

HOLDEN AT LUSAKA

(Civil Jurisdiction)



BETWEEN:

HAMMER AND TONGUES (ZAMBIA) LIMITED

APPELLANT

AND

FRONTIER FINANCE LIMITED

RESPONDENT

CORAM: Chashi, Sichinga and Banda-Bobo, JJA

ON: 24th August and 25th November 2021

For the Appellant: J. Katati, Messrs Dove Chambers

For the Respondent: L. Ng'onga, Messrs NCO Advocates

JUDGMENT

CHASHI JA, delivered the Judgment of the Court.

Cases referred to:

1. ***Cavmont Merchant Bank Limited v Amaka Company Limited***
- SCZ Judgment No. 12 of 2001
2. ***Franklyn v Lamond (1847) 4 CB, 637***

3. ***Cyril Anarade v Southerby and Company (1931) 47 TLR, 244***
4. ***Bank of Zambia v Jonas Tembo and Others (2002) ZR, 103***
5. ***Million Hamung'ande and Others v William Mulopa – CAZ Appeal No. 84 of 2019***
6. ***Isaacs v Robertson (1985) 3 All ER, 140***
7. ***BP Zambia Plc v Interland Motors (2001) ZR, 37.***

1.0 INTRODUCTION

1.1 This appeal is against the Judgment of Honourable Lady Justice Dr. W. S. Mwenda (High Court – Commercial Division) delivered on 3rd November, 2020.

1.2 In the said Judgment, the learned Judge dismissed all the claims by the Appellant who was the plaintiff in the court below. She also ordered that Counsel for the Appellant bears half of the costs of the proceedings.

2.0 BACKGROUND

2.1 The genesis of this whole matter lies in the proceedings under cause number **2014/HPC/0361**. In the said matter, Ian Teeba and Tubesebo Mwiya Teeba commenced proceedings by way of writ of summons against Frontier

Finance Limited and Hammer and Tongues (Zambia) Limited as 1st and 2nd defendants, claiming the following reliefs:

- (i) Refund of K141,508.22 being the amounts paid to purchase plot number 33563/1080 Kamwala South, Lusaka plus related bank and interest charges up to the month of August 2014;
- (ii) Reimbursement of K2,000.00 being costs of renovations carried out on the flats;
- (iii) Reimbursement of K700.00 being the outstanding electricity bill incurred before procurement of the property paid by the plaintiff;
- (iv) Damages for breach of contract;
- (v) Interest; and
- (vi) Any other relief deemed fit by the court and costs.

2.2 According to the accompanying statement of claim, the 1st and 2nd defendants, had sometime in 2013 entered into an agreement wherein the 1st defendant instructed the 2nd defendant (as auctioneers) to sell plot number 33563/1080 Kamwala South (the property) on its behalf as a finance company, by way of public auction. The 2nd defendant

placed an advertisement in the daily mail newspaper, accompanied by the 2nd defendants' catalogue.

2.3 The plaintiffs expressed interest and made a bid for K110,000.00 which was accepted. The letter of acceptance dated 5th November 2015, disclosed the identity of the seller as being the 1st defendant. The plaintiffs and the 1st defendant then executed a contract of sale. The total amount paid to the 2nd defendant inclusive of the commission came to K116, 380.00. The 2nd defendant then remitted the amount of K110,000.00 to the 1st defendant, withholding its commission of K6,380.00

2.4 About September 2014, the plaintiffs discovered that the defendants had no authority to pass title to the property as it belonged to a third party known as Reaves Malambo, hence the court action against the 1st and 2nd Defendants.

2.5 The 2nd defendant filed its defence on 12th June, 2015, in which its main line of defence was that, it was not a party to the contract of sale and therefore had no capacity to rescind the contract and equally no capacity to refund the purchase price which was paid to the 1st defendant.

- 2.6 After considering the evidence and submissions by the parties, Honourable Madam Justice P. M. Nyambe, SC formulated the first question for determination as “whether or not the 2nd defendant as agent of the 1st defendant disclosed the identity of the owner of the subject property to the plaintiff in sufficient time to enable them conduct due diligence investigations, prior to the fall of the hammer.
- 2.7 Although the 2nd defendant did not in its defence raise the principle of principal and agent relationship, Nyambe J, noted that during the trial, much effort was made to show that the 2nd defendant as auctioneer, was a mere agent and the 1st defendant as principal was supposed to bear the responsibility of the claims and that the 2nd defendant ought to have fallen out of the picture and should not have been joined to the proceedings. It is on that basis that she addressed the issue of principal and agent relationship.
- 2.8 In that respect, Nyambe J, had recourse to the **dictum** in the case of **Cavmont Merchant Bank Limited v Amaka Company Limited**¹ where the Supreme Court stated that: “*where an agent is a contracting party, he will be held personally liable even if he names his principal.*” Upon

examination of all the documents in the matter, the learned Judge opined that the 2nd defendant, signed all the contractual documents relating to the sale of the property, as such, was no ordinary agent, who ought to have fallen way. That, the 2nd defendant assumed the position of a contracting party and as such should be held personally liable and bear equal responsibility with the 1st defendant.

