

**IN THE COURT OF APPEAL OF ZAMBIA
HOLDEN AT LUSAKA
(CIVIL JURISDICTION)**

BETWEEN:

FIRST NATIONAL BANK ZAMBIA LIMITED

AND

BIG WILLAS TRANSPORT AND GENERAL

SUPPLIERS LIMITED

PETER MBAYA BUKASA

CORAM: CHASHI, SIAVWAPA, NGULUBE. JJA.

On 28th March, 2018 and 25th July, 2018.

For the Appellant:

G. Musyani, (Ms) and
M. Moonga In House
Counsel

For the 1st and 2nd Respondents:

K. Kaunda, Messrs Ellis
and Company.



1ST RESPONDENT

2ND RESPONDENT

JUDGMENT

NGULUBE, JA delivered the Judgment of the Court.

Cases referred to:

- 1. Sablehand Zambia Limited vs. Zambia Revenue Authority (2005) ZR 109***
- 2. Khalid Mohammed vs. Attorney-General (1982) ZR 49***

**3. *Anderson Kambela Mazoka vs. Levy Mwanawasa (2005)*
*ZR 138***

This is an appeal against a Judgment of the High Court delivered on 28th June, 2017.

The brief background to this matter is that, in 2010, the 1st respondent secured a loan from the appellant in the sum of ZMW 486,000=00 and mortgaged stand 873, Chilanga, owned by the 2nd respondent. The 1st respondent defaulted in making payments and surrendered scania truck registration number ALD173 to the appellant for the recovery of monthly hire charges worth ZMW 16,000=00 from the 1st respondent's clients which would be applied as loan repayments.

The 1st respondent through the appellant, then authorized the Road Transport and Safety Agency to note the appellant as the absolute owner of the said truck. The 2nd respondent averred that the appellant, through its agents and employees unlawfully and fraudulently sold the truck to Sarayaan Investments Limited in June, 2013 at an undervalued price of ZMW85,000=00.

The 1st respondent stated that one of the appellant's agents or employees prepared a handwritten note and purported that it was written by the 2nd respondent, when the respondent did not

give permission to the appellant to sell the truck. The 2nd respondent stated that he granted the appellant permission to hire out the truck and utilise the proceeds towards servicing the loan. After the sale, he was not informed of the same and of the balance of the loan.

Upon being queried, the appellant through its manager for risk, offered by way of a letter dated 14th May, 2014, to write back the sum of ZMW65,000 towards the proceeds of the sale of the truck so that the purchase price would appear to be ZMW 150,000=00. The defendant filed a defence in which it stated that the respondents surrendered the Certificate of Title for stand number 873, Lusaka voluntarily and executed a third party mortgage as security for the credit facility that was availed to the 1st plaintiff.

The appellant further stated that the respondents surrendered a scania truck registration number ALB 173 for the purpose of the appellant recovering ZMW 16,000 as monthly rental charge for the truck which would go towards the payment of the loan and that the 1st respondent authorised the sale of the truck and the noting of the appellant as the absolute owner. The appellant averred that, the truck was sold for ZMW 98,600=00 on or about 7th June 2013, with the proceeds going towards the servicing of

the loan which reduced the respondents' indebtedness from K294,330=72 to K195,730=72.

The appellant commenced a mortgage action against the respondents in Cause Number 2014/HP/0430 and obtained Judgment and started to enforce its rights of foreclosure, repossession and sale over stand number 873, Lusaka.

The lower court held a full trial and found that the 1st respondent surrendered the truck to the appellant for the sole purpose of allowing the appellant to recover monthly hire charges of ZMW 16,000 from the respondents' clients and to apply the same towards the monthly loan repayments.

The court further found that the 2nd respondent did not allow the appellant to sell the truck and that, the appellant's debt collector authored the handwritten note on page 33 of the Plaintiff's bundle of documents which he also signed stating that the 2nd respondent had given authority to the appellant to sell the truck.

The court found that, there was fraud in the manner in which the appellant sold the respondents' scania truck as the hand written note was authored by the appellant's debt collector. The court further found that there was misrepresentation by the appellant's

agent, that by the 2nd respondent authorizing RTSA to note the appellant as absolute owner of the truck, it would enable the truck to be used at pepsi to raise money that would be applied towards loan repayments when the appellant's agent intended to dispose of the truck.

