principle is equally applicable to instances where having made findings of fact and having made detailed analysis, the final order or conclusion of that judgement, goes against the findings made, as was the case in *casu.*

8.4 There are a plethora of authorities by the Supreme Court on when an appellate court will interfere with a trial court's findings of fact. In the case of **Amchile Import & Export Limited and Others v Ian Chimanga (T/A**

Tawana Business Ventures) and Another[1], Malila JS, as he then was, restated the Supreme Court's position as follows:

> *"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 misrepresentation 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."*

8.5 The case of **Nkhata and Others v The Attorney General**[2], was cited with approval in the case of **The Attorney-General v Ndhlovu**[3] where the Supreme Court made the following observations:

> *"We have considered the law set out in past judgments of this Court when a trial Judge's findings of fact, are attacked on appeal as in this case. In the case of NKHATA AND FOUR OTHERS -VS- THE ATTORNEY GENERAL OF ZAMBIA the Court made the following comments on this type of appeal:*
>
> > *"(1) By his grounds of appeal the appellant, in substance attacks certain of the learned trial Judges findings of fact. A trial Judge sitting alone without a jury can only be reversed on fact when it is positively demonstrated to the Appellate Court that:-*

(a) *by reason of some non-direction or misdirection or otherwise the Judge erred in accepting the evidence which he did accept; or*

(b) *in assessing and evaluating the evidence the Judge has taken into account some matter which he ought not to have taken into account, or failed to take into account some matter which he ought to have taken into account; or*

(c) *it unmistakenly appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or*

(d) *in so far as the Judge has relied on manner and demeanour; there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."*

8.6 We are further guided by the case of **Ministry of Home Affairs, the Attorney General v Lee Habasonda and Savenda v Stanbic Bank (Z) Limited**[4] where the Apex Court stated that:

"every judgment must reveal a review of the evidence, where applicable a summary of the arguments and submissions, if made, findings of fact,

the reasoning of the court on the facts and the application of the law and authorities, if any, to the facts."

8.7 From the extract of the Judgment of the lower court, quoted and highlighted above, we are of the considered view that the trial judge properly evaluated the evidence before him, leading to dismissal of the matter. However, the Order was at variance with his findings and verdict. It is inconceivable to dismiss the claims of the Respondent and to award him the same claim that he is seeking. This is a classic case of the lower court, arriving at a perverse conclusion not supported by the evidence nor the established facts.

8.8 It is the medley of events that ensued, that are of concern. **Section 22** of the Court of Appeal Act is instructive. The Appellant, aggrieved by the Judgment of the lower Court, ought to have appealed immediately against the Judgment as opposed to waiting for the issuance of a Writ of Fieri Facias and proceed in the manner that it did. We note that leave to appeal was granted.

8.9 It is trite, in our jurisdiction and in the Commonwealth, as we know it, that an order of Court must be obeyed, whether perceived to be a nullity, illegal void or irregular, until it has been set aside by the same court or on appeal. This was the position taken by the Supreme Court of England in the case of **R (on the application of Majers (formerly SM (Rwanda) v Secretary of State for the Home Department**[6], a case of public importance and notoriety for reasons that are not material to this appeal.

8.10 In that case, the Court confirmed the well-established principle of UK constitutional law, that a court order must be obeyed unless and until it has been set aside or varied by the Court (or overruled by legislation), notwithstanding any legal defects in the order.

8.11 This Court in its recent Ruling, in the case of **Bank of Zambia v Al Shams Building Materials Company Limited, Jayesh Shah and the Attorney General**[7] rationalised this principle, by guiding that it would be a recipe for confusion, if a party were allowed, in its wisdom or lack of it, to conclude on its own volition, that an order of court is a nullity (for whatever reason) and chose to disregard it. We reiterated that such conduct would water down the efficient administration of justice and erode the sanctity of judicial office.