2.9 Nyambe, J also referred to the case of **Franklyn v Lamond** where it was held that an auctioneer will be held liable if he/she conducts an auction without knowledge of the principal's lack of title or authority to sell although he/she acts in good faith. That an auctioneer will be held liable for selling property with defective title, even though he/she was conducting the auction in compliance with the principal's specific instructions. Further, that an auctioneer may be liable if he/she conducts an auction without knowledge of the principal's lack of title or authority to sell, although he/she acts in good faith and an auctioneer's good faith and his/her lack of knowledge is no defence.

2.10 Nyambe J, also placed reliance on the case of **Cyril Anarade Limited v Southerby and Company**³ where it was stated that:

"It is settled law that an auctioneer has a duty to ensure that the proper formalities are complied with in the sale of land... and must account strictly as a fiduciary for money received by him on the vendor's behalf."

The learned Judge found that the deep involvement by the 2nd defendant in the transaction placed it above the ordinary role of an agent and elevated it to the position of contracting party, as such was substantially liable and should have taken appropriate steps to assure itself of the title of the property.

2.11 Nyambe J, then made the following Orders:

- (i) Refund of K141,508.22 being the amount paid for the purchase of the property with interest.
- (ii) Re-imbursement of K2,000.00 being costs of renovations, with interest in accordance with the Judgment Act.
- (iii) Re-imbursement of K700.00 being the outstanding electricity bill paid by the plaintiffs.

(iv) Damages for breach of contract.

2.12 What then followed is that, the bailiffs proceeded to execute against the 2nd defendant and seized its goods, which resulted in the 2nd defendant paying the sum of K144,208.22 to Messrs Nhari Mushemi and Associates, the plaintiffs' lawyers in order to secure the goods. In addition, the 2nd defendant paid bailiff's fees in the sum of K17,600.00.

2.13 However, it would from the evidence in the current case, subject of this appeal, appear that the 1st defendant on its part prior to the execution aforestated, paid the sum of K71, 754.11 in satisfaction of the Judgment by Nyambe, J. Therefore, the total amount paid to the plaintiff's lawyers amounted to K215,962.33.

2.14 The execution by the bailiffs prompted the 2nd defendant, now the Appellant *in casu* to commence an action against the 1st defendant, now the Respondent, under cause number **2017/HPC/0345**, on 4th August, 2017 by way of writ of summons, claiming the following reliefs:

- (i) Re-imbursement of K144,208.22 being the amount paid to the bailiffs in order to secure the release of the seized goods.
- (ii) Refund of K17,600.00 being bailiffs' fees.
- (iii) Re-imbursement of legal fees.
- (iv) Interest and costs.

2.15 The attendant statement of claim to a large extent repeats the facts in cause number 2014/HPC/0361, save to add that, the Appellant on 26th April 2017, wrote to the Respondent demanding the reimbursement. The Respondent declined on the ground that, the Judgment by Nyambe, J pronounced both parties equally liable. According to the Appellant, it was merely an agent of the Respondent in the transaction and was not party to the contract of sale of the property. Further that it passed the full purchase price to the Respondent and only retained its commission.

3.0 DECISION OF THE COURT BELOW

3.1 After considering the evidence and the arguments by the parties, Mwenda, J found that it was not in dispute that on 8th September 2016, Nyambe, J delivered a Judgment in

cause number **2014/HPC/0361** in which she found the now Appellant and Respondent liable for selling the property to Ian Teeba and Tubesebo Mwiya Teeba with defective title. The learned Judge then formulated two issues for determination as follows:

- (i) Whether the Appellant was entitled to reimbursement of the sum of K144,208.22
- (ii) Whether the Appellant was entitled to a refund of K17,600.00.