The court also found that, there was fraud as it was established that the 2nd respondent did not author the hand written note which was used to sell the scania truck and have the ownership of the truck changed. The court found that the 2nd respondent was not a very literate person as he failed to read the letter on page 33 of the plaintiffs' bundle of documents.

The court found that, due to the fraudulent action of the appellant, the respondents were entitled to be awarded damages that would put them in the position they would have been in if the truck was not surrendered to the appellant.

The court awarded the respondents damages for misrepresentation and fraud and they were compensated by the award of damages in the amount of the value of the truck. They were also awarded costs of the proceedings.

Dissatisfied with the Judgment, the appellant appealed to this court advancing four grounds of appeal couched as follows-

1. The court below erred in law and fact when it held that the appellant had no authority to sell the truck despite making a finding of fact that the 2nd respondent handed over the 1st respondent's truck to the appellant and wrote a letter to the Road Transport Safety Agency (RTSA) to note the appellant as absolute owner of the truck.
2. The court below erred in law and fact when it held that the respondents authorised the Road Transport and Safety Agency to note the appellant as absolute owner of the truck only for the sole purpose of allowing the appellant to recover monthly hire charges of ZMW 16,000=00 from the respondent's clients and to apply the same towards the monthly loan repayments ignoring the concept of absolute ownership that gave the appellant authority to deal with the truck without restrictions or conditions, including the right of sale.
3. That the court below misdirected itself in law and fact when it decided that there was fraud on the basis upon which the truck was sold and ownership changed when in fact the

ownership of the truck was changed on the authority of the letter authored by the 2nd respondent to Road Transport and Safety Agency authorising them to note the appellant as absolute owner of the truck.

4. The court misdirected itself in law and fact when it made a finding that the value of the truck was US \$85,000 in the absence of evidence to support the foregoing and based on a gross misconception of facts and the law when even the respondents only advanced evidence to prove that the truck was purchased for US \$46,000.

In arguing the first ground of appeal, Counsel for the appellant contended that, the learned Judge in the court below found as a matter of fact, and the 2nd respondent confirmed signing the typed letter authorising RTSA to note the appellant as absolute owner of the truck. Counsel for the appellant argued that having been noted as absolute owner of the truck by RTSA, then, the appellant had authority to sell the truck.

Counsel contended that, at page 37 of the record of appeal and paragraph 2 of the statement of claim, it is stated that the respondents authorised RTSA to note the appellant as absolute owner of the truck. It was argued that, the appellant cannot be

said to have acted fraudulently in selling the truck and Counsel contended that the learned trial Judge ought to have found that the appellant had authority to sell the truck.

Counsel submitted that the learned trial Judge misdirected herself when she made a finding that the appellant had no authority to sell the truck based on a finding that the respondents did not authorise RTSA to note the appellant as absolute owner of the truck. It was further submitted that the appellant was the registered owner of the truck having been properly noted as absolute owner and this entitled the appellant to sell the truck. Counsel prayed that this ground of appeal succeeds.

As regards ground two, Counsel submitted that, the concept of absolute ownership connotes the actual and unconditional right that a person or entity registered as such has in a property. It was submitted that, the person or entity owning property as an absolute owner becomes the actual owner with powers to deal with such property in any manner deemed fit, without conditions and without limitation.

Counsel argued that the appellant sold the truck on the basis of its absolute ownership and not the purported hand written note on page 80 of the record of appeal.

It was further argued that the appellant's ownership of the truck was unconditional, without qualification and restriction and that the purpose of noting the appellant as absolute owner was to enable the appellant to sell the truck and apply the proceeds towards reducing the respondents' debt as agreed by the parties. Counsel prayed that this ground of appeal succeeds.

On ground three, Counsel for the appellant submitted that there was no fraud on the part of the appellant when the truck was sold and further that, the basis upon which the ownership of the truck was changed was the typed and executed note that authorised RTSA to note the appellant as absolute owner and not the hand written note. Counsel submitted that the respondents' evidence on record fell short of substantiating the allegations of fraud made against the appellant. Counsel cited the case of ***Sablehand Zambia Limited vs. Zambia Revenue Authority***¹ where the Supreme Court restated the standard required to prove an allegation of fraud in civil suits and that it must be clearly and distinctly alleged.