8.12 The Appellant has further argued that it is contrary to the policy of the law, for a party such as the Appellant, to suffer prejudice as a result of the acts of a court. It was further their submission at *page 12* of their heads of argument, that the Appellant has been put to unnecessary costs and expenses of this appeal by reason of the Respondent's wrongful acts of issuing a writ of Fifa in respect of a dismissed matter. Although we have already noted that we are not, in the circumstances of this case, addressing the grounds of appeal seriatim, we must nip this sense of loss, on the part of the Appellant, for alleged conduct of the court. We are of the considered opinion, that the Appellant was the author of its own woes. It received a judgment, which though in its favour, proceeded to make awards to the

Respondent. The Appellant chose to ignore the parts of the Judgment that were not in its favour until after the issuance of the Writ of Fieri Facias. This was wrong. The appellant simply misapprehended the Judgment of the lower court and did not move as it ought to have appealed the Judgment of the lower court.

8.13 For the above reasons, we are not inclined to deliberate either on the issue of functus on the part of the learned judge in the court below, or misconduct alleged on the part of Counsel for the Respondent, as both arguments have no place in *casu.*

8.14 As an appellate Court, we declare the concluding part of the judgment, which purported to award the Respondent his claim in the sum of K372,225.00 that stood dismissed, a nullity and set it aside. It goes without saying that the Writ of Fieri Facias is also set aside for the same reason that out of nothing, comes nothing.

9. **Conclusion**

9.1 By way of our concluding remarks, we would go further in our reasoning and hold that failure to give a balanced view of the evidence presented, was a serious misdirection on the part of the lower court as settled by the principle in the case of **Attorney General and the Movement for Multiparty Democracy v Akashambatwa Mbikusita Lewanika and four others.**[5]

9.2 We find ourselves viewing this matter totally through the lens of the interest of justice, and whilst ordinarily, we may have been inclined to

dismiss the appeal in the manner it has been brought before us, we cannot simply close our eyes and allow the Respondent to be awarded, due to a patent error of judgment on the part of the lower court. The appeal therefore succeeds.

9.3 There must however be responsibility, shouldered by the erring party, in the manner it has moved this court and indeed the court below. Although we allow this appeal, it is not for the grounds advanced by the Appellant, who must not therefore be let off the hook so easily. Costs have been occasioned by a series of errors and these must fall somewhere.

9.4 By way of post-script, we note the feeble attempt on the part of the Respondent, to challenge the appeal during the hearing of the appeal. We chose not to offer any comments when the same was proffered by *viva voce* submissions.

We have noted that the Respondent also made, albeit belatedly, an application to have the appeal dismissed, on account of alleged defects in the Record of Appeal. Needless to say, the application was dismissed by a Ruling of this Court delivered on 19th December 2023, as having been raised out of time, without leave and after it had already filed its Heads of Argument on 27th March 2023.

Similarly, we do not know what the Respondent was referring to, when he argued that the appeal had no leg to stand on. Suffice it to state that it is clear, that the objection, if any, by the Respondent, was not properly raised in the manner provided by the Rules of this Court.

9.5 On the award of costs, we are firmly alive to the general principle, that a successful party is entitled to costs. We are also alive to the cases that have echoed this principle such as **B.P. Zambia Plc vs Zambia Competition Commission & others**[8] and **YB And F Transport Limited vs Supersonic Motors Limited**[9]. We have also pronounced ourselves on costs, in the case of **Doyle B Kapambwe v Machona Kapambwe, Henry Machina & Rose M Kamungu.**[10]

9.6 However, and in *casu*, we refer to the principles on when a successful party may be disentitled to costs, as discussed by the case of **Re Re Elgindata Limited (No.2)**[11]. We accordingly order costs of this appeal to be borne by the Appellant, albeit the successful party to the appeal, the same to be taxed in default of agreement.

For avoidance of doubt, we restrict ourselves to costs in this Court only.

M. J. SIAVWAPA
JUDGE PRESIDENT

F. M. CHISHIMBA
COURT OF APPEAL JUDGE

A.N. PATEL S.C.
COURT OF APPEAL JUDGE