3.2 As regards the first issue, the learned Judge observed that it was clear from the evidence that the Appellant was calling on the court to adjudicate on the issue of agency. The learned Judge noted that the same issue was raised under cause number **2014/HPC/0361** and was comprehensively addressed and settled by a court of competent jurisdiction. As a result, the learned Judge was of the view, that it was not for her to question the decision of another court of equal jurisdiction or embark on a journey amounting to the re-opening or review of issues that were *res judicata*.

3.3 That the action by the Appellants amounted to an abuse of the court process. According to the learned Judge, the

proper thing to do for a litigant who is not satisfied with a final order of the court, where issues have been determined on their merits, was to appeal against the decision to a higher court.

- 3.4 The learned Judge further observed that the Appellant, through its witness having conceded that it was not in agreement with the Judgment by Nyambe, J should have appealed against the Judgment and not to raise the same issues before her.
- 3.5 The learned Judge after further consideration found that excess monies were paid to Messrs Nhari Mushemi and Associates. That the Appellant was entitled to a reimbursement of half of what they paid to the said lawyers. That however, it was not the Respondents who should reimburse but Messrs Nhari Mushemi and Associates.
- 3.6 On the issue of the bailiffs' fees, the learned Judge opined that based on the reasoning on the first issue, there was no basis upon which the Appellant should be reimbursed.

4.0 GROUNDS OF APPEAL

- 4.1 Dissatisfied with the Judgment, the Appellant has appealed to this Court advancing five (5) grounds couched as follows:

- (i) The court below erred in both law and fact, when it held that the Appellant raised the same issues that were raised under cause number 2014/HPC/0361, when the Appellant was merely seeking compensation as an agent for the loss it incurred following the Judgment of the court under cause number 2014/HPC/0361.
- (ii) The court below erred in both law and fact when it held that "*it is not for this court to question the decision of another court of equal jurisdiction,*" when the Appellant accepted the Judgment of the court under cause number 2014/HPC/0361 and did not question or raise any issues against the said Judgment.
- (iii) The court below erred in both law and fact when it held that the issues in the matter were *res judicata* when the issue of the Appellant's compensation by the Respondent herein for the loss suffered was never addressed under

cause number 2017/HPC/2020 and only arose after the court had delivered its Judgment under cause number 2014/HPC/0361.

- (iv) **The court below erred in both law and fact when it held that the Appellant should have appealed against the Judgment of the High Court under cause number 2014/HPC/0361 as there was no counter claim for compensation against the Respondent in that matter and the Appellant would not have recovered what it seeks to recover in this matter.**
- (v) **The learned trial Judge erred in both law and fact by holding that there was no basis upon which the Respondent should reimburse the Appellant herein with the excess amount of K71,754.11 that was paid by the Appellant to Nhari Mushemi and associates and K17,600.00 bailiffs' fees when the Appellant was an agent of the Respondent in the transaction that led to the action under cause number 2014/HPC/0361**

5.0 ARGUMENTS IN SUPPORT OF THE APPEAL

- 5.1 At the hearing of the appeal, Mr. Katati, Counsel for the Appellant relied entirely on the Appellant's written heads of argument.
- 5.2 In respect to the first ground, Counsel submitted that under cause number **2014/HPC/0361**, the Appellant in its defence never raised any claim against the Respondent, as they had no claim at all at the time against the Respondent until after the delivery of the Judgment. That the issue of compensation of the Appellant as an agent of the Respondent never arose and was never addressed by the court.
- 5.3 It was submitted that, the claim in the court below only arose after delivery of the Judgment in cause number **2014/HPC/0361** and after settling the whole Judgment sum and the fees for the bailiffs.
- 5.4 As regards the second ground, Counsel submitted that, the Appellant did not raise any issue against the Judgment by Nyambe, J as it accepted and complied with the Judgment by settling the whole Judgment sum in order to secure the release of the seized goods. That the claims in the court

below are totally different to the claims which were before Nyambe, J.

5.5 In respect to the third ground, Counsel drew our attention to the case of **Bank of Zambia v Jonas Tembo and Others**⁴ and submitted that for the defence of *res judicata* to succeed, a party must demonstrate that the cause of action is the same and that the issue has already been adjudicated upon by a competent court. According to Counsel the issue of indemnification by the Respondent has never been adjudicated upon. Further that the parties in the two cases are different.

5.6 In respect to the fourth ground, it was submitted that, the Appellant did not make any counter claim against the Respondent in cause number **2014/HPC/0361** for indemnification of the monies lost in the process of acting as agents of the Respondent, as it had not suffered any damage at the time of determination of the matter.