Counsel submitted that the respondents' pleadings and evidence in the court below failed to clearly and distinctly detail how the appellant perpetrated the alleged fraud. Counsel cited the case of ***Khalid Mohammed vs. Attorney-General***² and stated that the respondents failed to prove their case. Counsel prayed that ground three must also succeed.

On ground four, Counsel submitted that the learned trial Judge held that the costs that the respondents incurred were well above US \$46,000=00. Counsel contended that this finding by the court was not supported by the evidence on record as no evidence was led to show how the respondents incurred the extra costs. It was submitted that there was a misapprehension of the facts by the learned trial Judge on the issue of the expenses that were incurred by the respondents. It was argued that they failed to prove that the truck was worth US \$85,000=00. Counsel prayed that this ground of appeal succeeds.

In response to grounds one and two, Counsel for the respondents submitted that the court was on firm ground when it held that the hand written notes at page 83 of the record of appeal was the basis upon which the truck was sold and ownership of the truck changed. Counsel referred to the evidence of the appellant's

witness, Euphrace Kombe, DW1 who stated at pages 178 and 179 of the record of appeal that –

“the letter authorising change of ownership also later authorizing sale of the truck.”

Counsel submitted that the appellant's purported authority to sell the truck was derived from the hand written note which was fraudulently obtained by the appellants' agent. It was submitted that the appellant did not lead any evidence to prove that they sold the truck as absolute owners apart from the hand written note at page 83 of the record of appeal which was written by the appellant's agent. Counsel submitted that the appellant had failed to demonstrate that the findings of the lower court were perverse or made in the absence of any evidence. He accordingly prayed that ground one and two be dismissed for lacking merit.

On ground three, the respondents' Counsel submitted that the court below was on firm ground when it held that there was fraud on the part of the appellant's agent, which was the basis upon which the truck was sold and the ownership of the truck was duly changed. Counsel submitted that the court considered

the evidence of PW1, that he did not author the hand written notes on page 83 of the record of appeal, nor did he sign it.

The lower court further found that DW1 and other employees at the bank admitted that the debt collector engaged by the appellant authored the hand written note and that PW1's testimony of having met DW1 and other employees at the bank who admitted that the debt collector engaged by the appellant authored the hand written notes was not discredited in cross-examination and was found to be credible. It was submitted that, the appellant acted in bad faith when it failed to execute indemnity over the sale as required by the code of banking practice. Counsel prayed that ground three be dismissed for lack of merit.

On ground four, the respondents' counsel submitted that the court below was on firm ground when it held that the value of the truck was US\$85,000=00. It was submitted that, at page 38 of the record of appeal, the respondents claimed the sum of US\$85,000=00 as being the total cost of the truck. Counsel submitted that the sum of US\$85,000=00 includes all costs such as change of tyres, service, the procurement of parts like jacks, tents, spanners, registration and customs, which evidence was

not disputed by the appellants. Counsel argued that, the court took judicial notice of the costs incurred in registration, tax and service of the truck as costs which are incurred when vehicles are purchased. Counsel prayed that the appeal be dismissed with costs for being highly misconceived and incompetent.

At the hearing of the appeal, Counsel for the appellant submitted that she would rely on the heads of argument that were filed on behalf of the appellant. It was submitted that grounds one, two and three have a common denominator and would be argued together. Counsel submitted that the Judge in the Court below was not invited by the respondent to decide the issue of authority on the part of the bank to sell the truck. Counsel further submitted that the learned trial Judge erred when she opened up the issue of authority which was not an issue for determination.

Counsel referred to the case of **Anderson Kambela Mazoka vs. Levy Mwanawasa**³ and stated that parties are bound by their pleadings. Counsel submitted that it was an anomaly for the lower court to open up the issue of authority to sell the truck when it was not raised in the pleadings. On ground two, Counsel submitted that the bank, as absolute owner of the truck had the right to sell without getting permission from the respondents.

On ground three, Counsel submitted that there was no fraud on the part of the appellant as it sold the truck as absolute owner after being properly endorsed on the motor vehicle registration certificate. He submitted that the evidence in the lower court fell short of the standard required to prove a civil case of fraud.

On ground four, counsel argued that the Learned Judge in the court below made findings of fact which were not supported by the evidence such as the value of the truck which was purchased at US\$46,000 but was said to have been worth US\$85,000=00 with no evidence led to prove this. Counsel prayed that the appeal be allowed and that the lower court's Judgment be set aside.

In addition, Ms Musyani submitted on behalf of the appellant that the whole essence of having the appellant as absolute owner was to empower them at some future date to sell the truck.

In reply, Mr Kaunda, on behalf of the respondents submitted that he would rely on the heads of argument that were filed on 22nd February, 2018. He submitted that all the witnesses in the lower court testified on the issue of authority, particularly the testimony on pages 161, 164 and 165 of the record of appeal. It

was submitted that, the court found as a fact on page 22 of the record that the second respondent was an illiterate person who does not speak english and that was why he denied authoring the hand written notes.

Counsel prayed that the appeal be dismissed for lack of merit, with costs to the respondents.

We have examined the record of appeal, the Judgment of the lower court and the arguments and authorities relied on by learned Counsel for the parties. An appellate court will not reverse findings of fact made by a trial Judge unless it is satisfied that the findings were either perverse or made in the absence of any relevant evidence or upon misapprehension of facts or that they were findings which, on a proper view of the evidence, no trial court acting correctly could have reasonably made.

The appellant's four grounds of appeal raise the following issues –

- (1) Whether the appellant had authority to sell the truck.
- (2) Whether the respondents authorised the Road Transport and Safety Agency to note the appellants as absolute owner for the purpose of allowing the appellant to recover monthly hire charges or to sell the truck.

(3) Whether there was fraud in the manner in which the truck was sold.

(4) Whether the value of the truck was US \$46,000.

On the issue of whether the appellant had authority to sell the truck, the evidence on record is that the 2nd respondent surrendered the truck to the appellant so that monthly hire charges of ZMW16,000 would be recovered and applied towards servicing the loan.

The evidence of the 2nd respondent was that the debt collector informed him that the appellant had a contract with pepsi and that he surrendered his truck to the appellant so that it would be taken to pepsi to work under the contract. It was the 2nd respondents evidence in court that he did not authorise the sale of the truck.

The evidence of the 2nd respondent is that he did not author the handwritten note nor did he sign it. The court accepted this piece of evidence. Further, DW1 admitted that the hand written note that was used to sell the truck were authored by the debt collector. We therefore form the view that the appellant had no

authority to sell the truck. We do not find any merit in ground one and it is dismissed accordingly.

In ground two, the evidence on record is that the 2nd respondent authorised RTSA to note the appellant as absolute owner of the truck so that the truck would be used at pepsi to raise money that would be to service the loan. The evidence of the 2nd respondent on page 152 of the record of appeal shows this position. The 2nd respondent's testimony was that he was not told when the truck was sold and only discovered this two months after the sale. The registration of the appellant as absolute owner was therefore for the purpose of using the truck in a contract at pepsi to raise funds for the respondent. We do not find any evidence on the record of the 2nd respondent authorising the appellant to sell the truck. We therefore do not find merit in the second ground of appeal and it accordingly falls.