5.7 As regards the fifth ground, it was submitted that, it is not in dispute that the Appellant made the payment of K144,208.22 and K17,600 to Messrs Nhari Mushemi and Associates. That it was not in contention that the Appellant

was an agent of the Respondent and that was acknowledged by the learned Judge. Counsel submitted that as such, the Appellant was entitled to indemnification against all expenses it incurred in the course of performing its duties as an agent to the Respondent.

6.0 ARGUMENTS OPPOSING THE APPEAL

6.1 Mr. Hamachila, Counsel for the Respondent, equally relied on the filed heads of argument dated 11th June 2019. In response to the first ground, Counsel drew our attention to page R43, line 6-9 and page R51, line 11-18 of the record of appeal (the record) and submitted that the learned Judge was on firm ground when she held that the Appellant raised the same issues that were raised under cause number **2014/HPC/0361.**

6.2 In respect to the second ground, Counsel submitted that, the court below was on firm ground when it held that: "*it is not for the court to question the decision of another court of equal jurisdiction.*" According to Counsel, the issues raised in the two matters are similar on facts and evidence. That the issue was well articulated and adjudicated upon by the learned Judge.

- 6.3 In response to the third ground, it was submitted that, the court was merely making a passing comment and guiding the plaintiff in the matter as to the way forward.
- 6.4 In response to the fourth and fifth ground of appeal, Counsel asked us to take note that the proceedings in the court below and those under cause number **2014/HPC/0361** show that the arguments and submissions by the Appellant are one and the same and the court was therefore on firm ground in its holding. Counsel cited the case of **Isaacs v Robertson⁵**, where it was held *inter alia* that:

“It is the plain and unqualified obligation of every person against or in respect of, whom an order is made by the court of competent jurisdiction to obey it unless and until that order is discharged.”

7.0 ARGUMENTS IN REPLY

- 7.1 Mr. Katati, Counsel for the Appellant, set out to correct the errors in the Appellant's heads of argument, which corrections we have noted. In reply to the response on the fourth and fifth grounds of appeal, it was submitted that the Appellant accepted the Judgment under cause number

2014/HPC/0361 and complied with it to the extent of paying the whole Judgment sum in order to secure the release of its goods.

7.2 According to the Appellant, it was in the course of complying with the Judgment, that the Appellant acquired a cause of action against the Respondent for indemnification against the loss suffered as an agent of the Respondent. Counsel submitted that the action is totally different from the earlier one.

8.0 CONSIDERATION AND DECISION OF THE COURT

8.1 We have considered the evidence on record and the arguments by Counsel. We have also considered the impugned Judgment.

8.2 We shall consider all five grounds of appeal together as they are entwined. The issue these grounds raise is whether the matter which was before the learned Judge in the court below was *res judicata*.

8.3 In order to determine this issue, it is imperative that we revisit the law on the doctrine of *res judicata*. The doctrine has been applied in a plethora of cases in our jurisdiction with the notion that no man should be vexed twice upon one

and the same set of facts. In short, there should be an end to litigation. In that respect, the Supreme Court in the case of **Bank of Zambia vs Tembo and Others**,⁴ discussed the doctrine of res judicata as follows:

"In order that the defence of res judicata may succeed it is necessary to show that not only the cause of action was the same, but also the plaintiff has had an opportunity of recovering, and but for his own fault might have recovered in the first action that he seeks to recover in the second. A plea of res judicata must show either an actual merger or that the same points had been actually decided between the same parties. Where the former judgment has been for the defendant, the conditions necessary to exclude the plaintiff are not less stringent. It is not enough that the matter alleged to be concluded might have been put in issue, or that the relief sought might have been claimed. It is necessary to show that it actually was so put in issue."

8.4 Further in the case of **BP Zambia Plc v Interland Motors Limited**⁶ the Supreme Court held as follows:

"For our part, we are satisfied that, as a general rule, it will be regarded as an abuse of process if the same parties relitigate the same subject matter from one action to another or from judge to judge. This will be so especially when the issues would have become res judicata or when they are issues which should have been resolved once and for all by the first court as enjoined by Section 13 of the High Court Act...In terms of the section and in conformity with the court's inherent power to prevent abuses of its processes, a party in dispute with another over a particular subject should not be allowed to deploy his grievances piecemeal in scattered litigation and keep on hauling the same opponent over the same matter before various courts. The administration of justice would be brought into disrepute if a party managed to get conflicting decisions or decisions which undermined each other from two or more different judges over the same subject matter."

8.5 In addition, **Black's Law Dictionary, 8th Edition** at pages

1336 - 1337 defines *res judicata* as follows:

"1. An issue that has been definitively settled by judicial decisions... (2) An affirmative defence barring the same parties from litigating a second lawsuit on the same claim, or any other claim arising from the same transaction or series of transactions and that could have been but was not raised in the first suit. The three essential elements are: (1) An earlier decision on the issue; (2) A final judgment on the issue; (3) The involvement of the same parties or parties in privity with the original parties."

- 8.6 Applying the above law to the facts of this case, it is not in dispute that the Respondent and the Appellant were parties in the proceedings under cause number **2014/HPC/0361**, wherein they appeared as 1st and 2nd defendants respectively. One of the issues arising in that matter was the relationship between the Appellant and the Respondent, which was that of principal and agent.
- 8.7 As indicated in paragraph 2.8, Nyambe J, acknowledged the existence of the principal - agent relationship between the Appellant and the Respondent and went to great lengths on the subject. However, upon considering the evidence on

record, she was of the view that the Appellant was no ordinary agent in the circumstances of case. The court's line of reasoning was that the Appellant was deeply involved in the transaction and signed all the contractual documents relating to the sale of the property, as such, the Appellant assumed the position of a contracting party. As a result, the Appellant was held personally liable and assumed equal responsibility with the Respondent.

8.8 In the proceedings in the court below under cause No. **2017/HPC/0345**, which is subject of this appeal, the Appellant is claiming for reimbursement of the sum of K144,208.22 being monies paid to the bailiffs and a refund of K17,600.00 for bailiffs' fees. The Appellant's claim is fixed on the view that, it was merely an agent of the Respondent in the transaction and not a party. Therefore, it is entitled to be reimbursed for the monies paid to the bailiffs in order to secure the release of its goods.

8.9 A conjoint perusal of the proceedings under cause number **2014/HPC/0361** and cause number **2017/HPC/0345**, reveals that the subject matter of principal - agent relationship is the same and was adjudicated upon with

finality by a competent court in the previous action under cause number **2014/HPC/0361**. And the parties thereto were the same. Therefore, the matter commenced in the court below by the Appellant falls in the realm of the doctrine of *res judicata*.

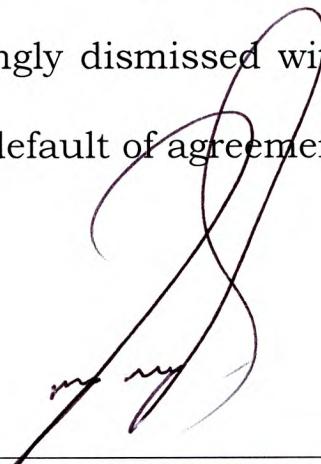
8.10 In view of the foregoing, we agree with Mweenda J, that the principal agent relationship was exhaustively dealt with by Nyambe J, who found that the Appellant assumed the position of the contracting party. To bring up the issue once more based on the same facts and claiming to be an agent is making an effort to have one Judge setting aside the Judgment of another of coordinate jurisdiction, which was frowned upon by the Supreme Court in the case of **BP Zambia Plc v Interland Motors Limited**⁶ cited above.

8.11 In that vein, it is also clear as found by Mweenda J, that Nyambe J, ordered that the parties equally share the payment of the Judgment sum. Therefore, the Appellant can only claim that which was paid on top of its share and only from the Teebas' lawyers, Messrs Nhari Mushemi and Associates, who were paid in excess and not the Respondent.

It is for the foregoing that, we find this appeal devoid of merit. For the avoidance of doubt, all five grounds of appeal fail.

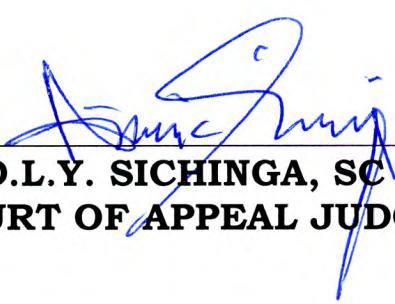
9.0 CONCLUSION

9.1 The upshot of the foregoing, is that the appeal lacks merit and is accordingly dismissed with costs to the Respondent, to be taxed in default of agreement.



J. CHASHI

COURT OF APPEAL JUDGE



D.L.Y. SICHINGA, SC
COURT OF APPEAL JUDGE



A.M. BANDA-BOBO
COURT OF APPEAL JUDGE