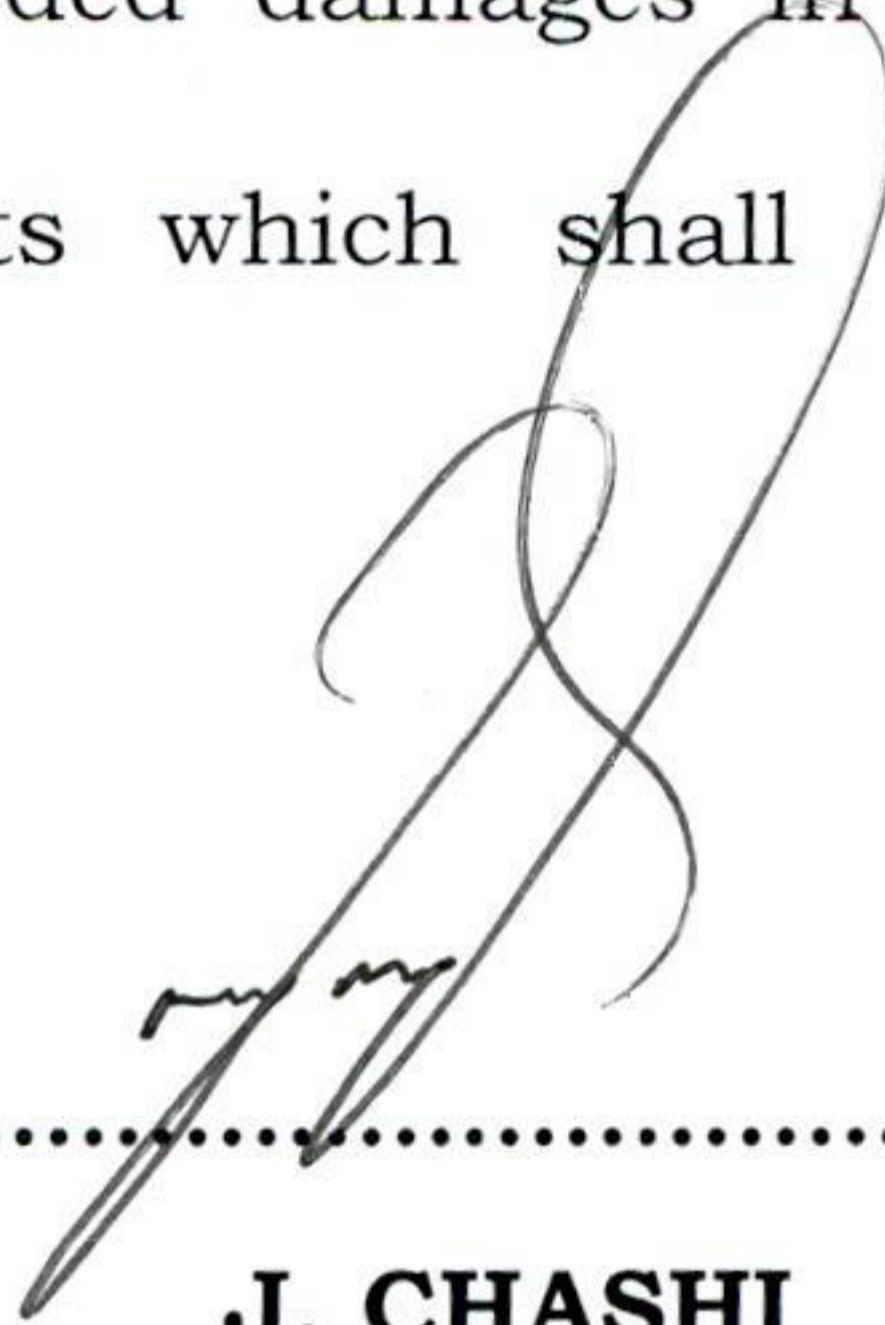
On ground three, the evidence of the 2nd respondent was that he did not write the hand written note that the appellant used to sell the truck. The evidence of DW1 Euphrace Kombe, a banker at the appellant was that, the debt collector wrote a hand written note authorising the sale of the truck. Further, the 2nd respondent's testimony was that he surrendered the white book

and the insurance documentation for the truck so that it would be used at pepsi and not to have the truck sold. We are of the view that the sequence of events highlighted above indicate that there was fraud in the manner in which the respondents' truck was sold. We cannot fault the lower court's finding of fact on the issue of fraud as it was supported by the evidence on record. We do not find merit in ground three and it accordingly fails.

On ground four, the lower court found that the truck was bought for the price of US \$46,000=00 but that when other incidental costs were added, the value of the truck was US\$85,000. However, the invoices on record show that the truck was bought for the sum of US\$46,000. Nonetheless, the court found that the value of the truck was US\$85,000. This is not supported by the evidence on record.

We therefore form the view that the value of the truck was US\$46,000 as the invoices on record show that this was the actual value of the truck. As the court's finding of fact on the said value was not supported by the evidence on record, we interfere with this finding of fact and hold that the truck was in fact worth US\$46,000. Ground four of this appeal succeeds in that we hold that the value of the truck was US\$46,000.

The net result is that this appeal fails in its entirety. The respondents are awarded damages in the value of the truck, US\$46,000 with costs which shall be taxed in default of agreement.



J. CHASHI

COURT OF APPEAL JUDGE



J.M. SIAVWAPA

COURT OF APPEAL JUDGE



P.C.M. NGULUBE

COURT OF APPEAL JUDGE